
**IN THE
NEBRASKA COURT OF APPEALS**

MITCHELL C. GREEN, an individual on)	
behalf of himself and all others similarly)	
situated and as a private attorney general,)	
)	On appeal from the District Court of
Plaintiff-Appellant,)	Douglas County, Nebraska
)	
v.)	Docket 992, Page 121
)	
AMERITRADE, INC., a Nebraska)	Hon. Gary B. Randall, District Judge.
corporation, and AMERITRADE)	
HOLDING CORPORATION, a Delaware)	
corporation,)	
)	
Defendants-Appellees.)	

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STATEMENT OF THE CASE

On behalf of a putative class of fellow customers, Plaintiff-Appellant Mitchell C. Green alleges that Defendants-Appellees Ameritrade, Inc. and Ameritrade Holding Corporation (collectively, “Ameritrade”) breached a contract between the parties by failing to deliver certain securities trading information (“quotes”) through Ameritrade’s on-line brokerage website on a “real-time” basis. Green Br. 1, 5-11. Green’s core complaint is that he received allegedly delayed and inaccurate option quotes on a few occasions. *Id.* at 10-11. As damages, Green seeks a refund of the \$20 a month he paid to subscribe to Ameritrade’s real-time quote service. *Id.* at 11.

In the District Court, Ameritrade proved that Green’s claim is meritless for five independent reasons. *See* Summ. J. Hrg. (11:24-29:2); Summ. J. Order (T108-09). First, no contract between Ameritrade and Green promises real-time options quotes; their contracts promise only real-time stock quotes. Second, the general account agreement between Ameritrade and Green expressly protects Ameritrade from liability for claims alleging inaccuracies or delays in the delivery of market data. Third, Ameritrade actually provided real-time options (and stock) quotes to Green, as the industry (with SEC approval) defines the term “real-time.” Fourth, Green received substantial and valuable performance under the parties’ contracts and failed to timely terminate those contracts upon learning of Ameritrade’s supposed breach, which precludes a refund. Fifth, Green continued to pay for and use the real-time quote service for 28 months after learning of its alleged inadequacies, which bars his claim under the voluntary payment doctrine and principles of ratification, estoppel, and waiver.

After receiving evidence and hearing argument on those issues, the District Court granted Ameritrade summary judgment on Green's claim. Summ. J. Order (T105, 112). The District Court agreed that no contract between Ameritrade and Green promised real-time options quotes and that a contractual limitation-on-liability provision precluded Green from suing Ameritrade. *Id.* at 108-12. Because those rulings sufficed to dispose of Green's claim, the District Court declined to address Ameritrade's other arguments. *Id.* at 112.

The District Court's summary judgment decision is subject to de novo review, under which "[s]ummary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law." *Jensen v. Bd. of Regents*, 268 Neb. 512, 516 (2004). But Green bears the ultimate burden of proving the existence of a material factual dispute: "After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial, *the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.*" *Polinski v. Sky Harbor Air Serv., Inc.*, 263 Neb. 406, 411 (2002) (emphasis added). Green must carry that burden, moreover, as to each of Ameritrade's grounds for summary judgment, whether the District Court relied on those grounds or not, since this Court may affirm the District Court's summary judgment

decision on any ground supported by the record. *Cont'l Cas. Co. v. Calinger*, 265 Neb. 557, 561 (2003).

On appeal, Green tries to divert attention from his failure to carry his burden of proving that material factual disputes preclude summary judgment by offering a host of new arguments. There is no evidentiary foundation for those new arguments, which are waived in any event. It thus remains undisputed that Ameritrade provided real-time stock and option quotes to Green, that Green had no problems with stock quotes and had at most only occasional problems with options quotes, and that Green continued to pay for, use, and benefit from Ameritrade's real-time quote service for 28 months after allegedly learning of the service's claimed problems. Green likewise cannot prove a material dispute over the fact that Green had no contract with Ameritrade promising real-time options quotes or the fact that Green agreed Ameritrade would not be liable for delays or inaccuracies in that data. In short, the undisputed evidence shows that Green has no contract claim under Nebraska law. Accordingly, the District Court's decision granting Ameritrade summary judgment should be affirmed.

PROPOSITIONS OF LAW

1. "Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law." *Jensen v. Bd. of Regents*, 268 Neb. 512, 516 (2004).

2. In summary judgment proceedings, the non-movant bears “the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.” *Polinski v. Sky Harbor Air Serv., Inc.*, 263 Neb. 406, 411 (2002).

3. A decision granting summary judgment “may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon.” *Cont’l Cas. Co. v. Calinger*, 265 Neb. 557, 561 (2003).

4. “An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.” *Scurlocke v. Hansen*, 268 Neb. 548, 553 (2004).

5. Discovery admissions by litigants are binding absent rational explanation for inconsistencies with a litigant’s current position. *Momsen v. Neb. Methodist Hosp.*, 210 Neb. 45, 53-55 (1981).

6. To establish that a personnel manual is a unilateral contract, the plaintiff must prove that the manual’s provisions were communicated to him or her. *Hillie v. Mut. of Omaha Ins. Co.*, 245 Neb. 219, 225 (1994).

7. Fact witness affidavits must “provide facts to support their statements” in order to be competent summary judgment evidence. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 513 (1997).

8. When offered by fact witnesses, “[s]tatements in affidavits as to opinion, belief, or conclusions of law are of no effect.” *Battle Creek*, 253 Neb. at 513; *Gerdes v. Klindt*, 253 Neb. 260, 269-70 (1997); *Whalen v. U S West Communic’ns, Inc.*, 253 Neb. 334, 344 (1997).

9. Fact witness affidavits opposing summary judgment must be based on personal knowledge rather than opinions or conclusions of law. Neb. Rev. Stat. § 25-1334; *Whalen*, 253 Neb. at 344.

10. When offered by fact witnesses, “[s]tatements in affidavits as to opinion, belief, or conclusions of law . . . are not evidence for the purposes of a summary judgment motion and are not considered when determining whether the summary judgment was appropriate.” *Whalen*, 253 Neb. at 344.

11. A party’s own “subjective understanding” that it has certain contractual rights does not establish that a contract exists conferring those rights. *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 160 (1994); *Cimino v. W.A. Piel, Inc.*, 227 Neb. 196, 201 (1987).

12. “A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.” *Murphy v. City of Lincoln*, 245 Neb. 707, 710 (1994).

13. “[C]lear and unambiguous language” in a contract “must be enforced according to its terms.” *Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 265 Neb. 133, 147 (2003).

14. Nebraska courts strictly enforce limitation-on-liability provisions. *Ray Tucker & Sons, Inc. v. GTE Directories Sales Corp.*, 253 Neb. 458, 465-67 (1997); *Bedrosky v. Hiner*, 230 Neb. 200, 203-09 (1988).

15. “A party may not pick and choose among the clauses of a contract, accepting only those that advantage it.” *Bedrosky*, 230 Neb. at 204.

16. “Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.” Restatement (Second) of Contracts § 201(1) (1981).

17. Ambiguities in affidavits must be construed against offering party. *Neb. Moline Plow Co. v. Fuehring*, 52 Neb. 541 (1897).

18. Statements in an expert affidavit that are “unsupported by appropriate foundation” are not competent summary judgment evidence. *Stukenholtz v. Brown*, 267 Neb. 986, 989 (2004).

19. Statements in an expert affidavit that are irrelevant are not competent summary judgment evidence. *Humphrey v. Burlington N. R.R. Co.*, 251 Neb. 736, 749 (1997); *Moore ex rel. Moore v. State*, 245 Neb. 735, 743 (1994).

20. Contracts must be interpreted sensibly. *GMAC v. Blanco*, 181 Neb. 562, 566 (1967); *Pellot v. Pellot*, 759 N.Y.S.2d 494, 496 (App. Div. 2003); *Vaughan v. Nationwide Mut. Ins. Co.*, 702 A.2d 198, 201 (D.C. 1997).

21. Statements in an expert affidavit “must be sufficiently definite and relevant to provide a basis for the fact finder’s determination of an issue or question.” *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 265 Neb. 918, 931 (2003).

22. A refund can be the measure of damages for a breach of contract only if the alleged breach was a “total breach” that defeated the purpose of the contract and substantially impaired its value. Restatement (Second) of Contracts §§ 243, 373; *Albers*

v. Koch, 185 Neb. 25, 28 (1969); *Abdul v. Subbiah*, 735 N.Y.S.2d 29, 30 (App. Div. 2001).

23. A refund can be the measure of damages for a breach of contract only if the allegedly injured party timely terminates the contract upon learning of the alleged breach. Restatement (Second) of Contracts § 373 cmt. a; *Snyder v. Hill*, 153 Neb. 721, 723-25 (1951); *Kemelhor v. Penthouse Int'l, Ltd.*, 689 F. Supp. 205, 215 (S.D.N.Y. 1988), *aff'd*, 873 F.2d 1435 (2d Cir. 1989) (table).

24. A total breach does not exist where the allegedly injured party has received valuable performance under the allegedly breached contract. *Albers*, 185 Neb. at 28-29; *Babylon Assocs. v. County of Suffolk*, 475 N.Y.S.2d 869, 874 (App. Div. 1984); *Shapiro, Inc. v. Bimblich*, 101 A.2d 890, 892-93 (D.C. 1954).

25. A total breach does not exist where the allegedly injured party continues to accept performance under the allegedly breached contract after learning of the alleged breach. *ESPN, Inc. v. Office of the Comm'r of Baseball*, 76 F. Supp. 2d 383, 392-94 (S.D.N.Y. 1999).

26. A timely termination does not exist where the allegedly injured party continues to accept performance under the allegedly breached contract after learning of the alleged breach. *Snyder*, 153 Neb. at 723-25; *ESPN*, 76 F. Supp. 2d at 393-94.

27. The voluntary payment doctrine prohibits recovery of voluntary payments of a disputed demand made with full knowledge of the material facts. *Woodmen of the World Life Ins. Soc'y v. ASCAP*, 146 Neb. 358, 368-69 (1945); *Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 790 N.E.2d 1155, 1156 (N.Y. 2003).

28. Ratification, estoppel, and waiver preclude a party from suing for breach of a contract when it has accepted and retained benefits conferred under that same contract with knowledge of the grounds for its suit. *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 390 (2000); *Combined Ins. v. Shurter*, 258 Neb. 958, 967 (2000); *Wegner v. West*, 169 Neb. 546, 552, 555 (1960); *El Reda v. Love Taxi, Inc.*, 608 N.Y.S.2d 656, 658 (App. Div. 1994); *A. Colish, Inc. v. Abramson*, 577 N.Y.S.2d 60, 61 (App. Div. 1991); *Gimbel Bros., Inc. v. Brook Shopping Ctrs., Inc.*, 499 N.Y.S.2d 435, 439 (App. Div. 1986); *487 Elmwood, Inc. v. Hassett*, 486 N.Y.S.2d 113, 117 (App. Div. 1985).

STATEMENT OF FACTS

A. Ameritrade's Real-Time Quote Service.

Ameritrade is a securities brokerage company that offers its customers the opportunity to trade securities, through the Internet and by other means, at discount prices. Trading Acct. Handbook (E9, 453-66:6, 11). It also offers a number of services designed to assist clients in their trading activities. *Id.* at 472-74. During the period at issue here, one such service was the real-time quote service ("RTQ Service"). *Id.* at 472. All Ameritrade customers could, at no charge, receive on-line "real-time quotes" for one security at a time. 2d Am. Compl. (T25); Answer (T30). The RTQ Service allowed subscribers paying a monthly fee of \$20 to create "quote lists" of multiple securities and view, in a single on-line display, "real-time quotes" showing recent trading data for each of those securities. 2d Am. Compl. (T25); Answer (T30). RTQ Service subscribers had access to "real-time quotes" for stocks and options. Harris Aff. (E5, 1-2:3, 11).

The quote information available to Ameritrade customers does not originate with Ameritrade. Harris Aff. (E5, 1-2:3, 11). Rather, Ameritrade is merely a conduit through which the data passes. Indeed, Ameritrade controls only a limited portion of the dissemination process. *Id.* at 1-4.

The trading data supplied to Ameritrade customers originates with the approximately ten major stock and options exchanges in the United States that make their trading data available for public dissemination. Harris Aff. (E5, 1-2:3, 11); SEC Report (E7, 80-83:4, 11). Pursuant to SEC regulations applicable to the distribution of market data, those exchanges have joined national market system reporting networks, of which there are three for stocks and one for options. SEC Report (E7, 80:4, 11). Network A of the Consolidated Tape Association (“CTA”) is the reporting network for stocks traded on the New York Stock Exchange (“NYSE”). *Id.* at 80-81. The American Stock Exchange and five regional stock exchanges report stock information through CTA Network B. *Id.* at 81. The NASDAQ System is the reporting network for stocks traded on the NASDAQ market. *Id.* at 81-82. And the six (previously four) domestic options exchanges use the Option Price Reporting Authority (“OPRA”) as their reporting network. *Id.* at 82-83.

The reporting networks operate under four national market system plans that exclusively govern the collection and dissemination of participant-exchange trading data. SEC Report (E7, 80-83, 86:4, 11). The Consolidated Tape Association Plan (“CTA Plan”) and the Consolidated Quotation Plan (“CQ Plan”) govern data for qualifying stocks and warrants listed on the exchanges belonging to CTA Networks A and B. *Id.* at 80-81. The NASDAQ/UTP Plan governs data for stocks trading on the NASDAQ

market. *Id.* at 81-82, 86. The Plan for Reporting Consolidated Options Last Sale Reports and Quotation Information (“OPRA Plan”) governs data for options trading on the domestic options exchanges. *Id.* at 82-83, 87.

The reporting networks allow distribution of two types of quote data: delayed and “real-time.” Delayed data must be deliberately delayed for an amount of time specified by the reporting network that collected the data. Harris Aff. (E5, 2:3, 11). CTA Networks A and B require a deliberate delay of at least 20 minutes. *Id.* The NASDAQ System and OPRA require at least 15 minutes. *Id.* Quote data not deliberately delayed in that fashion is real-time data—and is so described in NYSE and OPRA forms and other correspondence with Ameritrade and in the contract by which Ameritrade obtained its quote data. *Id.*; Roche Dep. (E7, 157, 162, 168, 172, 174:4, 11); OPRA invoices (E7, 227-38:4, 11); Data Feed Request (E7, 278:4, 11); ComStock Agreement (E6, 5, 45-46:3, 11). The reporting networks distinguish between delayed and real-time data in this manner because they charge for public dissemination of real-time data but not for deliberately delayed data. Harris Aff. (E5, 3:3, 11).

The quote collection and dissemination process begins when the reporting-network participant-exchanges transmit trading data to information processors that consolidate pertinent stock or options data. SEC Report (E7, 80, 86:4, 11). The information processors, in turn, disseminate the market data to third-party vendors. *Id.* The third-party vendors then sell the information to brokers, such as Ameritrade. *Id.* During the time at issue in this case, Ameritrade contracted with third-party vendor S&P ComStock, Inc. (“ComStock”) to obtain data from all of the stock exchanges that report

under the CTA Plan, the CQ Plan, and the NASDAQ/UTP Plan and all of the options exchanges that then reported under the OPRA plan. ComStock Agmt. (E6, 5, 14:3, 11); SEC Report (E7, 80-83, 86:4, 11).

On its arrival at Ameritrade, the trading data received from ComStock went first to two sets of servers owned by ComStock but located on Ameritrade's premises. Harris Aff. (E5, 2:3, 11). One set of ComStock servers deliberately delayed transmission of the market data to Ameritrade servers for the time necessary to make the data "delayed" under the standards of the reporting networks. *Id.* In accord with industry practice, Ameritrade labeled this data "delayed." *Id.* The other set of ComStock servers transmitted, without any deliberate delay, the market data received from ComStock directly to Ameritrade servers. *Id.* In accord with industry practice (and its dealings with the reporting networks and ComStock), Ameritrade attached a "real-time" label to that "not deliberately delayed" data. *Id.*

From the separate delayed and real-time Comstock servers, market data moved to separate delayed and real-time Ameritrade servers. Harris Aff. (E5, 2:3, 11). When the market data arrived on the Ameritrade servers, a third-party software program reformatted the market data (whether delayed or real-time) into a form that Ameritrade software could use to respond to customer inquiries. *Id.* This included creating a consolidated options quote from the individual exchange options quotes disseminated under the OPRA Plan, in the same manner OPRA itself has done since January 2003. *Id.*
at 3.

For those RTQ subscribers logged into their accounts, Ameritrade transmitted real-time trading data for securities included in RTQ subscriber quote lists from its servers to the Internet. Harris Aff. (E5, 3:3, 11). From the Internet, that data traveled via the facilities of a subscriber's Internet service provider to the subscriber's computer. *Id.* Although the entire collection and dissemination process might take longer, Ameritrade typically completed the processing activities under its control—from the receipt of data by Ameritrade servers to the transmission of that data to the Internet—within milliseconds. *Id.* at 3-4.

B. Green's Relationship With Ameritrade.

In January 1998, Plaintiff Mitchell Green opened an account with Ameritrade by signing a Cash, Margin, & Option Agreement (“CMO Agreement”). (E6, 48-50:3, 11). That agreement expressly incorporated by reference a set of Terms and Conditions for Ameritrade accounts intended to generally govern the relationship between Ameritrade and Green. *Id.* at 49-50; Terms and Conditions (E6, 52-57:3, 11). One provision of the Terms and Conditions expressly disclaims liability for inaccurate, incomplete, or delayed market information:

25. MATTERS RELATING TO INFORMATION PROVIDERS (defined as (1) the securities markets that make market data available, and (2) any information processor or other entity that assists in providing such market data.)

* * *

(C) DATA NOT GUARANTEED – The Information Providers do not guarantee the timeliness, sequence, accuracy or completeness of any market data or other information or messages that they disseminate. No Information Provider shall be liable in any way to Customer or to any other person for (a) any inaccuracy, error or delay in, or omission of, (i) any such data, information or message, or (b) any loss or damage arising from or occasioned by any such inaccuracy, error, delay or omission or by reason of non-performance, or of interruption in any such data, information or message, either due to any negligent act or omission by any disseminating party or due to any “force majeure” (i.e. flood, riot, labor dispute, accident, action of government, communications or power failure, equipment or software malfunctions) or any other cause beyond the reasonable control of any disseminating party.

Terms and Conditions (E6, 54-55:3, 11). At his deposition, Green testified that he understood that Ameritrade was included in the definition of Information Provider as used in this liability disclaimer:

Q: And my question is: If you look at paragraph 25 which appears in this document at D 6 and 7, was it your understanding in 1998 when you read this document and became an Ameritrade subscriber, that paragraph 25, referring to information providers, included Ameritrade and Ameritrade Holding?

A: I believe it did.

Green Dep. (E7, 41:4, 11).

At the same time he opened his Ameritrade account, Green subscribed to Ameritrade's RTQ Service by signing two additional contracts: an Application and Agreement for the Privilege of Receiving Last Sale Information and Bond Last Sale Information as a Nonprofessional Subscriber ("Last Sale Agreement") and a Nasdaq Contract Application-Agreement for Limited Nasdaq/NMS Last Sale Service Nasdaq Level 1 Service ("NASDAQ Agreement"). Last Sale Agmt. (E6, 59-65:3, 11); NASDAQ Agmt. (E6, 67-69:3, 11). The Last Sale Agreement granted Green access to information "reported pursuant to the CTA Plan" and information "relating to bonds and certain other securities" traded on the NYSE. Last Sale Agmt. (E6, 59-61, 64:3, 11). The NASDAQ Agreement granted Green access to "securities transaction information" for certain "NASDAQ securities." NASDAQ Agmt. (E6, 67:3, 11).

The Last Sale Agreement and NASDAQ Agreement promise only stock and bond information. Options information is not "reported pursuant to the CTA Plan," does not "relat[e] to bonds or certain other securities" traded on the NYSE, and does not concern "NASDAQ securities." SEC Report (E7, 80-83:4, 11). Indeed, none of the three contracts between Green and Ameritrade mentions, much less promises to furnish, real-time options quotes or OPRA Plan information. CMO Agreement (E6, 48-50:3, 11); Terms and Conditions (E6, 52-57:3, 11); Last Sale Agmt. (E6, 59-65:3, 11); NASDAQ Agmt. (E6, 67-69:3, 11). Green no longer disputes that fact. Green Br. 12-16. Green has admitted that there are no other written contracts between the parties that bear on his claim. When asked to identify the written contracts entitling him to real-time options

quotes, Green cited only the Terms and Conditions, the Last Sale Agreement, and the NASDAQ Agreement. Interrog. Resps. (E7, 15:4, 11).

From January 1998 until March 1999, Green apparently used Ameritrade's RTQ service without incident. In March 1999, however, he allegedly noticed, among other things, that the options prices he received from Ameritrade sometimes did not match those he received from another brokerage. Green Dep. (E7, 32:4, 11); Interrog. Resps. (E7, 14, 18-19:4, 11). He then allegedly called Ameritrade and spoke with a manager about his concerns. Green claims, without any substantiation, that the manager told him that Ameritrade "did not pull its quotes from all the exchanges but only the most active exchanges." Interrog. Resps. (E7, 14-15, 19:4, 11). Green further claims to have inferred from the manager's alleged statements that "the quotes [he] was getting were stale or old." Green Dep. (E7, 50:4, 11).

Despite allegedly concluding that Ameritrade's quotes were not "real-time" (Green Dep. (E7, 50:4, 11)), Green continued to subscribe to and use Ameritrade's RTQ service. Indeed, Green admits to having used the service as his *sole source* of quote information for all of his stock trades and for 25 to 50 percent of his option trades. *Id.* at 35-36, 45-46. Green traded securities through Ameritrade until April 2001. Acct. Stmts. (E6, 71-82:3, 11). It was not until July 2001 that he cancelled his RTQ Service subscription (*id.* at 87)—28 months after he became aware of the alleged problems with Ameritrade quotes and 16 months after filing the present suit.

Green has not identified a single securities transaction on which he lost money as a result of the alleged flaws in Ameritrade's RTQ service. Green Dep. (E7, 42, 45:4, 11).

Nor has he identified a single occasion on which he received inaccurate or delayed stock quotes. *Id.* at 35, 51. Green contends only that he received supposedly inaccurate or delayed option quotes on a few occasions. Green Aff. (E10, 2-4:9, 11); Green Br. 10-11.

C. Green's Ever-Shifting Claims And The District Court's Summary Judgment Ruling.

When Green sued Ameritrade in March 2000, he asserted breach of contract, fraud, deceptive trade practice, and consumer protection claims. Pet. (T1-10). The gravamen of his claims was that Ameritrade did not obtain real-time options quote information from all options exchanges and market makers. *Id.* at 5. Believing Green's suit to be a disguised securities fraud action, Ameritrade removed the case to federal court under the Securities Litigation Uniform Standards Act. *See Green v. Ameritrade, Inc.*, 279 F.3d 590, 593 (8th Cir. 2002). To obtain a remand to state court, Green abandoned his fraud, deceptive practice, and consumer protection claims, as well as any claim for trading losses resulting from the alleged breach of contract. *Id.* at 593-94, 598 & n.7. Later discovery revealed that Green sought only a refund of his \$20 per month RTQ Service subscription fee. Interrog. Resps. (E7, 19-20:4, 11); Green Dep. (E7, 47:4, 11).

Back in state court, Ameritrade moved for summary judgment on the ground that no contract promised Green real-time options quotes. Summ. J. Mot. (T20-21). In response, Green again amended his complaint to allege that Ameritrade did not obtain real-time options *or stock* quote information from all options *or stock* exchanges and market makers. 2d Am. Compl. (T23-28).

Ameritrade renewed its summary judgment motion adding additional arguments, including that Ameritrade obtained quote information from all of the SEC-approved reporting networks for stock and options trading data. Am. Summ. J. Mot. (T38-41). Unable to rebut that argument, Green changed course again in his summary judgment brief, asserting that he did not receive “true” real-time stock and options quotes because “real-time” means “instantaneous.” See Summ. J. Hrg. (14:17-17:14, 18:10-19:2). In support of that view, which has nothing to do with the actual language of the contracts at issue or the definition of “real-time” given by the SEC-approved reporting networks, Green offered only an ambiguous and foundationless “expert” affidavit by David P. Semak. Semak Aff. (E11, 1-4:10, 11).

Based on the parties’ briefs and oral argument, the District Court granted Ameritrade summary judgment. Summ. J. Order (T105-12). The Court gave two reasons for its decision. First, it determined that none of the contracts between Ameritrade and Green promised to supply options quote information: “[U]nder the unambiguous terms of the contracts, the Court concludes that Ameritrade did not breach any contractual provisions since it was not required under the contracts to provide real time information.” *Id.* at 110-11. Second, the Court found that the contractual limitation on liability for inaccurate or delayed information covered Green’s claims against Ameritrade: “Ameritrade cannot be held liable because the CMO Agreement specifically precludes information providers from being held liable for inaccurate or delayed information.” *Id.* at 111.

Now on appeal, Green yet again recasts his claims. For the first time, he asserts that an Ameritrade Trading Account Handbook is the missing contract to provide real-time options quotes. Green Br. 12-14. He likewise introduces a pair of new arguments that the scope of the limitation on liability for inaccurate and delayed information is ambiguous. *Id.* at 20. And he makes no real effort to defend his former claim that he did not receive real-time *stock* quote information. *Id.* at 7-9, 12-16.

ARGUMENT

I. The Grounds On Which The District Court Granted Summary Judgment Amply Justify Affirmance.

Green focuses his brief on challenging the two grounds on which the District Court granted summary judgment: (1) the absence of a contract promising Green real-time options quotes; and (2) the applicability of a contractual limitation on liability for inaccurate or delayed information. Green's challenges are meritless.

A. None Of The Parties' Contracts Promises Real-Time Options Quotes.

To avoid federal removal jurisdiction, Green jettisoned all of his misrepresentation claims, opting to proceed solely on a single breach of contract claim. *Green v. Ameritrade, Inc.*, 279 F.3d 590, 593-94 (8th Cir. 2002). Green also has conceded that he has no basis to claim that the real-time stock quotes he received were ever delayed or otherwise flawed. Green Dep. (E7, 35, 51:4, 11). Accordingly, Green has a claim against Ameritrade only if he can establish that Ameritrade breached a contract promising Green real-time options quotes. To do so, of course, Green must first prove that such a contract existed.

Before the District Court, it was undisputed that the only contracts between Green and Ameritrade were the CMO Agreement (which incorporated the Terms and Conditions), the Last Sale Agreement, and the NASDAQ Agreement. Summ. J. Order (T106). Indeed, Green's own affidavit opposing summary judgment cites only the CMO Agreement, the Terms and Conditions, the Last Sale Agreement, and the NASDAQ Agreement in describing the agreements he entered to open his account and subscribe to the RTQ Service. Green Aff. (E10, 1-2:9, 11). Moreover, when asked in discovery what written contracts entitled him to real-time options quotes, Green identified only the Terms and Conditions, the Last Sale Agreement, and the NASDAQ Agreement. Interrog. Resps. (E7, 15:4, 11).

On appeal, Green no longer disputes that the CMO Agreement, the Terms and Conditions, the Last Sale Agreement, and the NASDAQ Agreement do not promise him real-time options quotes. Green Br. 12-16. Nor could he. The CMO Agreement and the incorporated Terms and Conditions make no promises to supply real-time quotes of any sort. CMO Agreement (E6, 48-50:3, 11); Terms and Conditions (E6, 52-57:3, 11). The Last Sale Agreement promises only real-time quotes "reported pursuant to the CTA Plan" or "relating to bonds and certain other securities" traded on the NYSE, neither of which describes options quotes. Last Sale Agmt. (E6, 59-65:3, 11); SEC Report (E7, 80-82:4, 11). And the NASDAQ Agreement promises only real-time quotes for "NASDAQ securities," which are exclusively stocks, not options. NASDAQ Agmt. (E6, 67-69:3, 11); SEC Report (E7, 81-82:4, 11).

In sum, the only claimed contracts between Ameritrade and Green do not promise to provide real-time options quotes. That fact led the District Court to conclude that Green had no contractual right to such quotes on which he could found a breach of contract action. Summ. J. Order (T109-11). The District Court’s analysis was correct and its resulting decision to grant summary judgment should be affirmed.

Trading Account Handbook. Green tries to circumvent the District Court’s unimpeachable analysis principally by arguing that an Ameritrade Trading Account Handbook supplies the missing promise to provide real-time options quotes. Green Br. 12-14. Green’s argument fails for four independent reasons.

First, Green waived the argument by failing to raise it below. Before the District Court, Green never—not in his complaint, not in his summary judgment brief, and not at the summary judgment hearing—claimed that the Trading Account Handbook represented an additional agreement between Green and Ameritrade or that the Handbook promised real-time options quotes to RTQ Service subscribers. 2d Am. Compl. (T23-28); (32:20-39:8, 46:15-48:12). By failing to do so, he forfeited his right to raise such an argument on appeal. It is black letter law that “[a]n appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.” *Scurlocke v. Hansen*, 268 Neb. 548, 553 (2004).

This case well illustrates the reason for such a rule. Green says the Handbook is a unilateral contract accepted by performance. Green Br. 12. But because Green did not raise his Trading Account Handbook argument below, Ameritrade had no opportunity to take discovery and build a record on the issue. Thus, there is no record evidence on how

Green and Ameritrade understood the Handbook or whether Green ever received or read it. That evidence might have fully refuted Green's argument. *See Hillie v. Mut. of Omaha Ins. Co.*, 245 Neb. 219, 224-25 (1994) (stating requirements for finding unilateral contract in personnel manual). The raise-below-or-waive rule exists precisely to prevent litigants like Green from sandbagging their opponents in this manner.

Second, Green's new Trading Account Handbook argument flies directly in the face of his discovery admission that the only written contracts he believed to promise him real-time options quotes were the Terms and Conditions, the Last Sale Agreement, and the NASDAQ Agreement. Interrog. Resps. (E7, 15:4, 11). And Green offers no explanation for his patently contradictory assertions. In such circumstances, Nebraska courts have long considered a litigant bound by its earlier admission and disregarded the later contradictory assertion. *Momsen v. Neb. Methodist Hosp.*, 210 Neb. 45, 53-55 (1981) (discovery admissions bind litigants absent rational explanation for inconsistency). Green is not immune from that rule. His discovery admission regarding the contracts entitling him to real-time options quotes is binding and thus refutes his Trading Account Handbook argument.

Third, there is absolutely no record evidence that Green ever received, much less read, the Trading Account Handbook. The copy in the record is from Ameritrade's document production. Trading Acct. Handbook (E9, 452-75:6, 11). And Green never mentioned the Handbook in describing the materials he received from Ameritrade when he opened his account. Green Aff. (E10, 1-2:9, 11); Interrog. Resps. (E7, 15:4, 11). Logic dictates that a document Green neither saw nor read cannot be a contract between

Green and Ameritrade. *See Hillie*, 245 Neb. at 225 (no unilateral contract absent evidence that disciplinary manual provisions were communicated to plaintiff).

Fourth, the Trading Account Handbook is actually silent on what types of real-time quotes the RTQ Service promises. The Handbook says only that a customer paying \$20 a month will receive unlimited real-time quotes. Trading Acct. Handbook (E9, 472:6, 11). It does not say anything at all about options quotes. Green infers from the Handbook's explanation of options trading that the Handbook's 13-page-later reference to real-time quotes includes options quotes. Green Br. 12-14; Trading Acct. Handbook (E9, 455, 472:6, 11). Green gives no basis for that inference, however, and there certainly is no record evidence to support Green's reading. Nor is there any record evidence showing that Green understood the Handbook as an agreement to provide real-time options quotes. In fact, the different commission structures for trading options and for trading stocks (*see* Trading Acct. Handbook (E9, 455:6, 11)) and the different information content of stock and option quotes (*see* SEC Report (E7, 86-87:4, 11)), could easily imply different treatment of real-time quotes for options and for stocks. There simply is no reason to read the Trading Account Handbook as promising RTQ subscribers real-time options quotes.

“Real Time Quotes” Notation. In passing, Green further argues that the presence of a “Real Time Quotes” notation on Ameritrade's website when he viewed option quotes means that a contract to provide real-time options quotes existed. Green Br. 14. Of course, he gives no basis for that claim, which not surprisingly finds no support in the

terms of the actual agreements he signed. A three-word notation on a web page does not constitute a contract.

At most, the web page notation is simply a description of the information being viewed. *See* Quote Lists (E10, 28-32:9, 11). Ameritrade has never disputed (and, in fact, has consistently maintained) that Green received real-time options quotes despite having no contractual right to them. *See* pp. 31-35, *infra*. The “Real Time Quotes” notation is not a promise to supply real-time options quotes. Accordingly, even if the notation misdescribed what Green received (which it does not), there was no breach of contract.

Green’s Affidavit. Green makes one more effort to counter the District Court’s finding that he had no contractual right to real-time options quotes. Green Br. 14-16. He claims the following testimony from his own affidavit establishes a genuine issue of material fact on the subject:

In or about February 1998, I subscribed to AMERITRADE’s Real Time Quote service. This subscription entitled me, for a monthly contractual fee of twenty dollars (\$20.00), to receive real time, last sales information on both equities and options from AMERITRADE through its website.

Green Aff. (E10, 2:9, 11). Green’s affidavit, however, offers absolutely no factual basis for that conclusory statement.

To be competent summary judgment evidence, affidavits must “provide facts to support their statements.” *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 513 (1997). Otherwise, the statements are mere opinions or conclusions of law not based on personal knowledge and thus fall outside the affidavit requirements of Neb. Rev. Stat.

§ 25-1334. *See id.* at 513-14; *Gerdes v. Klindt*, 253 Neb. 260, 269-70 (1997); *Whalen v. U S West Communic'ns, Inc.*, 253 Neb. 334, 344 (1997). Such unsupported statements “are not evidence for the purposes of a summary judgment motion and are not considered when determining whether the summary judgment was appropriate.” *Whalen*, 253 Neb. at 344. Green’s baseless affidavit statement that he was entitled to real-time options information thus has “no effect” on Ameritrade’s right to summary judgment. *Battle Creek*, 253 Neb. at 513.

The case Green cites in support of his effort to use his affidavit to create a material factual dispute—*Roubideaux v. Davenport*, 247 Neb. 746 (1995)—is not even remotely on point. In *Roubideaux*, the Supreme Court reversed a summary judgment because it found material factual inconsistencies in the movant’s affidavit. *Id.* at 749-51. Green alleges no inconsistencies in any of the affidavits offered by Ameritrade. Instead, he invokes a conclusory allegation in his own affidavit. *Battle Creek*, *Gerdes*, and *Whalen*, not *Roubideaux*, are the pertinent authorities on whether such an affidavit statement precludes summary judgment, and they leave no doubt that Green’s conclusory statement is of no consequence.

Green’s statement that he was entitled to real-time options quotes does not create a genuine dispute of material fact in any event. At most, the statement only conveys Green’s own subjective understanding of the parties’ agreements. Such personal interpretations neither make plain contractual language ambiguous nor establish the existence of a contract. *See Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 160 (1994) (“[a plaintiff’s] subjective understanding . . . is insufficient to establish an implied

contract”); *Murphy v. City of Lincoln*, 245 Neb. 707, 710 (1994) (“A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.”); *Cimino v. W.A. Piel, Inc.*, 227 Neb. 196, 201 (1987) (“[Plaintiff’s] own subjective understanding of his right to [accrued salary] account is insufficient to establish his entitlement to that account.”). Green’s affidavit statement thus is no barrier to summary judgment.

B. A Contractual Limitation On Liability For Inaccurate Or Delayed Information Bars Green’s Claims.

The set of Terms and Conditions that governed the relationship between Green and Ameritrade expressly provides—in paragraph 25—that “[n]o Information Provider shall be liable” to a customer for “any inaccuracy, error or delay in, or omission of” “any market data or other information or messages that they disseminate.” Terms and Conditions (E6, 55:3, 11); *see pp. 12-13, supra*. Green has never contested that his suit is founded on claimed inaccuracies and/or delays in market data. Nor has he ever argued that the limitation on Information Provider liability is unenforceable. Green disputes only whether Ameritrade is an Information Provider protected from liability. Green Br. 16-20. In other words, Green admits that if Ameritrade is an Information Provider, the limitation-on-liability provision in paragraph 25 of the Terms and Conditions bars his breach of contract claim.

Paragraph 25 defines Information Providers to include securities markets, information processors, and any “other entity that assists in providing . . . market data.” Terms and Conditions (E6, 54-55:3, 11); *see* p. 12, *supra*. That “clear and unambiguous language . . . must be enforced according to its terms.” *Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 265 Neb. 133, 147 (2003). As a firm that transmits securities quotes from securities markets and information processors to its customers, Ameritrade plainly is an “entity that assists in providing . . . market data.” Green’s complaint, in fact, specifically alleges that Ameritrade “provided” stock and options quotes. 2d Am. Compl. (T25-26). Most significantly, as discussed above, Green admitted at his deposition that at the time he opened his Ameritrade account, he understood that Ameritrade fell within the definition of Information Provider in paragraph 25 of the Terms and Conditions. Green Dep. (E7, 41:4, 11); *see* pp. 13-14, *supra*. There is no evidence to the contrary.

That the Terms and Conditions would protect Ameritrade from liability for inaccurate or delayed market data makes perfect sense. Ameritrade had very limited control over the accuracy and timeliness of the data it transmitted. Harris Aff. (E5, 1-4:3, 11). It controlled only its own processing and the transmission of the data to the Internet. It had no control over generation of the data or its transmission from the exchanges to the information processors, from information processors to ComStock, from ComStock to Ameritrade, or from the Internet to Ameritrade customers. Given the sheer volume of data and Ameritrade’s lack of end-to-end control over that data, it would make no sense for Ameritrade to guarantee the accuracy and timeliness of the market data it transmitted.

Moreover, if Ameritrade was obligated to provide flawless and instantaneous trading data, it would face too great a liability risk to offer the data for \$20 per month or perhaps at all. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 433-34 (1990) (“natural consequence” of penalizing a party for providing erroneous information is for party to “cut back and impose strict controls upon . . . provision of information in order to limit liability”). And if denied the right to pay \$20 a month for trading data they find acceptable (as evidenced by their continued subscription to the service), Ameritrade customers would be worse off. *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996) (“adjusting terms in buyers’ favor might help [plaintiff] today . . . but would lead to a response, such as a higher price, that might make consumers as a whole worse off”). To guard against precisely such consequences, Nebraska courts strictly enforce limitation-on-liability provisions and routinely refuse to allow litigants to enforce favorable contract terms while they renounce unfavorable ones. *See Ray Tucker & Sons, Inc. v. GTE Directories Sales Corp.*, 253 Neb. 458, 465-67 (1997) (enforcing “limitation of liability clause”); *Bedrosky v. Hiner*, 230 Neb. 200, 203-09 (1988) (enforcing “exculpatory clause” and noting “[a] party may not pick and choose among the clauses of a contract, accepting only those that advantage it”); *see also SI Communic’ns, Inc. v. Nielsen Media Research*, 181 F. Supp. 2d 404, 409-13 (S.D.N.Y. 2002) (enforcing liability limitation in contract for data against claim regarding errors in data).

Despite all the evidence that Ameritrade is an Information Provider protected from liability for inaccurate or delayed market data under paragraph 25 of the Terms and Conditions, Green contends that the definition of Information Provider is ambiguous and

should be read against Ameritrade. Green Br. 17-20. The chief problem with Green's argument, as demonstrated above, is that Green himself has admitted that at the time he opened his Ameritrade account he understood Ameritrade to be an Information Provider under paragraph 25. Green Dep. (E7, 41:4, 11). Green does not (and cannot) explain the inconsistency between that admission and his current position. His admission that Ameritrade is an Information Provider thus binds him. *Momsen*, 210 Neb. at 53-55 (deposition admissions bind litigants absent rational explanation for inconsistency).

Green's admission, moreover, establishes that the parties shared a common understanding of the meaning of the term Information Provider as used in paragraph 25 of the Terms and Conditions. Black letter contract law requires that such shared understandings be enforced even where a term is susceptible to a different interpretation. *See* Restatement (Second) of Contracts § 201(1) (1981) ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.").

Green's supposed evidence of ambiguity is utterly unpersuasive in any event. The Semak affidavit does nothing to establish ambiguity. On how to read the term Information Provider, the affidavit only states:

The term Information Providers, as contained in paragraph 25(c) specifically refers to any exchange, organization, association or group of person, including any electronic communications network, whether incorporated or not, that maintains or provides a marketplace or facilities in which [sic] performs function commonly performed by a stock exchange,

and which is required to disseminate information relating to securities or other financial instruments.

Semak Aff. (E11, 3:10, 11). It is true, of course, that the Information Providers definition “specifically refers” to such securities markets. But it is equally true that the definition “specifically refers” to “information processors” and any “other entity that assists in providing . . . market data.” Terms and Conditions (E6, 54-55:3, 11). Semak’s statement does not purport to describe the only entities that qualify as Information Providers under paragraph 25. *See Neb. Moline Plow Co. v. Fuehring*, 52 Neb. 541 (1897) (ambiguities in affidavits will be construed against offering party). Thus, the statement simply is not evidence against the view that Ameritrade is an Information Provider.

Even if the Semak affidavit could be read to conclude that only the securities markets it describes qualify as Information Providers, this Court should disregard that conclusion for at least two reasons. First, the affidavit offers absolutely no foundation for such a conclusion—indeed, it does not even begin to explain why Ameritrade would not be an “entity that assists in providing . . . market data.” *See Stukenholtz v. Brown*, 267 Neb. 986, 989 (2004) (“opinion evidence which is unsupported by appropriate foundation is not admissible”). Second, Green has never articulated how Semak’s interpretation of Information Providers could be relevant to this case when Green himself has admitted that he understood Ameritrade to be an Information Provider under paragraph 25. *See Humphrey v. Burlington N. R.R. Co.*, 251 Neb. 736, 749 (1997) (disregarding irrelevant expert affidavit); *Moore ex rel. Moore v. State*, 245 Neb. 735, 743 (1994) (affirming exclusion of irrelevant expert opinion).

Paragraph 11 of the Last Sale Agreement is equally unavailing evidence for Green's reading of Information Providers. That the Last Sale Agreement's limitation-on-liability provision does not cover Ameritrade is of no consequence to whether the Terms and Conditions' entirely separate limitation-on-liability provision covers Ameritrade. Not only are the provisions worded differently, the Last Sale Agreement provision does not even use the term Information Provider. *Contrast* Terms and Conditions (E6, 54-55:3, 11), *with* Last Sale Agmt. (E6, 63:3, 11). Whatever the case, Green did not raise this argument below (Summ. J. Hrg. (39:9-42:10)), thereby waiving it for purposes of this appeal. *See Scurlocke*, 268 Neb. at 553 ("An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.").

Waiver also forecloses Green's argument from the Third-Party Beneficiary provision of the Terms and Conditions. Green never raised the argument in the District Court. Summ. J. Hrg. (39:9-42:10). Even if he had, the District Court no doubt would have rejected the argument. The fact that the Terms and Conditions confers Third-Party Beneficiary status on Information Providers does not mean that all Information Providers have to be third parties. *See* Terms and Conditions (E6, 55:3, 11). It only means that some have to be. The Third-Party Beneficiary provision thus is not at all inconsistent with Ameritrade being an Information Provider alongside third-party securities markets and information processors.

II. Additional Grounds For Summary Judgment Also Justify Affirmance.

A decision granting summary judgment "may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon." *Cont'l*

Cas. Co. v. Calinger, 265 Neb. 557, 561 (2003). Three such grounds are present here: (1) Green actually received what is understood in the industry to constitute real-time quotes for stocks and options; (2) Green did not suffer a total breach of contract or timely terminate the RTQ Service contracts following the alleged breach, necessary conditions for the restitutionary remedy he is seeking; and (3) Green continued to pay for and use the RTQ Service for months after learning of its supposed flaws, barring his claims under the voluntary payment doctrine and principles of ratification, estoppel, and waiver. The District Court did not find it necessary to address those arguments, but each independently requires summary judgment against Green and thus warrants an affirmance in this appeal.

A. Green Received Real-Time Quotes For Both Stocks And Options.

There are three SEC-approved stock quote reporting networks—CTA Network A, CTA Network B, and the NASDAQ System—and one SEC-approved options quote reporting network—OPRA. SEC Report (E7, 80-83, 86:4, 11). Those four networks are the only sources for stock and options trading data. *See* 17 C.F.R. § 240.11Aa3-1(c)(2)-(3) (disseminating securities market data outside of SEC-approved reporting network illegal). And each of the networks considers data that is not deliberately delayed for a network-specific holding period (20 minutes for CTA Networks A and B, 15 minutes for NASDAQ and OPRA) to be “real-time.” Harris Aff. (E5, 2:3, 11); *see* p. 10, *supra*.

As the Last Sale Agreement and the NASDAQ Agreement promised, Ameritrade obtained trading data from each of the exchanges belonging to the three stock reporting networks, and it transmitted that information to its RTQ Service subscribers without any

deliberate delay and within milliseconds of receiving it. Last Sale Agmt. (E6, 59-61:3, 11); NASDAQ Agmt. (E6, 67:3, 11); ComStock Agmt. (E6, 5, 14:3, 11); Harris Aff. (E5, 3-4:3, 11). Although no contract with Green required it to do so, Ameritrade also obtained trading data from each of the exchanges belonging to OPRA, and it transmitted that information as well to its RTQ Service subscribers without any deliberate delay and within milliseconds of receiving it. ComStock Agmt. (E6, 5, 14:3, 11); Harris Aff. (E5, 3-4:3, 11). These facts, none of which are disputed, prove that Green received “real-time” stock *and* options quotes.

Green nonetheless suggests that he did not receive real-time options quotes from Ameritrade because the quotes he received were not “instantaneous” (Green Br. 7), repeating a claim he made in the District Court as to both options *and* stock quotes (*see* Summ. J. Order (T108-09)). But Green’s contracts with Ameritrade—which expressly acknowledge the possibility of delayed information—do not promise “instantaneous” quotes. Terms and Conditions (E6, 55:3, 11); Last Sale Agmt. (E6, 63:3, 11); NASDAQ Agmt. (E6, 68:3, 11). Nor, as we have already explained, do the reporting networks define “real-time” in that manner. *See* p. 10, *supra*. A broker cannot supply real-time data other than the “not deliberately delayed” data that the SEC-approved reporting networks define as real-time. Indeed, “instantaneous” quotes are a physical impossibility, since data collection and transmission necessarily take some time.

In short, Green’s interpretation of “real-time” makes no sense. It defies the language of the parties’ contracts, the practices of the reporting networks, and basic laws of physics. The only sensible reading of “real-time” under the undisputed facts and

circumstances of this case is “not deliberately delayed”—the same definition used by the reporting networks that were the exclusive source of the quotes Ameritrade transmitted to its customers. Not surprisingly, contracts must be interpreted sensibly under Nebraska law (governing the CMO Agreement and the Terms and Conditions), New York law (governing the Last Sale Agreement), and District of Columbia law (governing the NASDAQ Agreement). *See GMAC v. Blanco*, 181 Neb. 562, 566 (1967) (“Contracts must receive a reasonable construction so as to give effect to the intention of the parties thereto and carry out rather than defeat the purpose for which they were executed.”); *Pellot v. Pellot*, 759 N.Y.S.2d 494, 496 (App. Div. 2003) (“When interpreting a contract, the court should arrive at a construction that will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized”); *Vaughan v. Nationwide Mut. Ins. Co.*, 702 A.2d 198, 201 (D.C. 1997) (“The contract must be interpreted as a whole, giving a reasonable, lawful and *effective* meaning to all its terms.”).

The only “evidence” Green has ever offered for his “instantaneous” interpretation is the claim in the Semak Affidavit that “[i]n the securities industry, the term ‘real-time information’ implies that the disseminated data is available as it is being generated in the actual market place.” Semak Aff. (E11, 3:10, 11). But Semak cites no industry sources and offers no other foundation for that statement, which of course contradicts the undisputed practices of the reporting networks. *See Stukenholtz*, 267 Neb. at 989 (“opinion evidence which is unsupported by appropriate foundation is not admissible”). Nor is the statement sufficiently definite on the meaning of “as it is being generated”—

which Semak tellingly uses instead of “instantaneous”—to be either an admissible expert opinion or evidence for Green’s interpretation of “real-time.” *See Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 265 Neb. 918, 931 (2003) (“expert’s opinion must be sufficiently definite and relevant to provide a basis for the fact finder’s determination of an issue or question”); *Neb. Moline Plow*, 52 Neb. 541 (ambiguities in affidavits will be construed against offering party). Semak’s affidavit thus does not salvage Green’s otherwise unsupported “instantaneous” interpretation of “real-time.”

Green’s further suggestion that he did not receive real-time options quotes because the options markets were not electronically linked is completely meritless. *See Green Br. 16.* Electronic linkage has to do with how the different options exchanges communicate with each other, not with how they communicate with OPRA’s information processor or how their trading data is disseminated. *See Order Directing Options Exchanges To Submit an Inter-Market Linkage Plan*, Exchange Act Release No. 42,029, 64 Fed. Reg. 57,674 (Oct. 26, 1999). During the period at issue, each of the exchanges electronically transmitted their exchange-specific trading data to OPRA’s information processor, which electronically transmitted the data to vendors. SEC Report (E7, 80, 86:4, 11). Ameritrade’s vendor electronically transmitted the data to Ameritrade. Harris Aff. (E5, 2:3, 11). Ameritrade then created consolidated options quotes from the separate exchange-specific quotes—in precisely the manner OPRA itself now does—and passed the consolidated quotes (which reflected trading on all exchanges, not just the dominant exchange) on to its customers. *Id.* at 3. The lack of electronic linkage, thus, could have

had no effect on the timeliness or accuracy of the options quotes Ameritrade disseminated.

The undisputed facts establish that Green received real-time stock and option quotes. For that reason, summary judgment against Green must follow. Green's receipt of real-time stock and option quotes thus independently warrants affirmance of the District Court decision.

B. Green Is Not Entitled To A Refund Because There Was No “Total Breach” And He Did Not Timely Terminate The Contracts.

Green does not seek to recover through this suit any traditional contract damages of the sort measured by expected gains, consequential losses, or substitution costs. *See* 1 Dan B. Dobbs, *Law of Remedies* § 3.3(1), at 293 (2d ed. 1993). Indeed, he has expressly disclaimed and is judicially estopped from seeking such damages. Green Dep. (E7, 47:4, 11); *Green v. Ameritrade, Inc.*, 279 F.3d 590, 598 n.7 (8th Cir. 2002). Green has chosen instead to seek a refund of the \$20 monthly subscription fees he paid for the RTQ Service. Second Am. Compl. (T27); Interrog. Resps. (E7, 19-20:4, 11); Green Dep. (E7, 47:4, 11). But he is not entitled to that measure of damages, even assuming Ameritrade committed the contract breaches Green alleges.

As a form of restitution, refunds are not available for every breach of contract. The breach must be a “total breach” that defeats the purpose of the contract and substantially impairs its value. *See* Restatement (Second) of Contracts § 373 cmt. a (“restitution is available only if the breach gives rise to a claim for damages for total breach”); *id.* § 243(4) (describing “total breach”); *Albers v. Koch*, 185 Neb. 25, 28 (1969)

(“The remedy of restitution for breach of contract is available to a plaintiff only in case defendant’s breach is total.”); *Abdul v. Subbiah*, 735 N.Y.S.2d 29, 30 (App. Div. 2001) (“Since the breach of contract by non-performance was a total breach, plaintiff was entitled to obtain restitution.”). The injured party also must timely terminate the contract upon learning of the alleged breach. *See* Restatement (Second) of Contracts § 373 cmt. a (“A party who has lost the right to claim damages for total breach by, for example, acceptance or retention of performance with knowledge of defects (§ 246), has also lost the right to restitution.”); *Snyder v. Hill*, 153 Neb. 721, 723-25 (1951) (acceptance of performance after alleged breach of lease foreclosed remedy of ejectment, a form of restitution); *Kemelhor v. Penthouse Int’l, Ltd.*, 689 F. Supp. 205, 215 (S.D.N.Y. 1988) (New York law: “[Counterclaimant] has lost its right to restitution because it accepted [plaintiff’s] services without protest until early 1983 immediately prior to its termination of salary payments.”), *aff’d*, 873 F.2d 1435 (2d Cir. 1989) (table). Put differently, if the breaching party has rendered substantial and valuable performance *or* the injured party continues to accept performance after the breach, a refund is not available.

The undisputed facts certainly establish that Ameritrade provided Green with substantial and valuable performance. He received “real-time” stock trading data without incident. Green Dep. (E7, 51:4, 11). And by his own account, the options trading data he received was allegedly flawed only on occasion. *Id.* at 46, 51. Indeed, Plaintiff used the RTQ Service to trade both stocks and options, both before and after he learned of the supposed flaws in the service. *Id.* at 35-36, 45-46. His continued use of the RTQ Service long after discovering its supposed flaws proves unequivocally that Green received

valuable performance from Ameritrade. *See ESPN, Inc. v. Office of the Comm'r of Baseball*, 76 F. Supp. 2d 383, 392-94 (S.D.N.Y. 1999) (“where a party with the right to terminate chooses instead to continue, the only inference to be drawn is that the party will derive a worthwhile benefit from its contractual relationship”). Ameritrade’s alleged breach thus does not come close to being a “total breach.” *See Albers*, 185 Neb. at 28-29 (breach of real estate contract terms permitting pre-possession entry and requiring possession by date-certain not total breach); *Babylon Assocs. v. County of Suffolk*, 475 N.Y.S.2d 869, 874 (App. Div. 1984) (installation of defective concrete pipe under a contract to build a sewage plant not substantial enough to warrant restitution); *Shapiro, Inc. v. Bimblich*, 101 A.2d 890, 892-93 (D.C. 1954) (deliberately miswired meter box not a substantial breach of contract to wire houses).

The undisputed facts also establish that Green continued to accept performance long after learning of Ameritrade’s alleged breach of contract. For 28 months after he first learned of the supposed flaws in the RTQ Service, Green paid \$20 a month to maintain access to the service. Acct. Stmts. (E6, 71-82, 87:3, 11); Interrog. Resps. (E7, 14-15, 18-19:4, 11); *see p. 15, supra*. During that 28-month time period, moreover, Green continued to use the RTQ Service. Green Dep. (E7, 35-36, 45-46:4, 11). In short, Green did not terminate the allegedly breached contracts in a timely fashion. *See Snyder*, 153 Neb. at 723-25 (no restitution where landlord accepted rent after alleged breach of lease); *ESPN*, 76 F. Supp. 2d at 393-94 (seasonal contract required termination after knowledge of the breach and before the next season).

Because Green’s breach of contract claim does not involve a “total breach” and a timely termination, the restitutionary relief of a refund is not available. Green does not allege, has not proved, and is judicially estopped from seeking any other damages. Green thus has no claim for relief. That fact alone warrants affirming summary judgment against Green.

C. The Voluntary Payment Doctrine, Ratification, Estoppel, And Waiver Bar Green’s Claim Because He Continued To Pay For And Use The RTQ Service After Learning Of Its Alleged Flaws.

In this litigation, Green has repeatedly maintained that he concluded in March 1999 that Ameritrade was not providing him with what he thought were real-time quotes. He testified to that fact at his deposition. Green Dep. (E7, 32, 49-50:4, 11). And when Ameritrade propounded interrogatories asking Green to state “when and how you discovered the basis for your claims against Ameritrade” and “all facts upon which you base your claim,” the last event he identified occurred in March 1999. Interrog. Resps. (E7, 13-15, 17-19:4, 11); Green Dep. (E7, 32:4, 11). Green nonetheless continued to use the RTQ service and pay Ameritrade the \$20-a-month RTQ Service fee for another 28 months—including through the first 16 months of this litigation—until July 2001 when he finally canceled the service. Acct. Stmts. (E6, 71-88:3, 11); Green Dep. (E7, 35-36, 45-46:4, 11). That continued payment for and use of the RTQ Service bars Green’s claim under the voluntary payment doctrine and principles of ratification, estoppel, and waiver.

The voluntary payment doctrine prohibits recovery of voluntary payments of a disputed demand made with full knowledge of the material facts. *See Woodmen of the World Life Ins. Soc’y v. ASCAP*, 146 Neb. 358, 368-69 (1945) (“Where one has

voluntarily, with full knowledge of the facts, paid a disputed demand, which he claimed he did not owe, he cannot ordinarily recover it back on the ground of its invalidity.”); *Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 790 N.E.2d 1155, 1156 (N.Y. 2003) (voluntary payment doctrine “bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law”). Similarly, ratification, estoppel, and waiver preclude a party from suing for breach of a contract when it has accepted and retained benefits conferred under that same contract with knowledge of the grounds for its suit. *See Baye v. Airlite Plastics Co.*, 260 Neb. 385, 390 (2000) (“The acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, will create an estoppel.”); *Combined Ins. v. Shurter*, 258 Neb. 958, 967 (2000) (“if a party seeks to enjoy the benefits of [an agreement], such action constitutes a ratification of the [agreement] and a waiver of any objections or rights which that party might otherwise have had”); *Wegner v. West*, 169 Neb. 546, 552, 555 (1960) (acceptance of benefits results in waiver); *A. Colish, Inc. v. Abramson*, 577 N.Y.S.2d 60, 61 (App. Div. 1991) (ratification and estoppel proper where payments made on disputed leases without objection for several years); *487 Elmwood, Inc. v. Hassett*, 486 N.Y.S.2d 113, 117 (App. Div. 1985) (paying rent as it became due waived right to claim discharge from rent because of lease breach).

Under these rules, a party intending to litigate its obligation to pay must do so before, rather than after, it makes payments and accepts the benefits of the agreement imposing the payment obligation. *See Woodmen of the World*, 146 Neb. at 368-69 (“if the party would resist an unjust demand he must do so at the threshold[, as] . . . he cannot

postpone the litigation by paying the demand in silence and afterward suing to recover the amount paid’”); *El Reda v. Love Taxi, Inc.*, 608 N.Y.S.2d 656, 658 (App. Div. 1994) (estoppel; “if plaintiffs wished to protest the deductions, they should have objected when the deductions were first imposed some fifteen years earlier, or within a reasonable period thereafter”); *Gimbel Bros., Inc. v. Brook Shopping Ctrs., Inc.*, 499 N.Y.S.2d 435, 439 (App. Div. 1986) (voluntary payment; “When a party intends to resort to litigation in order to resist paying an unjust demand, that party should take its position at the time of the demand, and litigate the issue before, rather than after, payment is made.”). Those who delay in asserting their claims while enjoying the benefits of the contract under which those claims arise, despite knowledge of the alleged facts giving rise to those claims, forfeit their opportunity to seek restitution. *See Gimbel Bros.*, 499 N.Y.S.2d at 439 (“[Plaintiff] displayed a marked lack of diligence in determining what its contractual rights were, and is therefore not entitled to the equitable relief of restitution.”).

The voluntary payment doctrine, ratification, estoppel, and waiver serve to prevent a party from securing the benefits of a contract by making payments and then afterward seeking a refund based on some known imperfection in those benefits. But that is precisely what Green is attempting to do in this litigation. He received extensive benefits from the Ameritrade RTQ Service for years, executing numerous stock and option transactions based upon the market information he received, and now he wants his money back. In short, he is asking for a ruling that he should have received the valuable RTQ Service for nothing. The voluntary payment doctrine, ratification, estoppel, and waiver

prevent such inequitable results. As such, summary judgment against Green may be affirmed on that ground too.

CONCLUSION

For the foregoing reasons, Ameritrade respectfully asks that the Court affirm the District Court's decision granting Ameritrade summary judgment against Green.

Respectfully submitted,

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