

Before
FINRA DISPUTE RESOLUTION, INC.
_____ X

DAVID DE GROOT,

Claimant,

FINRA-DR Case No.
13-00119

- against -

E*TRADE SECURITIES LLC

Respondent.
_____ X

**PRE-HEARING BRIEF OF
E*TRADE SECURITIES
LLC**

TO ARBITRATOR HORNSTEIN:

Respondent E*TRADE SECURITIES LLC (“E*TRADE”), by its undersigned counsel, hereby submits this ANSWER to the Statement of Claim in the above-captioned case.

I. Introduction.

The Initial Prehearing Conference Scheduling Order requires mandatory memoranda of legal issues covering all claims and defenses with specific emphasis on case facts such as automated telephonic trade orders, record retention, etc.

II. Background and Facts.

E*TRADE Securities, LLC (“E*TRADE”) is an electronic, on-line discount brokerage that offers order execution services for low commission prices compared to traditional broker-dealers. The vast majority of E*TRADE’s customers conduct business through E*TRADE’s website or Interactive Voice Response (“IVR”) System, without ever speaking directly to a broker or a

customer service representative. E*TRADE communicates its policies and procedures through its website.

Claimant, an employee of Apple Inc. (NASD: AAPL), opened his E*TRADE account in order to participate in Apple's Employee Stock Purchase Program ("ESPP"). On September 7, 2012, Claimant held 119 shares of Apple that he had acquired periodically from December 2008 through July 2012.

On September 9, 2012, Claimant dialed in to E*TRADE's Interactive Voice Response ("IVR") System. The IVR system is a voice recognition and touch-tone phone system that provides customers with a quick and efficient method of accessing account information and placing orders in their accounts.

Claimant indicated to the IVR system that he wished to sell shares in his ESPP account. When asked how many shares he wished to sell, Claimant replied "sell all my shares." Claimant indicated that he wanted to place a market order to sell all his shares. Claimant also indicated that he wished to receive the proceeds of his sale by check.

Important to this arbitration is the fact that, before placing the order, E*TRADE's IVR system asked Claimant to confirm the order. Claimant would have had to say "Yes" or press the "1" key on his telephone to confirm the order. If the order was incorrect, Claimant could have said "No" or pressed the "2" key to cancel. Further, at any time during the call, Claimant could have asked the system to "go back" or asked for a customer service representative to assist in placing his trade. Additionally, Claimant could have logged into E*TRADE's website or mobile app and typed his order.

III. Response to Claimant's Brief.

Claimant has not cited a single case on point. In support of his arguments regarding negligence, Claimant has cited a case from the 1930s regarding a tug boat collision and two cases from the 1990s regarding the accidental transmission of the AIDS virus.

E*TRADE does not dispute that it has a duty to execute its customer's orders. Subject to FINRA's best execution rule, E*TRADE is required to execute orders promptly and at the best available price. See FINRA Rule 5310. The Supplementary Material to FINRA Rule 5310 states: "A member must make every effort to execute a marketable customer order that it receives fully and promptly." Additionally, E*TRADE offers customers a two-second execution guarantee for market orders on S&P 500 stocks such as Apple, Inc.

The only dispute in this case is a factual dispute as to the order given. Claimant contends that he wanted to enter an order to sell 5 shares. E*TRADE recorded an order for 119 shares when Claimant gave the instruction "sell all my shares." Claimant's entire case hinges on his testimony that E*TRADE's IVR system did not ask him to confirm the order.

Claimant had a number of options to place the order in question. The evidence to be presented at hearing will show that every order entry system available to E*TRADE customers requires the customer to confirm the order before it is placed. First, Claimant could have placed the order via E*TRADE's website. Claimant would have typed the exact order he wished to place into the fields on E*TRADE's website and clicked a button to preview the order.

E*TRADE's website then would have presented an order preview page and Claimant would have had to click a second button to verify and place the order.

E*TRADE also provides mobile access to customers through a number of apps available for smartphones and tablets, including the Apple iPhone and Apple iPad. Similar to the website, customers using the mobile apps enter their order details into fields in the apps, click a button to preview the order, and then click a second button to verify and place the order.

E*TRADE employees who take orders over the telephone are required to read the order back to the customer and receive the customer's acknowledgement of the order prior to placing the order.

E*TRADE's IVR system has a similar confirmation process. The system asks the customer for the same information requested in the website's fields – security, buy or sell, quantity, and price¹ – the IVR system then repeats the order back to the customer and asks the customer to say "Yes" or press "1" to confirm the order or say "No" or press "2" to go back.

Claimant is the only customer to have disputed the validity of an order placed through the IVR system. Remarkably, Claimant expects the arbitrator to believe that his transaction was the sole instance where E*TRADE's IVR system did not operate as programmed.

The remainder of Claimant's brief attempts to create a "discovery tort" from the fact that E*TRADE does not record IVR calls. As indicated in E*TRADE's answer, E*TRADE's IVR system routinely receives between 5,000

¹ Additionally, Claimant could have used the keys on his telephone to enter the quantity desired or, at any time, he could have asked for customer service and been connected to an E*TRADE employee to assist in placing his order.

and 25,000 calls per day. Despite this volume of calls, complaints arising from the IVR system are scarce.² Hence, E*TRADE does not record automated transactions.

E*TRADE does record certain inbound calls to its customer service employees. Claimant correctly points out that E*TRADE is not required to record these calls. NASD Rule 3010³ only requires the taping of conversations when a certain percentage of a firm's employees have been subject to certain disciplinary actions. Distinct from this case, the NASD taping rule and E*TRADE's taping procedures focus on the conduct of employees and on conversations between two human beings. There are no rules or regulations in the industry requiring the recording of automated transactions and the undersigned has found no cases on point.

Finally, Claimant's damages are uncertain and overstated. Claimant sold 119 shares of Apple at \$680.143 per share on September 7, 2012. Claimant elected to repurchase 116 shares on September 18, 2012 at \$698.506 per share. Apple hit a record high of \$705 per share on September 21, 2012 and then fell almost 50% to \$385 per share on April 19, 2013. As of the date of this brief, Apple is trading at approximately \$490 per share. But for the fact that he elected to repurchase 116 shares, Claimant would currently be in a better position having

² The scarcity of complaints arising from the IVR system also explains the confusion on the part of E*TRADE employee Akearah Judge addressed on pages 5 and 6 of Claimant's brief. There are so few written complaints regarding the IVR system, that Ms. Judge – a compliance analyst who responds to customer complaints – was not familiar with the IVR system.

³ Claimant's brief incorrectly cites FINRA Rule 3010. There is no such rule. The taping rule is contained in the NASD rules governing "responsibilities relating to associated persons, employees, and other's employees."

sold all of his shares and retaining the proceeds, regardless of the tax consequences.

IV. Conclusion.

Respondent is not responsible for Claimant's losses. Rather, Claimant's own decision-making caused his loss – if any. For the foregoing reasons, Claimant's claim should be dismissed.

WHEREFORE, Respondent respectfully request that an Order be issued against Claimant:

- a. Denying all claims in the Statement of Claim;
- b. Assessing the costs and expenses of this proceeding against Claimant;
- c. Granting Respondent all such other and further relief as this Panel may deem just and necessary.

Date: August __, 2013

Respectfully Submitted,

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