

IN THE FINANCIAL INDUSTRY REGULATORY AUTHORITY

FINRA CASE NO. 13-00119

In Matter of Arbitration Between)
DAVID DE GROOT,)
 Claimant,)
v.)
E*TRADE SECURITIES, LLC,)
 Respondent.)

CLAIMANT’S DAMAGES BRIEF

In response to the arbitrator's order, David de Groot respectfully submits this brief detailing his damages and the remedy he is requesting in this arbitration.

As has been explained in prior filings and at the hearing on October 2, 2013, Mr. de Groot’s damages stem from the erroneous execution of his order of September 7, 2012 to sell five shares of his Apple stock from his Employee Stock Purchase Plan (ESPP) account. Instead of selling only five shares, E*TRADE sold all 119 of his shares. After being informed by E*TRADE that it would not correct the trade, Mr. de Groot executed a cover transaction to mitigate damages by depositing the check sent to him by E*TRADE in order to repurchase as much of the stock as possible. Since this check did not equal an exact number of shares, he added \$121.24 from the cash in his E*TRADE

account but, due to the stock's rising price, was only able to repurchase 116 shares of the stock.

Assuming proper adjustment of his account to reflect the actual order placed, his money damages total \$3,521.96, which equals the sale price of the five shares of Apple stock on September 7, 2012 plus the \$121.24 he advanced to repurchase the Apple stock in order to limit losses.

Mr. de Groot seeks to be placed in the position he would have occupied had his instruction to sell five shares been properly executed. To accomplish this, he seeks the following remedy: **First**, E*TRADE should adjust his account to reflect the sale of five (5) shares (instead of 119) of Apple stock on September 7, 2012, which will result in his ESPP account showing 114 shares remaining as of that date. **Second**, E*TRADE should pay to him \$3,400.72, which represents the amount he is due for the sale of five (5) shares at \$680.143/share, the value at which the trade was executed. **Third**, he should be reimbursed the \$121.24 in additional funds he paid out of his account to repurchase the Apple stock at market. **Fourth**, both he and the IRS should be sent corrected Forms 1099-B for 2012, reflecting the sale of five (5) shares of Apple stock instead of the 119 erroneously sold.¹ Each of these requests is described in detail below.

¹ Mr. de Groot also requests that E*TRADE be ordered to pay all costs of this arbitration as well as his reasonable attorney's fees.

1) **Adjust ESPP Account to show 114 shares remaining as of September 7, 2012**

Since Mr. de Groot only instructed E*TRADE to sell five shares of stock, this is the sale amount that his account should reflect. E*TRADE has the ability to adjust his account to reflect the actual sale that was ordered and not the one that it erroneously executed. E*TRADE tells its customers that in the event of trading problems due to fraud, it will “restore to [the customer’s] account cash and/or shares of securities equal to the amount of cash and/or shares of securities in [the] account at the time of any unauthorized activity.” It assures its customers that “[a]ny unauthorized trades will be reversed and positions will be reinstated.”² Mr. de Groot’s case is analogous to a fraudulent trading situation in that trading on his account was performed for an amount of shares that he had not authorized.

At the hearing on October 2, 2013, Erik Renga, Director of Operations for E*TRADE Clearing, testified that the company has the ability to make the requested adjustment to Mr. de Groot’s account but chose not to because it didn’t believe there was a good enough reason to do so. Mr. Renga subsequently acknowledged on cross-examination that if the arbitrator in this case were to order E*TRADE to make the adjustment to Mr. de Groot’s account, that *would* constitute a good enough reason.

² E*TRADE Customer Protection Guarantee <https://us.etrade.com/e/t/jumppage/viewjumppage?PageName=cpg> (last visited November 21, 2013).

Adjustment of the account is also appropriate to remove the covering transaction from his retail account. As Mr. de Groot testified at the hearing, he repurchased the stock on the advice of his family in order to mitigate the damages caused by E*TRADE's erroneous interpretation of his instructions. This action was in line with E*TRADE's brokerage agreement, which required him to take action in mitigation even if it was later determined that the error was E*TRADE's. Specifically, Section 5(c) of E*TRADE's Brokerage Agreement states:

If I object to a transaction for any reason, I understand that I will attempt to limit any Losses that may result from such transaction. I understand and agree that unless I take such action to limit Losses, I will bear sole responsibility for any and all further Losses that may occur thereafter, even if my objection to the initial transaction is ultimately determined to be valid.

(Statement of Claim, Exhibit F). Repurchasing the Apple stock was the appropriate action to be taken to limit losses at the time of the transaction here because Apple's stock price was rising. (See E*TRADE Hearing Exhibit F.) Thus, this covering transaction is part and parcel of the trades that should be adjusted to correct the erroneously executed order.

Finally, adjustment of the account is required since Mr. de Groot otherwise would be liable for income tax on shares of stock he did not authorize to be sold. Following this adjustment, Mr. de Groot's ESPP account should show a balance of 114 shares of Apple stock as of the trade date of September 7, 2012.

Note that during the pendency of this arbitration, Mr. de Groot sold an additional ten (10) shares of Apple stock on March 26, 2013. Therefore, following the adjustment, as of that date his ESPP account should show a balance of 104 shares (114 – 10) of Apple stock as shown below:

Date	Plan Type	Order Type	Price Type	Shares Sold	Remaining Balance	Execution Price	Total Amount
03/26/2013	ESPP	Sell ESPP	Mkt	10	104	\$463.390	\$4,633.90
09/07/2012	ESPP	Sell ESPP	Mkt	5	114	\$680.143	\$3,400.72

2) **Make payment of \$3,400.72 to Mr. de Groot**

This payment represents the value of the five shares of stock Mr. de Groot ordered be sold on September 7, 2012. The sale of five shares at \$680.143/share totals to \$3,400.72. Mr. de Groot has not yet collected these funds because he redeposited E*TRADE's check to repurchase the stock in order to limit losses to the account, as required by E*TRADE's Brokerage Agreement.

3) **Reimburse Mr. de Groot's Cash Account \$121.24**

In order to repurchase a whole number of shares, Mr. de Groot needed to add \$121.24 to the check he received for the erroneous sale, with which he was then able to repurchase 116 shares of Apple stock. This amount should be restored to his E*TRADE account.

4) **Provide Corrected IRS Form 1099-B to Mr. de Groot and IRS**

Upon adjustment of his E*TRADE account, E*TRADE should send Mr. de Groot and the IRS a corrected Form 1099-B for 2012, reflecting the sale of

five shares of Apple stock from his ESPP in 2012. (His 1099-B for 2013, when issued, should show a sale of ten (10) shares from his ESPP account in 2013.) In this way, he will be liable for taxes only on the shares he authorized for sale, and not on those sold by E*TRADE without his permission.

CONCLUSION

The remedy requested by Mr. de Groot represents a fair, common-sense means to compensate him for his losses, and to restore his ESPP account, his “nest egg,” to its proper level.

Respectfully submitted,

DAVID DE GROOT,
By his attorney,



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Document transmitted by electronic mail to:
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