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 REPLY BRIEF ON DAMAGES

David de Groot respectfully submits this reply brief in response to E*TRADE's Post-Hearing Brief Regarding Economic Damages.

E*TRADE begins its brief by accusing Mr. de Groot of failing to file a brief that is responsive to the arbitrator's order, stating that he "merely restates the exact same relief requested at the hearing." It completely ignores the fact that the bulk of Mr. de Groot's brief is devoted to explaining in detail why the requested relief is appropriate, and how it was calculated. Yet, immediately thereafter, E*TRADE presents a section it titles "Background and Facts" but which is really another attempt by it to argue that it should not be found liable for Mr. de Groot's losses. E*TRADE is, in essence, seeking a second bite at the liability apple. Such arguments are inappropriate at this stage of the litigation, and to the significant extent that E*TRADE is merely repeating arguments it has already made, Mr. de Groot

respectfully refers the arbitrator to his pre-hearing brief. To the extent that E*TRADE has advanced new arguments in support of its position that it should not be found liable, this brief addresses those arguments.

E*TRADE SHOULD BE FOUND LIABLE FOR FAILING TO PROPERLY EXECUTE MR. DE GROOT'S ORDER TO SELL FIVE SHARES OF APPLE STOCK

As was made clear in the hearing and pre-hearing briefing, Mr. de Groot vehemently denies E*TRADE's claim that he instructed its Interactive Voice Response (IVR) system to "sell all my shares." He clearly stated "sell five shares" yet the system apparently interpreted this as "sell my shares," and sold all of the shares of Apple stock in his account without having given him the opportunity to confirm the sale. He would have been able to demonstrate this to the arbitrator had E*TRADE recorded the call to the IVR system. However, to save money, E*TRADE negligently chooses not to record calls to its IVR system. And, through its additional negligence, E*TRADE failed even to preserve a complete electronic log of Mr. de Groot's call.

E*TRADE states in footnote 1 of its brief that Mr. de Groot "would have had to choose from one of his eight tax lots in order to complete the sale of five shares." This adds nothing to its argument because the entire issue in this arbitration is that E*TRADE's IVR system misinterpreted Mr. de Groot's instruction. He, therefore, did not hear any instruction to select a tax lot

because the system did not properly interpret his instruction to "sell five shares."

E*TRADE next states that its system asked Mr. de Groot to confirm his order, which Mr. de Groot also vehemently denies. E*TRADE offers no proof that Mr. de Groot was ever presented with an opportunity to confirm his order, and even that portion of the call log that it *did* preserve contains no indication of any order confirmation step. (See Claimant's Opening Brief, p.7, E*T000300).

E*TRADE next incorrectly asserts that Mr. de Groot newly claims to have repurchased the Apple shares "to comply with E*TRADE's Customer Agreement . . . ." As he stated at the hearing, he repurchased the shares on the advice of his parents in order to mitigate the damages caused by E*TRADE's erroneous interpretation of his instructions. However, this action also was in compliance 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. Had Mr. de Groot <u>not</u> repurchased the shares and had Apple's stock price continued to rise (as it was doing at the time of the repurchase), E*TRADE would now be claiming that it should not be liable for his losses because he failed to repurchase the stock in accordance with his contractual duty to mitigate damages. It cannot have it both ways. The contract is clear: Mr. de Groot was <u>required</u> to take action lest he "bear sole responsibility for any and all further Losses that may occur thereafter, even

if [his] objection to the initial transaction [was] ultimately determined to be valid." (E*TRADE Brokerage Agreement, Section 5(c)).

Finally, E*TRADE now asserts for the first time in its damages brief that Mr. de Groot's decision to return E*TRADE's check is indicative of "buyer's remorse." Far from that being the case, the evidence introduced at the hearing (ranging from his own testimony, to the recordings of his calls to E*TRADE's Customer Service department, to E*TRADE's own internal correspondence) clearly demonstrates that Mr. de Groot intended to sell five shares of stock, and that it was only when E*TRADE refused to correct the trade that he did his best to reverse the transaction completely by giving E*TRADE back its check and instructing it to repurchase as many of the Apple shares as possible.

EQUITABLE RELIEF IS APPROPRIATE IN THIS CASE BECAUSE OTHERWISE "IT WOULD BE EXTREMELY DIFFICULT TO ASCERTAIN THE AMOUNT OF COMPENSATION WHICH WOULD AFFORD ADEQUATE RELIEF"

E*TRADE correctly states that equitable relief, such as Mr. de Groot in part seeks here, should only be granted "where there is no adequate legal remedy to compensate the injured party." (E*TRADE Post-Hearing Brief, p. 5). It goes on to cite California Civil Code § 3422, which indicates, *inter alia*, that such relief may be obtained "where it would be extremely difficult to

ascertain the amount of compensation which would afford adequate relief." That is the case here.[1]

Had Mr. de Groot's order been properly executed, his federal tax liability would be $455.33 at the 15% capital gains tax rate based on the sale of the five shares of stock he instructed E*TRADE to sell, and assuming the sale was made from the oldest lot with the lowest purchase price:

Purchase Date	Purchase Price	Sale Price	Qty	Sale Amount	Purchase Amount	Fees	Taxable Gain	**Proper Tax Owed**
12/26/08	$72.94	$680.143	5	$3,400.72	$364.70	$0.49	$3,035.53	**$455.33**

Yet, if E*TRADE's error is left uncorrected, Mr. de Groot will owe over nine thousand dollars in federal tax alone, even when assuming that all shares would be taxed only at the 15% capital gains rate:

Purchase Date	Purchase Price	Sale Price	Qty	Sale Amount	Purchase Amount	Fees	Taxable Gain	**Improper Tax Owed**
Various	Various	$680.143	119	$80,937.01	$18,336.51	$11.76	$62,588.74	**$9,388.31**

Thus, he will be liable for an additional $8,932.98 over what he should be required to pay. He should not be required to pay taxes on an

[1] The arbitrator instructed the parties to discuss the law applicable to this litigation in their pre-hearing briefs. While E*TRADE ignored this instruction, Mr. de Groot noted in his brief that E*TRADE's Brokerage Agreement states that the "Agreement will be deemed to have been made in the State of New York and will be construed, and the rights and liabilities of the parties determined, in accordance with the internal laws of the State of New York." (E*TRADE Brokerage Agreement § 12(m), Statement of Claim Exhibit F). Nonetheless, E*TRADE continues to cite California law in support of its contention that Mr. de Groot is not entitled to equitable relief. Since the requirements for such relief are similar in all states, Mr. de Groot does not object to using the cited California statute in analyzing his entitlement to this relief.

unauthorized trade based on E*TRADE's error any more than he would be required to pay taxes on an unauthorized trade based on fraud.[2]

E*TRADE's analysis merely addresses the difference in tax Mr. de Groot would have to pay based on his account having been liquidated at a time when not all shares had been held for a period long enough to qualify them for most favorable tax treatment compared to how much he would have to pay had all of the shares been held long enough to entitle them to such treatment. Its argument assumes that the issue merely relates to whether parts of this erroneous trade would be taxed as ordinary income or as a capital gain. This is a red herring. The *real* issue is that, as a result of E*TRADE's error, and absent adjustment of his account and correction of his IRS Form 1099-B, Mr. de Groot will owe many thousands of dollars in income tax at the present time that he should not be required to pay. Moreover, E*TRADE's statement that "no matter when Claimant sold his shares, he was going to at least incur long term capital gains taxes" is facially incorrect because were he to subsequently sell shares at a price below that which he had paid, a distinct possibility, he would owe no capital gains tax at all.

E*TRADE could be ordered to pay Mr. de Groot $8,932.98 to compensate him for the additional tax he will be required to pay if his

[2] Mr. de Groot does not "rely" on E*TRADE's Complete Protection Guarantee in support of his claim, as stated in footnote 2 of E*TRADE's brief. He merely states that his situation 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, and he contends that the arbitrator should order E*TRADE to perform the same adjustment to his account that E*TRADE would make in the event of fraudulent trading on the account.

account is not adjusted. Yet, even if E*TRADE were ordered to pay him this amount, it would not represent an accurate computation of his damages because what Mr. de Groot will do in the future with his shares and the price at which those shares will be trading at the time he chooses to sell them cannot be known at this time and will have an impact on his subsequent tax liability. To accurately determine the proper amount of compensation would require ongoing analysis every time a subsequent trade was executed, and would span years. Thus, "it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief" and is why adjustment of his account is a necessary component of the appropriate remedy in this case.

Finally, E*TRADE attempts to incorporate the current price of Apple stock into its computation of Mr. de Groot's losses. The current price of Apple stock is irrelevant to this litigation since Mr. de Groot simply seeks to be placed in the position he would have occupied had his instruction to sell five shares been properly executed. What *is* relevant is that by selling shares it had not been authorized to sell and absent adjustment of his account, E*TRADE will leave Mr. de Groot with thousands of dollars of tax liability that should not be incurred.

E*TRADE has never stated that it *cannot* adjust his account in the manner he requests, only that, without an order from the arbitrator, it *will not* do so. Adjustment of his account and correction of his IRS Form 1099-B

to reflect the sale of five (5) shares, coupled with the payment to him of $3,521.96 for these shares (including his out-of-pocket expense of $121.24 in mitigating losses), is the only way to deal with this matter accurately, and in a manner that is fair both to Mr. de Groot and to E*TRADE.

CONCLUSION

With briefing now complete, and with no party having requested a hearing, Mr. de Groot respectfully asks that the relief he has requested be granted in full.

Respectfully submitted,

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Dated: December 30, 2013

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