IN THE FINANCIAL INDUSTRY REGULATORY AUTHORITY

FINRA CASE NO. _____

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

STATEMENT OF CLAIM

A central question raised in this arbitration is whether voice recognition software deciphering of a customer's oral instruction is to be believed without any audio record of what was actually said, and in the presence of facts indicating that no reasonable customer would have given the alleged instruction.

E*TRADE EXECUTES TRADE OF INCORRECT QUANTITY

The claimant, David De Groot is an employee of Apple Computer who participates in the company's employee stock purchase plan. Shares of Apple stock that Mr. De Groot acquires must be held for a period of at least one year before they can be sold without incurring significantly higher tax liability, a fact of which he was well aware. At the time of the event that led to this claim, Mr. De Groot owned 119 shares of Apple stock ("APPL"), many of which had been held for less than the requisite one-year period.

On September 7, 2012, Mr. De Groot called E*TRADE's Interactive Voice Response (IVR) system, and instructed the system to sell five (5) shares of his Apple stock. Instead of executing his requested order, E*TRADE's IVR system incorrectly recorded his instruction as an order to sell all of his shares, and subsequently an order was entered to liquidate his 119 shares of Apple stock instead of the five (5) he had ordered be sold.

The actual words he spoke in response to the system's prompt for the number of shares to sell was "sell five shares."

MR. DE GROOT PROMPTLY INFORMS E*TRADE OF ITS ERROR

As soon as he became aware of this erroneous sale, early on Saturday, September 8, Mr. De Groot promptly attempted to contact E*TRADE's customer service department to inform them of the error. He learned, however, that customer service is not available on the weekend, and then sent a secure email to E*TRADE the following day in an attempt to have the error corrected as soon as possible. The details of Mr. De Groot's numerous contacts with E*TRADE and their responses are set forth in E*TRADE's letter to Mr. De Groot of September 25, 2012. (Exhibit A.)

As detailed in that letter, E*TRADE completed a trade inquiry on September 10 and informed Mr. De Groot that the erroneous sale would not be reversed. Over the next several days he attempted to have this decision reversed. When it became clear that E*TRADE would not do so, and in an

attempt to mitigate any losses, Mr. De Groot deposited the check for $80,915.25 that had been issued for the erroneous sale back into his E*TRADE account and repurchased the Apple stock. He was, however, only able to repurchase 116 shares of the stock at the then current market price, and was further required to invest additional funds amounting to $121.24 that was taken from his account to complete the purchase.

Mr. De Groot believed that if E*TRADE would simply listen to the recording of his call to the IVR system, they would hear that he had instructed the system that he wished to "sell five shares." However, in its letter of September 25, E*TRADE informed him that "[r]ecorded telephone calls are proprietary records, and per Firm policy, audio copies and transcripts of recorded telephone conversations cannot be provided to customers."

COUNSEL ATTEMPTS TO RESOLVE THE MATTER PRIOR TO ARBITRATION

Following receipt of this letter, Mr. De Groot engaged present counsel. Believing, as did his client, that this matter should be resolvable without resorting to arbitration, counsel wrote E*TRADE on October 18, 2012, asking that the recording of the call be listened to. (Exhibit B.) Counsel suggested that, should the matter proceed to arbitration, the recording would be evidence an arbitrator would require to make a ruling, notwithstanding any company policy to the contrary about providing it. He suggested that

E*TRADE listen to the actual recording of Mr. De Groot's instruction, contending that it would then be clear that he had instructed the system to "sell five shares" in response to its prompt.

Ms. Akearah E. Judge, Compliance Analyst at E*TRADE, responded on November 7, 2012 (Exhibit C) that "[a]fter further review of the call logs for Mr. DeGroot's account XXXX-4995, it ha[d] been confirmed that Mr. De Groot requested via the Firm's Interactive Voice Response ("IVR") system to sell all of his Apple Inc. ("AAPL") Employee Stock Plan Program ("ESPP") shares at market price on September 7, 2012."

Counsel next contacted Ms. Judge by telephone on November 20, and asked whether anyone had actually listened to the recording. Ms. Judge stated that no one had actually listened to the words that Mr. De Groot spoke. Counsel then requested that he be provided with a copy of the audio of Mr. De Groot's call to the IVR system. He was instructed to put his request in writing, which he did in his letter of November 25, 2012 (Exhibit D). In this letter, counsel stated that he and Mr. De Groot did not doubt that E*TRADE had executed the order that its computer "thought" had been placed. He contended, however, that Mr. DeGroot had stated that E*TRADE was to "sell five shares" and that this instruction was incorrectly converted by E*TRADE's system into some other words that then caused his order to be executed incorrectly.

E*TRADE FINALLY ADMITS THAT IT DOES NOT RETAIN VOICE RECORDINGS OF INSTRUCTIONS GIVEN TO ITS IVR SYSTEM

On December 14, 2012, E*TRADE responded by providing a copy of the computerized call log, which indicated, as expected, that the IVR system had recorded what it took to be an order to sell all shares. (Exhibit E.) However, to counsel's amazement, with regard to his request to be provided the actual voice recording used to generate this order, E*TRADE responded that "E*TRADE maintains an electronic call log, rather than voice recordings." In essence, E*TRADE admitted that it relies on its computer's translation of spoken words to determine whether a particular instruction was given. It assumes that its IVR system is infallible. As anyone who has witnessed the odd (and often comical) translations made by even excellent voice recognition software, such as is found on Apple's iPhone, to assume that the system's translations are always accurate represents a frightening level of trust, and not to maintain a copy of the audio that produced the order, whether legal or not, robs a wronged client, such as Mr. De Groot, of the opportunity of ever proving that the computer was in error.

Indeed, since the transaction log indicates "sell all my shares," it is possible that "sell five shares" was interpreted by the system as "sell my shares." But, this will remain a mystery since E*TRADE affirmatively chose not to maintain the voice recording that would settle the matter.

While E*TRADE might argue that Mr. De Groot could have recorded the call himself, which we would contend would be an unreasonable requirement, making such a recording would violate E*TRADE's own terms of agreement, as Section 5(e) of its Customer Agreement expressly states that "E*TRADE Securities does not consent to the recording of telephone conversations by any third party or me." (Exhibit F.)

In light of the fact that (1) Mr. De Groot would not have instructed to sell Apple shares held for less than one year since this would have subjected him to taxation as income rather than at the capital gains rate, (2) Mr. De Groot immediately contacted E*TRADE upon learning of its error, and (3) when E*TRADE failed to recognize its error and rewind the transaction, he promptly redeposited the funds to his account and repurchased the Apple stock in order to mitigate any losses, Mr. De Groot has provided substantial evidence in support of his contention that he instructed E*TRADE to sell only five shares of the stock, and that E*TRADE's execution of a sale of all of his shares was an error on its part.

E*TRADE has chosen not to maintain the voice recording of his call and even forbids its clients from making their own recordings, contending, in essence, that its IVR system is infallible. If the computer says he said it, then he must have said it. E*TRADE should not be permitted to benefit from its choice not to retain evidence that would enable Mr. De Groot to prove his claim.

Moreover, as this record clearly indicates, E*TRADE could have easily resolved this matter prior to arbitration yet it chose not to do so. In addition, it failed to divulge until the very last moment that it, in fact, had not retained a recording of the call, frustrating Mr. De Groot's efforts at resolving the matter and implying that it had listened to the call by stating that "audio copies and transcripts of recorded telephone conversations cannot be provided to customers." (Exhibit A.) This attempt to frustrate Mr. De Groot's efforts at having the erroneous sale corrected constitutes an unfair business practice under California's consumer protection statute, Business & Prof. Code § 17200 et seq., and warrants the awarding of reasonable attorney fees to Mr. De Groot. Equity also demands that Mr. De Groot not be prejudiced financially as a result of E*TRADE's refusal to correct its error.

RELIEF REQUESTED

Mr. De Groot respectfully requests that a hearing be held in Boston, Massachusetts, and that the Arbitrator award the following relief:

1) "Rewinding" of the erroneously executed sale transaction such that Mr. DeGroot will be left with 114 shares of Apple stock (the original 119 less 5 shares);
2) Payment of $3,400.72 to Mr. DeGroot, which represents five (5) shares at $680.143/share;

3) Restoration of the $121.24 in additional funds he paid out of his account to repurchase the Apple stock at market;

4) Provision of an IRS Form 1099 statement to him and to the IRS that will correctly indicate the sale of five (5) shares of Apple stock on September 7, 2012 and not the erroneous sale of 119 shares.

5) All costs incurred in the filing of this arbitration;

6) Reasonable attorney fees incurred in resolving this claim.

Respectfully submitted,

DAVID DE GROOT,
By his attorney,

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Dated: January 13, 2013