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**Award  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Name of the Claimant  
Scott McMichael

Case Number: 02-04593

Name of the Respondent  
E\*Trade Securities, LLC

Hearing Site: Tampa, Florida

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Nature of the Dispute: Customer vs. Member.

**REPRESENTATION OF PARTIES**

Scott McMichael, hereinafter referred to as "Claimant", appeared pro se.

For E\*Trade Securities, LLC, hereinafter referred to as "Respondent": John Bersin, Assistant General Counsel, E\*Trade Securities, LLC, Rancho Cordova, California.

**CASE INFORMATION**

Statement of Claim filed on or about: August 2, 2002.

Claimant signed the Uniform Submission Agreement: June 17, 2002.

Statement of Answer and Counterclaim filed by Respondent on or about: October 8, 2002.

Motion for a Change of Venue filed by Respondent on or about: October 8, 2002.

Respondent signed the Uniform Submission Agreement: October 8, 2003.

**CASE SUMMARY**

Claimant asserted the following causes of action: 1) breach of fiduciary duty; 2) fraud; 3) breach of contract; 4) negligence; 5) violation of NASD and NYSE rules; 6) violation of state laws; and 7) violation of federal laws. The causes of action relate to the sale of the common stock Network Appliance in Claimant's account.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses. In addition, Respondent filed a Counterclaim which asserted Claimant failed to mitigate the loss caused by margin calls in his account.

**RELIEF REQUESTED**

Claimant requested general and compensatory damages in the amount of not less than \$17,338.00, punitive damages in an amount according to proof, interest at the legal rate on all sums recovered, attorneys' fees, costs and such other and further relief as the Arbitrator deemed just and appropriate.

Respondent requested that the undersigned arbitrator (the "Arbitrator") deny all claims in the Statement of

Claim, assess the costs and expenses of this proceeding against Claimant, award damages on its counterclaim in the amount of \$11,783.50, plus interest at the rate of 9% from March 31, 2001 to June 7, 2004, and all other and further relief as the Arbitrator deemed just and necessary.

**OTHER ISSUES CONSIDERED AND DECIDED**

On or about February 13, 2003, the Arbitrator issued an order which denied Respondent's Motion for a Change of Venue.

At the evidentiary hearing on June 7, 2004, Claimant, after adequate notice and opportunity to be heard, failed to appear. The Arbitrator determined notice was sufficient and was consistent with Claimant's Motion to Postpone filed on or about October 28, 2003 and order granting same. In the motion, Claimant provided his address in Florida, and did not update his address with NASD Dispute Resolution since that time. Additionally, the Arbitrator determined that Claimant was properly served with the Answer, including the Counterclaim, and received due notice of the hearing and that the arbitration of this matter would proceed without said Claimant present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

**AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

- 1) Claimant's claim is dismissed without prejudice. However, any refile of the claim with NASD Dispute Resolution shall be such that the hearing venue is only permitted in the jurisdiction of the NASD Dispute Resolution office nearest to Respondent's principal place of business.
- 2) Claimant is liable on the claim of breach of contract for margin interest and shall pay to Respondent the sum of \$11,783.50, plus prejudgment interest of \$3,378.10 from March 31, 2001 until June 7, 2004.
- 3) Any and all claims for relief not specifically addressed herein, including Claimant's request for punitive damages, are denied.

**FEES**

Pursuant to the Code, the following fees are assessed:

**Filing Fees**

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 125.00
Counterclaim filing fee	= \$ 750.00

**Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, E\*Trade Securities, LLC is a member firm and a party:

Member surcharge	= \$ 425.00
Pre-hearing process fee	= \$ 0.00
<u>Hearing process fee</u>	<u>= \$ 0.00</u>
Total Member Fees	= \$ 425.00

**Adjournment Fees**

Adjournment granted during these proceedings for which fees were assessed:

December 8-10, 2003, adjournment requested by Claimant = \$450.00.

The Arbitrator assessed the total adjournment fee of \$450.00 to Claimant.

**Injunctive Relief Fees**

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the Arbitrator.

No injunctive relief fees were incurred during this proceeding.

**Forum Fees and Assessments**

The Arbitrator has assessed forum fees for each session conducted. A session is any meeting between the parties and the Arbitrator, including a pre-hearing conference with the Arbitrator, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator @ \$450.00	= \$ 450.00
Pre-hearing conference: February 13, 2003	1 session
One (1) Hearing Session with single arbitrator @ \$450.00	= \$ 450.00
Hearing Date: June 7, 2004	1 session
<u>Total Forum Fees</u>	<u>= \$ 900.00</u>

The Arbitrator has assessed the total forum fees of \$900.00 to Claimant.

**Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred during this proceeding.

**Fee Summary**

Claimant is solely liable for:

Initial Filing Fee	= \$ 125.00
Forum Fees	= \$ 900.00
<u>Adjournment Fee</u>	= \$ 450.00
Total Fees	= \$1,475.00
<u>Less payments</u>	= \$1,250.00
Balance Due NASD Dispute Resolution	= \$ 225.00

Respondent is solely liable for:

Member Fees	= \$ 425.00
<u>Counterclaim Filing Fee</u>	= \$ 750.00
Total Fees	= \$ 1,175.00
<u>Less payments</u>	= \$ 1,175.00
Balance Due NASD Dispute Resolution	= \$ 0.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

**ARBITRATOR**

John P. Cullem, Esq.

Public Arbitrator, Presiding Chairperson

**Arbitrator's Signature**

/S/

John P. Cullem, Esq.

Public Arbitrator, Presiding Chairperson

Signature Date

June 23, 2004

Date of Service (For NASD Dispute Resolution office use only)

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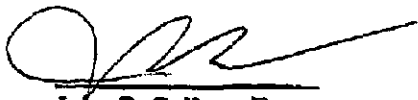
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ARBITRATOR

John P. Cullem, Esq.

Public Arbitrator, Presiding Chairperson

Arbitrator's Signature



John P. Cullem, Esq.  
 Public Arbitrator, Presiding Chairperson

6/2/04  
 Signature Date

Date of Service (For NASD Dispute Resolution office use only)