

NASD DISPUTE RESOLUTION AWARD
NASD DISPUTE RESOLUTION

CASE: 02-06111

Edward James Phillips, claimant vs. E*Trade Securities, Inc., respondent.

ATTORNEYS:

Claimant appeared pro se, Pompano Beach, FL.

For Respondent appeared in-house counsel John Bersin, Esq., Rancho Cordova, CA.

DATE FILED: October 11, 2002

CASE SUMMARY: Claimant alleged that respondent was negligent and tardy in handling his account.

ARBITRATOR'S REPORT: See attached Exhibit A.

Claim Data

Claim: \$12,541.00
Punitive: \$5,000.00
Interest: \$.00
Filing Fees: \$425.00

Award Data

Award: \$.00
Punitive: \$.00
Interest: \$.00
Filing Fees: \$.00

AWARD: The undersigned arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows: 1) The claims of claimant are dismissed in their entirety. 2) All requests for interest are denied. 3) All requests for punitive damages are denied. 4) All other relief requests are denied. 5) The \$425.00 filing fee previously deposited with NASD Dispute Resolution by the claimant, shall be retained by NASD Dispute Resolution.

OTHER FEES: Pursuant to Rule 10333 of the Code, respondent has paid to NASD Dispute Resolution the \$425.00 Member Surcharge previously invoiced.

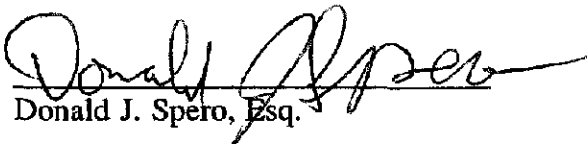
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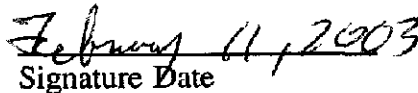
Donald J. Spero, Esq.

Sole Public Arbitrator

AFFIRMATION

I, Donald J. Spero, Esq., do hereby affirm, upon my oath as arbitrator that I am the individual described herein who executed this instrument, which is my oath and award.


Donald J. Spero, Esq.


Signature Date

February 21, 2003

Date of Service (For NASD-DR office use only)

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Addendum to Arbitrator's Decision
January 27, 2003

Having carefully reviewed the pleadings and documentation filed by the parties I find for E*Trade Securities (the "Respondent") and accordingly dismiss the claim of Edward James Phillips (the "Claimant") with the parties paying their own costs.

This dispute arises out of a "no limit" order Claimant placed with E*Trade for shares of Emulex while trading in that company's shares was temporarily suspended on August 25, 2000. When a no limit order is placed for securities the broker executes the order for the market price at the time of the purchase. When an order is placed with a limit the broker may not pay more per share than the customer authorized when the order was placed.

When trading resumed at 1:29 p.m. on August 25 Respondent promptly executed Claimant's order at the market price which made the total purchase price exceed the available funds in Claimant's account. By the terms of the account Claimant had three days to make up the shortfall in the purchase price. Claimant instructed Respondent to sell the stock on January 28, 2000, three days after the purchase. The price realized on that sale was less than the price at which the order was executed thus causing a loss to Claimant.

In a telephone conversation with Respondent at 1:13 p.m. on August 25 Claimant was put on notice that there was no certainty as to what the price of Emulex shares would be when trading resumed. He nevertheless declined to place a price limit on his order for the stock. It is clear from Claimant's past trading history that he knew the significance of placing an order with a limit on it.

At 2:03 p.m. on August 25 Claimant spoke again with Respondent at which time he asked Respondent to reverse the purchase, thereby assuming the loss. Respondent declined his request. Curiously Claimant did not resolve the matter at that time by instructing Respondent to sell the shares. He waited until August 28, perhaps hoping for an increase in the price of Emulex shares.

Claimant postures his claim as one in negligence contending that the Respondent should not have executed an order for more money than was in his account to cover the purchase price. He characterizes the execution of this order as "error." This is not a claim in tort, however it is in contract. It is clear from the account documents governing the relationship between the parties that where a purchase is made in excess of the amount of the funds in the account that Claimant must pay the difference by the "settlement date" which is three days after the trade. This is an accepted practice in the securities industry. In fact Respondent acted within the parameters of the contract between the parties and industry practice.

In a letter to Claimant dated September 9, 2000 Respondent stated that "We do our best to reject orders if funds are not available to comply with our in-house rules. It is possible however, for an order to be accepted inadvertently and overextend the cash in the account." If this were a matter sounding in tort Claimant might assert the doctrine that one who undertakes a duty must do so with

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appropriate diligence. Here, however, the parties' actions are governed by their contract. In the current matter there is no evidence that Respondent covenanted with Claimant to reject orders where there were inadequate funds in the account to cover the purchase. In fact the documents reflect the opposite.