

**N.A.S.D. REGULATION AWARD**

**NASD Regulation, Inc. Office of Dispute Resolution**

In the Matter of the Arbitration Between

Name of Claimant

Khosro Daraiefard

98-00206

Name of Respondent

E\*Trade Securities, Inc.

**REPRESENTATION OF PARTIES**

For Claimant: Khosro Daraiefard represented himself, pro se.

For Respondent: Ekwan E. Rhow, Esq.  
Bird Marella Boxer Wolpert & Matz  
Los Angeles, California.

**CASE INFORMATION**

Claimant's Statement of Claim was filed on or about January 15, 1998.  
Claimant's Submission Agreement was signed on January 10, 1998.  
The Statement of Answer was filed on or about March 13, 1998.

**HEARING INFORMATION**

The hearing was held in San Francisco, California on: July 17, 1998 one session.

**CASE SUMMARY**

Claimant alleges that damages were suffered due to the unavailability of the Respondent's trading system. Claimant alleges that due to this unavailability of the system Claimant was unable to cover his short position in Walt Disney Corp. at, or close to, the opening price of the stock.

Respondent denies each and every claim asserted in the Statement of Claim. Respondent specifically argues that Claimant never closed out his position in Walt Disney Corp. even after he was able to connect with the trading system.

**Date Served:**

**AUG 19 1998**

### **RELIEF REQUESTED**

Claimant requested an award in the amount of \$2,205.00.

Respondent requests that each and every claim be dismissed.

### **DISCUSSION OF LIABILITY AND DAMAGES**

This discussion will cover the major factors that determined the award.

#### **LIABILITY**

The most significant issue here is whether E\*Trade should have provided an electronic and/or telephone system to handle the extraordinarily high volume of trades of 10/28/97 so that customers like Mr. Daraiefard could get access to the system and trade within a reasonable period of time.

Brokerage houses cannot be expected to provide instant access to enormous numbers of customers on days experiencing many multiples of the volume of a normal trading day. On the other hand, there is a foreseeable higher-than-average volume that brokerage houses must reasonably anticipate and provide for.

The issue is, what is that reasonably-foreseeable volume? To determine it requires projecting volume based on past spikes, factoring in the growth of the number of accounts. This statistical analysis could also include assessing the state of the art by comparing E\*Trade's existing system with the systems of similar brokerage houses. Finally, the cost of providing a system capacity for the level of activity of 10/28/97 would have to be calculated and a cost-benefit analysis done. Obviously, the data-crunching necessary to establish the answer to these large questions is not practicable in a case of this magnitude and therefore neither party has attempted to provide more than very rough estimates of a few of these factors.

#### **DAMAGES**

In any case, had liability been established, the measure of damages would have been the difference between the price Mr. Daraiefard should have gotten by reaching E\*Trade after a "reasonable" delay (which could not be established absent the statistics) and the price he could have bought at when he actually did finally get through. There is always a fundamental obligation to attempt to minimize losses - here that would have been done by closing the position before the price gets further away. Mr. Daraiefard refrained from taking advantage of the opportunity to close his position when he did get through because he assumed that E\*Trade would want to compensate him for the loss from the delay. However, the customer contract anticipates the problem of delays and warns that the house denies responsibility for delays from a variety of causes.

### **OTHER ISSUES CONSIDERED & DECIDED**

Date Served:

AUG 19 1998

Upon review of the file and the representations made by/on behalf of the Claimant, the undersigned arbitrator has determined that E\*Trade Securities, Inc. failed to properly file a Uniform Submission Agreement pursuant to §10314(b)(1) of the NASD Code of Arbitration Procedure (the "Code"), however Respondent is required to arbitrate pursuant to §10301(a) of the Code and is bound by the decision rendered in this matter.

The parties agreed to receive conformed copies of the award while the original remains on file with NASD Regulation, Inc., Office of Dispute Resolution.

### AWARD

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

1. Each and every claim asserted in the Statement of Claim is denied;
2. Each side to bear their own costs.

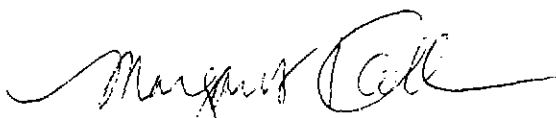
### FORUM FEES

There was 1 session x \$25= \$25 in total forum fees. Pursuant to §10332(b) of the NASD Regulation, Inc., Office of Dispute Resolution Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less. Pursuant to §10332(c) of the Code, the Respondent is assessed all forum fees.

Pursuant to §10332(c) of the Code, NASD Regulation, Inc. shall **retain** the non-refundable filing fee in the amount of \$25 and shall **refund** the hearing session deposit made by the Claimant in the amount of \$25.

Pursuant to §10333 of the Code, E\*Trade Securities, Inc. has paid to NASD Regulation, Inc. the \$150 member surcharge previously invoiced.

**Fees are payable to the NASD, Regulation, Inc.**

  
Margaret Kallman

Public / Industry

Public  
Presiding Arbitrator

Date Served:

AUG 19 1998