

**AWARD**  
**FINRA Dispute Resolution**

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In the Matter of the Arbitration Between:

Names of Claimants

John A. Lozes, Kirk Baerwaldt, Maxine Baerwaldt,  
Timothy Sturge, Donald N. Patten, and Nader Nakib

vs.

Case Number: 09-02855  
Hearing Site: Kansas City, Kansas

Name of Respondent

E\*TRADE Securities, LLC

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**NATURE OF THE DISPUTE**

Customers vs. Member

**REPRESENTATION OF PARTIES**

John A. Lozes, Kirk Baerwaldt, Maxine Baerwaldt, Timothy Sturge, Donald N. Patten, and Nader Nakib ("Claimants") were represented by Diane A. Nygaard, Esq., The Nygaard Law Firm, Overland Park, Kansas. On or about January 18, 2010, FINRA received a Notice of Appearance on behalf of Claimants, Kirk Baerwaldt and Maxine Baerwaldt, after which Kirk Baerwaldt and Maxine Baerwaldt were represented by Lars K. Soreide, Esq., Soreide Law Group, Fort Lauderdale, Florida. On or about May 4, 2010, FINRA received notice a Notice of Appearance for Claimants that Robyn C. Crowther, Esq., Caldwell Leslle & Proctor, PC, Los Angeles, California would be acting as co-counsel.

E\*TRADE Securities, LLC ("Respondent" or "E\*TRADE") was represented by John Bersin, E\*TRADE Financial Corporation, Roseville, California. On or about August 29, 2009 a Notice of Appearance was filed on behalf of Respondent. After which, Respondent was represented by Lonnie L. Simpson, Esq. and Kate E. Lucente, Esq., DLA Piper, LLP, Tampa, Florida.

**CASE INFORMATION**

The Statement of Claim was filed on or about May 18, 2009. The Submission Agreement of Claimant, John A. Lozes, was signed on or about June 8, 2009. The Submission Agreement of Claimants, Kirk Baerwaldt and Maxine Baerwaldt, was signed on or about June 8, 2009. The Submission Agreement of Claimant, Timothy Sturge, was signed on or about June 5, 2009. The Submission Agreement of Claimant, Donald N. Patten, was signed on or about June 8, 2009. The Submission Agreement of Claimant Nader Nakib

was signed on or about June 7, 2009. Claimants filed an Amended Statement of Claim on or about July 1, 2009.

The Statement of Answer was filed by Respondent, E\*TRADE Securities, LLC, on or about August 27, 2009. The Submission Agreement of Respondent, E\*TRADE Securities, LLC, was signed on or about August 21, 2009.

### **CASE SUMMARY**

Claimants asserted the following causes of action: fraud; negligence; breach of contract; and violations of federal securities law, SEC Rules, FINRA Rules of Fair Practice, and MSRB Rules. Claimants alleged that E\*TRADE recommended that they purchase various auction rate preferred securities ("ARPS"), which were represented to them as tax-exempt, safe, and liquid investments. Claimants stated that in February 2008, the auctions for these securities began to fail and as a result they were unable to redeem these securities. Claimants request that the Panel award them the par value of their remaining ARPS plus interest and attorneys' fees.

Unless specifically admitted in its Answer, Respondent, E\*TRADE Securities, LLC, denied the allegations made in the Statement of Claim and asserted defenses including the following: no E\*TRADE representative knowingly made any false statement to Claimants, about Auction Rate Securities; E\*TRADE correctly described the Auction Rate Securities investments as preferred stock issued by a large, well-capitalized investment fund and those investments were not subject to principal risk, had liquidity at fixed intervals, where the going forward interest rate would be set by a bidding process. In addition E\*TRADE asserted that the Auction Rate Securities investments performed exactly as its representatives described to Claimants and Claimants controlled their own investment decisions. E\*TRADE further alleged that it neither caused nor contributed to any failed Auction Rate Securities auctions, because it did not participate in those actions in any way.

### **RELIEF REQUESTED**

In the Statement of Claim, Claimants requested an award in the amount of:

Actual/Compensatory Damages	\$1,075,000.00
Interest	Unspecified
Attorneys' Fees	Unspecified
Other Costs	Unspecified
Other Monetary Relief	Unspecified
Other Non-Monetary Relief	Rescission

In the Amended Statement of Claim, Claimants requested an award in the amount of:

Actual/Compensatory Damages	\$1,310,000.00
Interest	Unspecified
Attorneys' Fees	Unspecified
Other Costs	Unspecified
Other Monetary Relief	Unspecified
Other Non-Monetary Relief	Rescission

Respondent requested that the claims asserted against it be denied in their entirety and that it be awarded its costs and attorneys' fees.

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

The Panel acknowledges that they have each read the pleadings and other materials filed by the parties.

Claimants filed a Motion to Prevent Respondent from Presenting Defenses on or about August 25, 2009. Respondent filed a Response in Opposition to Claimants' Default Motion on or about August 31, 2009. On or about December 21, 2009, the Panel denied Claimants' Motion to Prevent Respondent from Presenting Defenses.

Respondent filed a Motion to Sever, to Reconsider Venue, and for Expedited Ruling on or about August 7, 2009. Claimants filed a Response in Opposition to Respondent's Motion to Sever, to Reconsider Venue, and for Expedited Ruling and filed a Motion for Sanctions and Attorneys' Fees on or about August 24, 2009. On or about September 16, 2009, FINRA Dispute Resolution declined to rule on Respondent's Motion and deferred determination to the Panel appointed in this case. On or about December 21, 2009, the Panel denied Respondent's Motion to Sever, to Reconsider Venue, and for Expedited Ruling and deferred ruling on Claimants' Motion for Sanctions and Attorneys' Fees until the final hearing.

On or about January 15, 2010, Respondent filed a Motion for Order Simplifying and Expediting Complex Arbitration Proceeding. Claimants filed a Response in Opposition on or about January 25, 2010. Respondent filed a Reply to its Motion for Order Simplifying and Expediting Complex Arbitration Proceeding on or about February 1, 2010.

On or about January 18, 2010, Claimants, Kirk and Maxine Baerwadlt, filed a Motion to Sever and Relocate.

On or about February 8, 2010, the Panel entered an Order granting Kirk and Maxine Baerwadlts' Motion to Sever, upon the oral stipulation of all parties, and denied Respondent's Motion for Order Simplifying and Expediting Complex Arbitration Proceeding.

On or about February 8, 2010, FINRA received notice that Claimant, Donald N. Patten, dismissed all claims asserted against Respondent.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

### **AWARD**

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

- 1.) Respondent, E\*TRADE Securities, LLC, is liable for and shall pay to Claimant, John A. Lozes, the sum of \$150,000.00 in compensatory damages in exchange for the transfer of the auction rate securities held by Lozes;
- 2.) Respondent, E\*TRADE Securities, LLC, is liable for and shall pay to Claimant, Timothy Sturge, the sum of \$100,000.00 in compensatory damages in exchange for the transfer of the auction rate securities held by Sturge;
- 3.) Respondent, E\*TRADE Securities, LLC, is liable for and shall pay to Claimant, Nader Nakib, the sum of \$50,000.00 in compensatory damages in exchange for the transfer of the auction rate securities held by Nakib;
- 4.) Respondent, E\*TRADE Securities, LLC, is liable for and shall pay to Claimants, John A. Lozes, Timothy Sturge, and Nader Nakib, the sum of \$95,000.00 in attorneys' fees pursuant to Delaware Code § 7323 and California Code §1780;
- 5.) Other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and
- 6.) Any relief not specifically enumerated, including punitive damages, is hereby denied with prejudice.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

FINRA Dispute Resolution will retain the non-refundable filing fee\* for each claim:

Initial Claim filing fee = \$ 1,800.00

*\*The filing fee is made up of a non-refundable and a refundable portion.*

### **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 persons at the time of the events giving rise to the dispute. Accordingly, as a party, E\*TRADE Securities, LLC is assessed the following:

Member surcharge	= \$ 2,750.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,000.00

### **Hearing Session Fees and Assessments**

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

One (1) Pre-hearing session with a single arbitrator x \$450.00	= \$ 450.00
Pre-hearing conference: May 10, 2010	1 session
Two (2) Pre-hearing sessions with Panel x \$1,200.00	= \$ 2,400.00
Pre-hearing conferences: December 1, 2009	1 session
February 4, 2010	1 session
Seven (7) Hearing sessions x \$1,200.00	= \$ 8,400.00
Hearing Dates: June 15, 2010	3 sessions
June 16, 2010	2 sessions
June 17, 2010	2 sessions
<b>Total Hearing Session Fees</b>	<b>= \$11,250.00</b>

The Panel has assessed \$11,250.00 of the hearing session fees to E\*TRADE Securities, LLC.

All balances are payable to FINRA Dispute Resolution and are due upon receipt.

**ARBITRATION PANEL**

Mark S. Foster - Public Arbitrator, Presiding Chair  
Joseph D. Sheppard, III - Public Arbitrator  
Michael J. Hunter - Non-Public Arbitrator

Concurring Arbitrators' Signatures:

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Mark S. Foster  
Public Arbitrator, Presiding Chair

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Signature Date

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Joseph D. Sheppard, III  
Public Arbitrator

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Signature Date

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Michael J. Hunter  
Non-Public Arbitrator

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Signature Date

7/21/10  
Date of Service (For FINRA office use only)

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Joseph D. Sheppard, III - Public Arbitrator  
Michael J. Hunter - Non-Public Arbitrator

Concurring Arbitrators' Signatures:

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Mark S. Foster  
Public Arbitrator, Presiding Chair

JUL 21, 2010  
Signature Date

Joseph D. Sheppard, III  
Joseph D. Sheppard, III  
Public Arbitrator

Signature Date

Michael J. Hunter  
Michael J. Hunter  
Non-Public Arbitrator

Signature Date

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