

2012 WL 3687487 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
Nassau County

Niles C. WELIKSON, Plaintiff,

v.

E*TRADE SECURITIES LLC and E*Trade Financial Corp., Defendants.

No. 004676/12.

August 2, 2012.

Short Form Order

[Douglas P. Lobel](#), Cooley LLP, Reston, Virginia for E*TRADE Securities.

[Richard Walsh](#) of Horning Welikson & Rosen, P.C., Williston Park, New York, for Niles C. Welikson.

Hon. [Stephen A. Bucaria](#), Justice.

TRIAL/IAS, PART 1

MOTION DATE: June 22, 2012

Motion Sequence # 001

The following papers read on this motion:

Notice of Motion.....	X
Affidavit in Opposition.....	X
Affidavit in Support.....	X
Reply Affirmation.....	X
Memorandum of Law.....	X

Motion by defendants E*Trade Securities LLC and E*Trade Financial Corp. to compel arbitration is *granted*.

This action arises from a dispute between a securities broker dealer and its customer.

On January 17, 2006, plaintiff Niles Welikson opened an online brokerage account with defendant E*Trade Securities LLC and placed an order to purchase 1,000 shares of Sirius Satellite Radio at \$6.035 per share. Welikson alleges that on December 26, 2008, E*Trade, without his knowledge or consent, sold the Sirius stock for .1225 per share. On January 23, 2012, Welikson was advised by an E*Trade representative that his position had been liquidated to cover an “inactivity fee” of \$85.00. Welikson alleges that the price of Sirius Radio subsequently climbed to \$2.35 per share.

On April 12, 2012, plaintiff commenced the present action against E*Trade. In his first cause of action for breach of contract, plaintiff alleges that E*Trade sold his stock without his consent. Plaintiff seeks damages based upon the price of Sirius on the date he commenced the action, i.e. \$2.35 per share. In the second cause of action, plaintiff asserts that E*Trade's action of selling the stock without his knowledge constitutes a deceptive act or practice in violation of [§ 349 of the General Business Law](#). In the third cause of action, plaintiff alleges that E*Trade's action of selling his stock without his knowledge constitutes fraud. Plaintiff seeks both compensatory damages and punitive damages of \$500,000.

By notice of motion dated May 14, 2012, defendants move to compel arbitration. Sec 8B of E*Trade's customer agreement provides that any controversy relating to the customer's relationship with E*Trade, any account held with E*Trade, or any service provided by E*Trade will be resolved by arbitration according to the rules of the National Association of Securities Dealers.

Plaintiff opposes arbitration primarily on the ground that the customer agreement also contains language, "This agreement contains a pre-dispute arbitration clause." Plaintiff argues that the "pre-dispute arbitration" language creates an ambiguity as to whether his dispute concerning the liquidation of his position is arbitrable.

A party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties' clear, explicit and unequivocal agreement to arbitrate ([Fiveco v Haber](#), 11 NY3d 140, 144 [2008]). In the securities industry, by industry adopted regulation, a customer can compel arbitration of a dispute with a broker dealer. There is a federal policy favoring the arbitrability of such disputes, at least upon the demand of the customer ([Waterford Investment Services v Bosco](#), 682 F.3d 348 [4th Cir, 2012]), The court must consider such practice and usage of trade in the securities industry in interpreting the arbitration provision of E*Trade's customer agreement.

The court concludes that Sec 8B of the customer agreement is a clear and unequivocal agreement to submit plaintiff's dispute concerning defendants' authority to sell his stock to arbitration. Defendants' motion to compel arbitration is *granted*. The matter shall be submitted to arbitration in accordance with the rules of the Financial Industry Regulatory Authority, formerly known as the National Association of Securities Dealers, or NASD.

So ordered.

Dated AUG 02 2012.

<<signature>>

J.S.C.