

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Martin Stern

92-02555

Name of Respondents

First Nutley Securities, Inc.
Ameritrade, Inc.

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on August 3, 1992, Claimant Martin Stern, who appeared Pro Se, alleged that he asked Mr. German Ramos, registered representative from Respondent First Nutley Securities, Inc., to get him literature about Phoenix Resources Corp., Inc., which he did, whereby on March 9, 1990 Claimant instructed Mr. Ramos to buy for him 2,000 shares at 9/16 each which Mr. Ramos claimed he did. Claimant further alleged that on April 9, 1990 he received notice the stock had been exchanged. Claimant says he contacted Respondent First Nutley Securities, Inc. and was advised by Respondent First Nutley Securities, Inc. that Mr. Ramos no longer worked there, but Claimant says he was assured that he owned the stock he had instructed Mr. Ramos to buy for him. Claimant says that he was given a quote of \$.50 for Phoenix Resources Corp., Inc. Claimant contends that in May 1991 he sold 1,500 shares of Phoenix Resources Corp., Inc. and in August 1991 he received confirmations canceling the Phoenix Resources Corp., Inc. Claimant further contends that he acquired 2,000 shares of "Phoenix Resources, Inc." through the same broker. Claimant further alleged that he received a letter from Respondent First Nutley Securities, Inc. that Respondent Ameritrade, Inc., Respondent First Nutley's clearing firm, journaled 2,000 shares of Phoenix Resources, Inc. and as a result when the liquidating transaction took place Claimant sold Phoenix Resources Corp., Inc. Claimant contends that either First Nutley Securities, Inc. or Ameritrade should have been held responsible for any error and any purchases that resulted from it. Claimant asserts that he never discussed or gave instructions to buy Phoenix Resources Corp., Inc. with Mr. Dotoli, registered representative at Respondent First Nutley Securities, Inc., but only with Mr. Ramos. Claimant further asserted that because of Respondents First Nutley Securities, Inc. and Ameritrade's actions, he did not

receive the stock he requested at the time he wanted to buy it and that he received shares of a stock he never intended to buy.

Respondent First Nutley Securities, Inc. by and through their Vice President, William G. Fisher, maintain that on March 9, 1990 Claimant Martin Stern instructed Mr. Franklin Dotoli, registered representative of Respondent First Nutley Securities, Inc., to buy 2,000 shares of Phoenix Resources, Inc. whereby Mr. Dotoli executed the order and faxed it to Respondent Ameritrade, Respondent First Nutley's clearing firm. At this point, the wrong security was journaled to Claimant's account. Respondent First Nutley Securities, Inc. further maintained that on August 21, 1991, Respondent Ameritrade notified Respondent First Nutley Securities, Inc. of the discrepancies and the corrections which would have to take place. These corrections left First Nutley with a debit balance since the credit balance from the sale was sent to the Claimant. Respondent First Nutley Securities, Inc. contends that on May 2, 1992 Claimant instructed William Fisher, registered representative, to liquidate 1,500 shares of Phoenix Resources Corp. and these instructions were carried out. Respondent First Nutley Securities, Inc. notes that the company Claimant refers to, "Phoenix Resources, Inc.", was not trading under that name on March 9, 1990 but was then trading as Texas International.

Respondent Ameritrade by and through their counsel, Jeffrey J. Scott, Esq. of Kry, Boyle, Golz, Reich & Freedman, Denver, CO, maintained that it is the obligation of Respondent First Nutley Securities, Inc. to properly inform Respondent Ameritrade of the actual trade which is being asked to be cleared. Respondent Ameritrade further maintained that the trade tickets dated March 9, 1990 sent by Respondent First Nutley Securities to Respondent Ameritrade was for 2,000 shares of Phoenix Resources Corp. at 9/16. Respondent Ameritrade cleared this purchase. Respondent Ameritrade contends that on the date Respondent First Nutley Securities, Inc. entered the trade ticket there was no public trading of The Phoenix Resource Companies, Inc. and Ameritrade further notes that trading of that company under that name did not begin until April 20, 1990. Ameritrade further contends that pursuant to their clearing agreement with First Nutley Securities, Inc., First Nutley Securities, Inc. was to notify Ameritrade of any errors in a transaction and Respondent Nutley Securities, Inc. did not do so. Ameritrade asserts that pursuant to instructions from First Nutley Securities, Inc. on May 2, 1991, 1,500 shares of Phoenix Resources Corp., Inc. were sold. Respondent Ameritrade further asserted that as a result of the sale in Claimant's account of the security which Claimant did not own, Respondent Ameritrade was required to cover the short position, resulting in a charge and damages to Respondent Ameritrade, which resulted in the assertion of a Cross-claim against Respondent First Nutley Securities, Inc. and a Counterclaim against Claimant Martin Stern.

RELIEF REQUESTED

Claimant Martin Stern requests that 2,000 shares of Phoenix Resources Corp., Inc. be "reinstated" to his account.

Respondent First Nutley Securities, Inc. requests that the Claimant's claim be denied.

Respondent Ameritrade requests that Claimant's claim be dismissed and that its Counterclaim against Mr. Stern and its Cross-claim against Respondent First Nutley Securities, Inc. in the amount of \$2,921.90 plus costs and attorney's fees be recognized.

AWARD

Pursuant to Section 13 of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Joseph H. Cooper, Esq., was selected to review and determine the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on July 27, 1992, by the Respondent First Nutley Securities, Inc. on September 11, 1992 and by the Respondent Ameritrade on September 11, 1992.

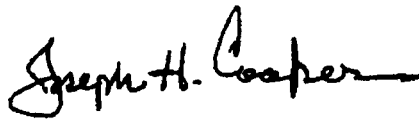
And, the Arbitrator, having considered the submissions of the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. The claims of Claimant Martin Stern against Respondents First Nutley Securities, Inc. and Ameritrade are dismissed.
2. Claimant Martin Stern is liable and shall pay to Counterclaimant Ameritrade the sum of \$2,921.90 in damages.
3. Respondent First Nutley Securities, Inc. is liable and shall pay to Cross-claimant Ameritrade the sum of \$750.00, representing attorney's fees.
4. Except for the award in number 3 above, the parties shall bear their respective costs and attorney's fees.
5. The \$50.00 and \$575.00 in filing fees previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Martin Stern and Respondent Ameritrade shall be retained by the NASD, Inc. Claimant Martin Stern is liable and shall pay to Respondent Ameritrade the sum of \$575.00 as reimbursement.

Page Four
Award 92-02555

AFFIRMATION

I, JOSEPH H. COOPER, ESQ., do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.

A handwritten signature in cursive script, reading "Joseph H. Cooper", written in black ink.

Signature of Arbitrator

DATE OF DECISION: July 12, 1993

ARBITRATOR'S FINDINGS

NASD Case Number: 92-02555

Claimant: Martin Stern

Respondent: First Nutley Securities, Inc.
(now Nutley Securities Inc.)

Respondent: Ameritrade, Inc.

All three parties here are partly responsible, each in their own way, for this mix-up.

It seems to me that Ameritrade, the clearing broker, is the least culpable; it was Ameritrade personnel who detected "the error" and tried to rectify matters. As far as I can tell, Ameritrade is the only party actually out money. Ameritrade was not in a position to have clarified or questioned the initial transaction back in March of 1990, and Ameritrade was not a party to, nor privy to, the discussions that led to the transactions. I found Ameritrade's Answer persuasive, especially paragraph 5 and Exhibit A thereto (in particular clauses 1 and 3 of Ameritrade's Correspondent Manual). Also, para. IX -- the Indemnification provision (p.6) of Ameritrade's September 2, 1987 Agreement with First Nutley Securities seems applicable.

I would deny Mr. Stern's claim against Ameritrade.

I would grant Ameritrade's Counterclaim against Mr. Stern in the amount of \$2,921.90.

To my mind, Mr. Stern may have profitted from the confusion he helped create, however unwittingly. As I read Mr. Stern's letters of 10-10-91 and 7-27-92, they seem to attest to the confusion and serve as evidence of how the "wrong" stock may have been bought and the "wrong" stock may have been sold.

Mr. Stern says he was in contact with the company and had information about it. He was in the best position to prevent, discover, and alleviate the confusion.

In his letter of 10-10-91, Mr. Stern makes reference to Texas International and Phoenix Resources. It is not entirely clear, even in Oct. of '91, that he means the Texas International that traded as The Phoenix Resource Companies, Inc. beginning on 4-10-90. He apparently got Phoenix Resources Corp. on 3-9-90 (2,000 shares at 9/16). He never denies getting a buy confirmation for same; nor does he deny this was entered on his monthly summary statement. He has received and retained the proceeds from the sale of 1,500 shares of The Phoenix Resource Companies, Inc. (\$2,921.90.) He does not claim he paid anymore for this than the \$1,175 he presumably paid on 3-9-90.

I would also deny Mr. Stern's claim against First Nutley Securities, now d/b/a Nutley Securities.

Mr. Stern was in the best position to prevent, discover, and alleviate the confusion. His January 14th, 1992 (should be 1993) letter indicates to me that his confusion, his inexactness, or his lack of precision or clarity was (or were) the cause of the ensuing confusion, which he apparently profitted from. He wound up with

more stock than he paid for, and amazingly, he even claims to hold more shares of each issuer than either Ameritrade or First Nutley believe he still holds. His incorrect (and confusing) reference to a particular issuer points up to me his continuing imprecision and even incomprehension of the source (the cause) of his supposed troubles. This is borne out by Mr. Stern's follow-up letter dated 4-8-93.

I would therefore, require Mr. Stern to pay the full amount of the cost of the stock bought for his account by Ameritrade and for which (by his own letter, misdated January 14, 1992) he did not (and apparently has not) remitted any funds. (Surprisingly, though, he does claim to hold the very shares so purchased by Ameritrade.)

First Nutley Securities/Nutley Securities must bear some of the blame for the mix-up. Even though Mr. Stern never denies having received confirmations, and even though he seems to have been an active if not sophisticated trader (he traded frequently, apparently), and despite the incoherence of his letters, First Nutley could have seen the need for clarification before the May 1991 trade.

The Answer submitted by Nutley Securities' Vice President William G. Fisher (who is also a registered rep.) indicates to me why this mix-up occurred, for the references (in the first two paragraphs) to the stocks in question are not precisely accurate and are confusing, still, given the similarity of the names. If at the time of filing its Answer Nutley Securities doesn't exercise a bit more care and precision, one can infer that care and precision were lacking back in 1990, when the initial trade was made. Nutley Securities' letter to Mr. Stern dated December 18, 1991 has inaccurate references, too. This may seem picky, but to

my mind it is telling. It may be hard on Mr. Fisher to note his inexactitude, his technically inaccurate references to the stocks, but that very inexactness goes to the heart of this dispute.

I don't think anyone, any party, tried to deceive or defraud another. A little more attention to details, a little more care, a little inquiry might have cleared the misunderstanding and avoided the mix-up.

Mr. Stern should be required to pay Ameritrade \$2,921.90.

I would also assess the NASD fee (or fees) against Claimant Martin Stern. (He filed a case that should never have taken on the dimensions it did. Again, it was Mr. Stern's lack of clarity and reasonable care, and his failure to see things for what they were which compounded what may have been a simple, easily rectifiable misunderstanding.)

I would award \$750 in attorney's fees to Ameritrade, payable by Nutley Securities (formerly First Nutley Securities). Nutley Securities might have been able to clear-up this confusion and spared all parties the proceeding. A little care and patient inquiry and explanation might have done the job. Furthermore, Nutley Securities delayed the disposition of the case by its failure to respond promptly to Ms. Hudak's January requests, and its March 23 response to Ms. Giblin's reminder letter tracks (for the most part verbatim) the responses made by Ameritrade through its lawyer (in his January 14 letter).

Joseph H. Cooper
July 1993