

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

96-02289

Name of Claimant

Keming Gong

Name of Respondents

E*Trade Securities, Inc.
Herzog, Heine, Geduld Inc.

Name of Cross claim Claimant

Herzog, Heine, Geduld Inc.

Name of Cross claim Respondent

E*Trade Securities, Inc.

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on May 29, 1996, Claimant Keming Gong ("Gong"), through his representative Tianhong Zhou, alleged that Respondents E*Trade Securities, Inc. ("E*Trade") and Herzog, Heine, Geduld, Inc. ("Herzog") executed buy orders #84 and #85 each for 1000 shares of AMTX on April 30, 1996, and reversed #84 on May 1, 1996, after the value of the stock had increased from over \$18.00 per share to over \$22.00 per share. Claimant contended that he received a confirmation slip for transaction #84. Claimant further alleged that on May 1, 1996, he sold 2000 shares of NCDI to cover a \$2,571.00 outstanding call in his account resulting from transaction #84. Claimant also alleged that since he sold NCDI to cover transaction #84, he believed he had 3500 shares total of AMTX, as he held 1500 in other accounts. Claimant contended that he sold 1500 shares of AMTX on May 1, 1996, thereby retaining 2000 shares. Claimant further contended that he was later notified that transaction #84 was canceled despite his attempt to cover the outstanding call. Claimant asserted that because he was not notified that transaction #84 was canceled, he sold shares of AMTX that he would not have otherwise sold. Claimant further asserted that he unsuccessfully attempted to resolve the dispute with the Respondents and that as a result of the above, he has suffered a loss for which the Respondents should be held liable.

Respondent Herzog, Heine, Geduld, Inc., through its representative Scott T. Pratt, Esq., of the law firm of Keesal, Young & Logan located in Long Beach, CA, maintained that it was not responsible for damages, if any, that may have resulted in the delayed reporting of the reversal of the trade. Respondent further maintained that it accepts no liability for executing the orders as Clearing Agent for Respondent E*Trade. Respondent also maintained that it followed E*Trade's instructions to purchase 1000 shares of AMTX on April 30, 1996, and to subsequently reverse that transaction. Respondent contended that it did not participate in the conversations with Claimant and that as a result of the above, it cannot be held liable for any unauthorized or incorrect instructions as alleged by Claimant.

Respondent E*Trade Securities, Inc., through its representative, David M. Greenburg, Esq., a sole practitioner located in San Francisco, CA maintained that the transactions in the account were not canceled for the purpose of improperly depriving the Claimant of profits to which he was entitled. Respondent E*Trade further maintained that Claimant was given notice of the cancellation order well before the price of the stock AMTX moved upward. Respondent E*Trade also maintained that Claimant has suffered no loss and failed to take proper steps to mitigate any possible loss.

Cross-claimant Herzog, Heine, Geduld, Inc., through its representative Scott T. Pratt, Esq., of the law firm of Keesal, Young & Logan located in Long Beach, CA, entered a cross claim against Respondent E*Trade Securities, Inc. and alleged that a Clearing Agreement providing for indemnification and contribution for any loss, including attorneys' fees, expenses and costs was entered into with E*Trade Securities, Inc. Cross-claimant further alleged that the evidence is abundantly clear in demonstrating that it fulfilled its obligations under the terms of the Clearing Agreement.

Cross claim Respondent E*Trade Securities, Inc. in responding to a Cross-Claim filed by Herzog admitted that it entered into a Clearing Agreement with Herzog and that the agreement provides for it to indemnify Herzog for its reasonable costs and losses to the extent they did not result from the conduct of Herzog. Cross claim Respondent further maintained that it lacks sufficient information and belief as to who, if anyone, is at fault.

RELIEF REQUESTED

Claimant Keming Gong requested \$9,375.00 in actual damages.

Respondent E*Trade Securities, Inc. requested that the claims be dismissed and that it be awarded costs and attorney fees.

Respondent Herzog requested that the claims be dismissed.

Cross claim Claimant Herzog requested indemnification and contribution against Respondent E*Trade plus attorney fees, expenses and costs.

The arbitrator considered and reviewed all documentation submitted by the parties concerning Respondent Herzog, Heine, Geduld, Inc.'s request to convene a hearing as its cross claim exceeds \$10,000.00. The arbitrator did not rule on this request as the cross claim was dismissed without prejudice.

The arbitrator informed the parties that he would consider additional documents filed with the NASD, Inc. on or before August 19, 1996. Respondent E*Trade Securities requested an extension of time until September 19, 1996, to submit additional information because it filed the initial response on "the assumption that this is not a simplified [arbitration]." Respondent E*Trade Securities filed additional information dated September 26, 1996. The arbitrator reviewed all documentation submitted by the parties regarding this additional pleading. The arbitrator did not consider Respondent E*Trade Securities' additional information dated September 26, 1996 as it was not filed in a timely manner.

AWARD

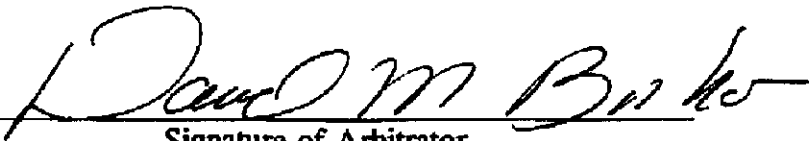
Pursuant to Section 10302 of the NASD, Inc. Code of Arbitration Procedure, a single Public Arbitrator, David M. Bosko, was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on May 20, 1996; by Respondent E*trade Securities, Inc. on July 17, 1996 and by Respondent Herzog, Heine, Geduld, Inc. on June 26, 1996.

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

1. The Respondents E*Trade Securities, Inc. and Herzog, Heine, Geduld, Inc. are jointly and severally liable and shall pay to the Claimant Keming Gong \$9,375.00 in actual damages.
2. Respondent Herzog, Heine, Geduld, Inc.'s cross claim against E*Trade Securities, Inc. is dismissed without prejudice pursuant to Section 10302(d) of the NASD Code of Arbitration Procedure.
3. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant shall be retained by the NASD, Inc. Respondents E*Trade Securities, Inc. and Herzog, Heine, Geduld, Inc. are liable and shall pay to the Claimant Keming Gong \$150.00 as reimbursement of the filing fee.
4. The \$575.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by Respondent Herzog, Heine, Geduld, Inc. shall be refunded by the NASD, Inc.
5. The parties shall bear their respective costs.
6. All other relief requests are denied.

AFFIRMATION

I, **DAVID M. BOSKO** , 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.


Signature of Arbitrator

DATE OF DECISION: **October 24, 1996**