

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Richard Kreekon,

Claimant,

and

No. 96-02336

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

Respondents,

REPRESENTATION OF PARTIES

Claimant Richard Kreekon was represented by Michael D. McKinley, Esquire, Julie C. McKain, Esquire and Timothy D. Zeiger, Esquire of McKinley Ringer Zeiger, P.C., located in Dallas, Texas.

Respondents Herzog, Heine, Geduld, Inc., E*Trade Securities, Inc. were represented by Mark T. Drooks, Esquire of Bird, Marella, Boxer, Wolpert & Matz, located in Los Angeles, California.

CASE INFORMATION

Claimant Richard Kreekon's Statement of Claim was filed on or about May 31, 1996.

Claimant Richard Kreekon's Submission Agreement was signed on May 13, 1996.

Respondent E*Trade Securities, Inc. Statement of Answer was filed on or about July 29, 1996.

The NASD Regulation Office of Dispute Resolution, Inc. has no record of Respondent's E*Trade Securities, Inc.'s Submission Agreement.

Respondent Herzog, Heine, Geduld, Inc.'s Statement of Answer and Cross-Claim for Indemnity and Contribution was filed on or about July 24, 1996.

Respondent Herzog, Heine, Geduld, Inc.'s Submission Agreement was signed on June 28, 1996 by Charles Christofilis, Secretary of Herzog, Heine, Geduld, Inc.

HEARING INFORMATION

No pre-hearing conferences were held.

The hearing was held on January 13, 1997 for two (2) sessions.

The hearing was held in Dallas, Texas.

CASE SUMMARY

Claimant Richard Kreekon ("Claimant") brought this claim to recover losses incurred in his margin account with respondent E*Trade Securities, Inc. ("E*Trade"), and respondent Herzog, Heine, Geduld, Inc. ("Herzog"), clearing broker for the account, resulting from the forced sale of stocks based on erroneous calculations or information and repeated mistakes.

According to Claimant, from January 19, 1996 to January 24, 1996 he was repeatedly given incorrect information by E*Trade and/or Herzog regarding the amount of stock and/or funds that he was required to sell or deposit in order to satisfy his account's maintenance call requirements. Claimant asserted that no one at E*Trade told him what the specific maintenance call requirement percentage was for his account at any given time, only that his account was in a call position; however, Claimant added, when he questioned one of the E*Trade customer service representatives on January 22, 1996 regarding the alleged shortfall in his account, he was told that his account was not in a call position because he had 44% equity in the account, and that his account was subject to an equity requirement of 40%. Claimant further asserted that due to the erroneous calculations or information, he was forced to sell 15,000 shares of SI Diamond at a loss of \$2.25 per share incurred between January 25, 1996 and February 2, 1996, and 500 shares of SBS Technology at a loss of \$.88 per share incurred between January 22, 1996 and January 26, 1996. Claimant contended that the value of the holdings in his account had fluctuated less than one point during the period he received the erroneous information, and on the day after he liquidated his account, he was notified that he had margin buying power in his account nearly equal to the amount of stock that he had just sold. Claimant alleged that he was forced to liquidate these two stocks to satisfy the erroneous margin call before he would have chosen to sell them.

Claimant also asserted that E*Trade failed to investigate his complaints before it issued its final sell demand on January 24, 1996. According to Claimant, he notified E*Trade that he believed that a mistake had been made in calculating the call requirements for his account, but no one would respond to his request for additional research and an investigation of his account. Claimant thus alleged that E*Trade and Herzog breached their customer agreements and the rules, regulations, customs and usages of the industry.

Respondent E*Trade denied that Claimant suffered any loss as a result of anything E*Trade did or failed to do. Although E*Trade admitted that there was confusion in computing the margin maintenance requirements in Claimant's account between approximately January 19, 1996 and

January 24, 1996, it contended that if Claimant suffered any loss, it was solely a result of Claimant's own actions or failure to act.

Respondent Herzog denied the allegations made against it in the Statement of Claim. Herzog contended that it is only the clearing broker for E*Trade, and as such it has no liability for E*Trade's conduct. Herzog asserted that Claimant specifically agreed in his Customer Agreement that Herzog was not responsible for the conduct of E*Trade. Herzog made the following affirmative defenses: (1) the Statement of Claim fails to state a claim against Herzog upon which relief may be granted; (2) Herzog is entitled to indemnification and contribution against E*Trade for any award rendered in favor of Claimant; (3) Claimant's alleged losses, if any, were proximately caused by his own acts or omissions, or the acts or omissions of E*Trade or another party, and any judgment rendered against Herzog must be reduced or denied accordingly; (4) Claimant expressly and/or by his conduct ordered, approved, authorized, participated in, and ratified the acts and transactions complained of and upon which recovery is sought, and is accordingly estopped or otherwise precluded from recovery herein; and (5) all risks concerning the purchase and sale of securities in Claimant's account at E*Trade were fully known to him, and he knowingly, willingly and voluntarily assumed the risk of investing in the stock market.

In addition, Herzog brought a cross-claim against E*Trade for indemnification and contribution. According to Herzog, it entered into a Clearing Agreement with E*Trade whereby E*Trade agreed to indemnify and hold harmless Herzog.

RELIEF REQUESTED

Claimant Richard Kreekon requested an award for: compensatory damages resulting from the sale of the SI Diamond stock in the amount of \$33,750.00; compensatory damages resulting from the sale of the SBS Technology stock in the amount of \$440.00; compensatory damages resulting from the trading cost of the SI Diamond stock in the amount of \$19.95; compensatory damages resulting from the trading cost of the SBS Technology stock in the amount of \$19.95; punitive damages in the amount of \$50,000.00; attorneys' fees in the amount of \$14,000.00 (estimated); and pre-judgment interest (through May 24, 1996 @ 10% per year) in the amount of \$1,117.64.

Respondent E*Trade Securities, Inc. requested that claimant Richard Kreekon take nothing by his complaint and that it be awarded its costs of arbitration and attorney fees.

Respondent Herzog, Heine, Geduld, Inc. requested that claimant Richard Kreekon's claim against it be dismissed in all respects and that it be awarded indemnity and contribution in the sum of its attorneys' fees, and for any losses, liabilities, and/or costs that are incurred in connection with this matter.

OTHER ISSUES CONSIDERED & DECIDED

Respondent E*Trade Securities, Inc. did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to §10301 of the NASD Code of Arbitration Procedure and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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. In either case, the parties have agreed to receive conformed copies of the award while the original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

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

1. Respondent E*Trade Securities, Inc. is liable for and shall pay claimant Richard Kreekon compensatory damages in the amount of \$7,449.00; and
2. Respondent Herzog, Heine, Geduld, Inc.'s Cross-Claim against correspondent E*Trade Securities, Inc. is denied and dismissed;
3. That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$500 per hearing session and \$300 for each pre-hearing conference, if any. There were no pre-hearing conferences and there were two (2) hearing sessions x \$500 = \$1,000 in forum fees. Pursuant to §10332(b) of the NASD 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, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$500 and shall **retain** as forum fees the hearing session deposit in the amount of \$150 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Richard Kreekon.

Pursuant to §10333 of the Code, respondent E*Trade Securities, Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution the member surcharge in the amount of \$300.

Respondent E*Trade Securities, Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution one-half of the cost for the speaker-phone provided at the January 13, 1997 hearing in the amount of \$87.50.

Respondent E*Trade Securities, Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$500 (= ½ \$1,000 total forum fees).

Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$300 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by respondent Herzog, Heine, Geduld, Inc.

The NASD Regulation, Inc. Office of Dispute Resolution shall **reimburse** respondent Herzog, Heine, Geduld, Inc. for its hearing session deposit in the amount of \$600 and its filing fee in the amount of \$250 pursuant to the withdrawal of its Cross-Claim. The NASD Regulation, Inc. Office of Dispute Resolution shall also **reimburse** respondent Herzog, Heine, Geduld, Inc. for its overpayment in the amount of \$387.

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Dated:

/s/ Richard A. Knudsen
Richard A. Knudsen
Public Arbitrator, Presiding Chair

April 22, 1997

/s/ Ann Blaess Kimball
Ann Blaess Kimball, Esquire
Public Arbitrator

April 29, 1997

/s/ Charles T. Dix
Charles T. Dix
Industry Arbitrator

April 21, 1997