

Award
NASD Regulation, Inc.

In the Matter of the Arbitration Between:

Stephen Wong and Melinda Wong, Claimants vs. E*Trade Securities, Inc., Respondent.

Case Number: 99-00104

Hearing Site: San Francisco, CA

REPRESENTATION OF PARTIES

Claimants, Stephen Wong and Melinda Wong, (hereinafter collectively referred to as "Claimants"): *In Pro Per*, 3052 Hillside Drive, Burlingame, CA 94010.

Respondent, E*Trade Securities, Inc., "E*Trade, (hereinafter referred to as "Respondent"): Paul Chan, Esq., Bird Marella Boxer & Wolpert, 1875 Century Park East, 23rd Floor, Los Angeles, CA 90067-2561.

CASE INFORMATION

Statement of Claim filed on or about: January 26, 1999

Claimants, signed the Uniform Submission Agreement: December 29, 1999

Statement of Answer filed by Respondent, on or about: March 18, 1999

Respondent, signed the Uniform Submission Agreement: June 23, 1999

CASE SUMMARY

Claimants asserted the following causes of action: Respondent was negligent in its handling of a market order Claimants placed with Respondent to purchase shares of stock.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted the following defenses: Respondent fulfilled its obligations in both submitting and reporting on Claimants' order; Claimants caused their own damages and; Claimants' damages are speculative.

RELIEF REQUESTED

Claimants requested:

Compensatory Damages

\$74,375

Respondent requested:

Non-Monetary Relief

Claim be denied in full.

OTHER ISSUES CONSIDERED AND DECIDED

At the November 15, 1999 arbitration hearing, the Panel ordered the parties to submit post-hearing briefs. The parties submitted the post-hearing briefs on December 6, 1999.

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 evidence presented at the hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants seek damages from Respondent E*Trade Securities, Inc. ("E*Trade") for the profits they would have made from the sale of 7,000 shares of a stock called Navarre, Inc. ("NAVR") which they claim they would have realized had they known earlier that the stock had been purchased in their account. Claimants entered an order by e-mail to purchase 7000 shares of NAVR on the morning of November 27, 1998. Claimants received no confirmation of the trade but instead received at 9:20 p.m. of that same date an e-mail that "the order to buy 7,000 NAVR expired." Claimants read that e-mail on Saturday morning November 28, 1998.

Later in the day on November 28, 1998 E*Trade sent two e-mails to Claimants notifying them that the 7,000 shares of NAVR had been purchased at \$12 1/6. The evidence is uncontraverted that Claimants did not read these November 28 e-mails until 10:55 a.m. on Monday, November 30, 1998 nearly one and a half hours after the opening of the market. Claimants promptly sold their NAVR positions at a price of \$16 realizing a profit of approximately \$27,000 on the trade. Claimants contend that had they known on Saturday or Sunday that the first e-mail was incorrect and their purchase of 7,000 shares had been executed, they would have sold the 7,000 shares at the opening of the market on Monday, November 30 at a much higher price than \$16.

There is evidence to the effect that the NAVR opened at a price above \$26 on November 30. During the first hour of trading NAVR traded at prices below \$20 a share. To correct its failure to execute the trade on September 27, E*Trade apparently purchased the stock at a price of approximately \$26.00 but gave the stock to Claimants at \$12 1/16 which was the price at or about the time Claimants entered their order on November 27. The result of all of this is that Claimants made \$27,000 on this transaction, and E*Trade lost approximately \$100,000 (the difference between the \$12 1/16 market order price and the \$26.00 price at which E*Trade purchased the stock for Claimants).

Claimants claim lost potential additional profits of approximately \$74,000 assuming they would have sold the 7,000 shares at the highest price possible on November 30. However, there is no

evidence to indicate that Claimants would have entered an order at the opening price or would have been able to sell at that price. There is some evidence that Claimants have a pattern of short term trading but there is no evidence of a pattern of purchasing stock on one day and selling at the opening price the very next day. At most the evidence is that Claimants have bought stock on one day and sold the same stock during the course of the next day.

Claimants contend that E*Trade was negligent in two regards. One, it failed to timely execute the order on November 27 and two, it failed to telephone Claimants to advise them of the fact that the original e-mail to them was in error. On the other hand E*Trade contends that Claimants *were required, according to the terms of the E*Trade customer agreement executed by Claimants*, to review e-mails on a regular basis and had they done so through the course of the weekend they would have realized that they did have a position in NAVR as of November 27. E*Trade also argues that because Claimants had some prior experience with later corrected e-mails in their E*Trade account, they should have been alerted to the potential of a mistake in this situation.

Although this may not be a case of first impression and the facts are somewhat unique, we believe this case raises interesting and somewhat difficult factual and legal issues in an area of commerce that is expanding rapidly and still evolving. The parties have cited some law to us but it is not directly controlling. After careful deliberation we have concluded that E*Trade did not have a duty, as a matter of law, to telephone Claimants to advise them that the first e-mail was an error. We have also concluded that given the nature of E trading with reduced customer services, reduced broker commissions, and the use of e-mails for market orders and confirmations, the relevant provisions of the E*Trade customer agreement are not per se unconscionable.

The equities of the case have further influenced our decision: Claimants did profit from the transaction, and E*Trade lost a substantial amount of money in honoring the original trade. Whatever negligence did occur with respect to the original order was corrected by E*Trade by virtue of its going into the market and purchasing the stock and giving it to Claimants at the price they would have paid if the order had been timely filled. Finally, we are mindful of the fact that there is no evidence (and we would be required to speculate to make an award of damages based on the record before us) regarding the actual time when Claimants would have entered a sell order on November 30 and the price at which the stock would have been sold.

Based on all the foregoing, we find in favor of E*Trade and deny Claimants' Statement of Claim. Forum fees are to be shared equally between the parties.

2. All other claims are denied in their entirety.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$150

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute. In this matter, the member firm is a party.

Member surcharge	= \$1000
Pre-hearing process fee	= \$600
<u>Hearing process fee</u>	<u>= \$1500</u>
Total membership fees	= \$3100

Forum Fees and Assessments

The Panel assesses forum fees for each hearing session conducted. A hearing 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 2 arbitrators x \$500	= \$500
Pre-hearing conference: September 3, 1999	1 session
One (1) Hearing session x \$500	= \$500
<u>Hearing Date: November 15, 1999</u>	<u>1 session</u>
Total Forum Fees	= \$1000

1. The Panel has assessed \$750 of the forum fees jointly and severally to Claimants.
2. The Panel has assessed \$750 of the forum fees to Respondent.

Fee Summary

Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 150
<u>Forum Fees</u>	<u>= \$ 500</u>
Total Fees	= \$ 650
<u>Less payments</u>	<u>= \$ 650</u>
Balance Due NASD Regulation, Inc.	= \$ 0

NASD Regulation, Inc. Office of Dispute Resolution
Arbitration No. 99-00104
Award Page 5 of 6

Respondent, is hereby solely liable for:

Member Fees	= \$ 3100
<u>Forum Fees</u>	<u>= \$ 500</u>
Total Fees	= \$ 3600
<u>Less payments</u>	<u>= \$ 2700</u>
Balance Due NASD Regulation, Inc.	= \$ 900

All balances are due to NASD Regulation, Inc. and are payable within 30 days of the service date of this Award.

NASD Regulation, Inc. Office of Dispute Resolution
Arbitration No. 99-00104
Award Page 4 of 4

Concurring Arbitrators' Signatures

Richard J. Geyer

Richard Jaeger, Esq.
Public Arbitrator, Presiding Chair

1/19/2000
Signature Date

Signature Date

Edmund R. Manwell, Esq.
Public Arbitrator

Signature Date

Bernard Wayne Bunning, CPA
Industry Arbitrator

Signature Date

Date of Service (For NASD office use only)

Date Served:
JAN 25 2000

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Bernard Wayne Bunning, CPA
Industry Arbitrator

1/21/00
Signature Date

Date of Service (For NASD office use only)

Date Served:

JAN 25 2000