

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Kenneth A. DeLonge, (Claimant) vs. J.W. Barclay & Co., Inc., John Bruno, and John J. Cioffoletti, (Respondents)

Case Number: 00-04817

Hearing Site: New York, New York

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**REPRESENTATION OF PARTIES**

Claimant, Kenneth A. DeLonge, hereinafter referred to as "Claimant": David K. DeLonge, Esq., Schumann, Hanlon, Doherty, McCrossin & Paolino, Jersey City, NJ.

Respondent, J.W. Barclay & Co., Inc. ("Barclay"), did not appear at the hearings in this matter. Previously represented by: Steven D. Toskes, Esq., Klayman, Lazarus & Toskes, P.A., Boca Raton, FL and Charles Lake, Compliance Consultant on behalf of J.W. Barclay & Co., Inc., Woodbridge, NJ, respectively.

Respondent, John Bruno ("Bruno"), did not appear at the hearings in this matter. Previously represented by: Lester Morse, Esq., Law Offices of Lester Morse P.C., Great Neck, NY and Charles Lake, Compliance Consultant on behalf of J.W. Barclay & Co., Inc., Woodbridge, NJ, respectively.

Respondent, John J. Cioffoletti ("Cioffoletti"), did not appear at the hearings in this matter. Previously represented by: Scott L. Silver, Esq., Gusrae, Kaplan & Bruno, PLLC, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: October 30, 2000.

Claimant signed the Uniform Submission Agreement: October 25, 2000.

Joint Statement of Answer filed by Barclay and Bruno on or about: December 26, 2000.

Barclay did not sign a Uniform Submission Agreement.

Bruno signed the Uniform Submission Agreement.

Statement of Answer filed by Cioffoletti on or about: February 15, 2001.

Cioffoletti did not sign a Uniform Submission Agreement.

### CASE SUMMARY

Claimant asserted the following causes of action: misrepresentations and omissions of material facts; criminal conspiracy; deceptive sales practices; fraudulent inducement in violation of the Securities Act of 1933 and the Securities Exchange Act of 1934; common law fraud; negligence; breach of fiduciary duty; and respondeat superior. Claimant's claim involved the stocks of Holly Products Inc., Hudson Technologies, Inc., Bailey Corp., Gatefield Corporation, Kay Kotts Associates, Inc., Optex Biomedical, Inc., Russian Wireless, and Retix.

Unless specifically admitted in their Answer, Barclay and Bruno denied the allegations made in the Statement of Claim and asserted the following defenses: Barclay and Bruno serviced Claimant's account in accordance with Claimant's instructions; Claimant was a successful businessman and a sophisticated, accredited investor; Claimant fully controlled and authorized all of the activity that transpired in his account over eight years; there were no violations of securities regulations committed in the servicing of Claimant's account; the profits and losses in Claimant's account were attributable to market fluctuations alone; and Claimant never initiated a complaint regarding the transactions that were executed in his account.

Unless specifically admitted in his Answer, Cioffoletti denied the allegations made in the Statement of Claim and asserted the following defenses: Cioffoletti acted at all times in compliance with the applicable rules and regulations, acted in good faith, and did not induce the alleged act or acts, if any, constituting any alleged violations of law; Claimant's claims are barred by the Statute of Limitations and the NASD Code of Arbitration Procedure denying all claims filed more than six years after the date of purchase; Claimant failed to mitigate his damages; the Statement of Claim fails to plead fraud with the requisite particularity; the Statement of Claim fails to state a basis or claim upon which relief can be granted; the damages of Claimant, if any, are the proximate result of the culpable conduct of Claimant or of persons and/or entities other than Cioffoletti; the damages of Claimant, if any, are the proximate result of the market conditions and/or other factors beyond the control of Cioffoletti; Claimant is barred by the doctrines of laches, waiver, estoppel, and ratification; and the Statement of Claim seeks relief which is beyond the powers granted to the Panel, or which is beyond the scope of arbitrable disputes herein, and such relief cannot be granted herein.

### **RELIEF REQUESTED**

Claimant requested:

- a. Compensatory damages against Respondents in the amount of \$584,595.00 on the grounds of fraud in violation of the Securities Act of 1933 and the Securities Exchange Act of 1934, common law fraud, negligence, and breach of fiduciary duty;
- b. Compensatory damages against Respondents in the amount of \$500,000.00 based upon abusive sales practice, breach of promise to allocate warrants to Claimant to recoup his loss, and promissory estoppel;
- c. Interest from January 1, 1997 to November 1, 2000 at 9% per annum pursuant to New York C.P.L.R., in the total amount of \$201,685.27;
- d. Compensatory damages against Respondents in the amount of \$127,709.00, plus interest at 9% from January 1, 1995 to November 1, 2000 in the total amount of \$67,047.22, on the grounds of fraudulent market manipulation and failure to supervise; and
- e. Compensatory damages against Barclay and Cioffoletti in the amount of \$35,000.00 for promotion and solicitation of the sale of Russian Wireless stock.

Barclay and Bruno requested dismissal of all claims against them, plus reimbursement of all costs and expenses incurred in defending this claim.

Cioffoletti requested that the Panel dismiss this arbitration in its entirety as against him; award Cioffoletti his costs, disbursements, and attorneys' fees incurred herein; assess all forum fees against Claimant in this matter; and award such other and further relief as the Panel deems appropriate.

### **OTHER ISSUES CONSIDERED AND DECIDED**

Prior to the hearings in this matter, Claimant entered into a settlement agreement with Respondent Bruno.

Upon review of the file and the representations made on behalf of the Claimants, the undersigned arbitrators (the "Panel") determined that Barclay and Cioffoletti have been properly served with the Statement of Claim and received due notice of the hearing, and that arbitration of the matter would proceed without Barclay and Cioffoletti present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

Barclay and Cioffoletti did not file with NASD Dispute Resolution, Inc. properly executed submissions to arbitration but are required to submit to arbitration pursuant to the Code and, having answered the claim, are bound by the determination of the 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.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Barclay and Cioffoletti be and hereby are jointly and severally liable for and shall pay to Claimant the sum of \$357,000.00 as compensatory damages, plus interest in the amount of \$5,000.00.
2. Barclay and Cioffoletti be and hereby are jointly and severally liable for and shall pay to Claimant the sum of \$384,000.00 as punitive damages. The Panel awarded punitive damages pursuant to the following case law, as argued in Claimant's hearing brief: Fine Host Corp. Securities Litigation, 25 F. Supp.2d 61, 63 (D.Conn.1998); Taxman v. Bd. of Ed. Piscataway, 91 F3d 1547 (3rd Cir 1996); and Smith v. Whitaker, 160 N.J.221(1999).
3. Barclay and Cioffoletti be and hereby are jointly and severally liable for and shall pay to Claimant the sum of \$500.00, to reimburse Claimant for the filing fee previously paid to NASD Dispute Resolution, Inc.
4. All other requests for relief are hereby denied.

### **FEEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee	= \$ 500.00
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**Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. In this matter, J.W. Barclay & Co., Inc. is a party.

Member surcharge	= \$2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$4,500.00

**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:

Two (2) Pre-hearing sessions with Panel x \$1,200.00	= \$2,400.00
Pre-hearing conferences: May 2, 2001	1 session
August 7, 2001	1 session

Two (2) Hearing sessions x \$1,200.00	= \$2,400.00
Hearing Date: November 7, 2001	2 sessions
Total Forum Fees	= \$4,800.00

The Panel has assessed all of the forum fees jointly and severally against Barclay and Cioffoletti.

**Fee Summary**

1. Claimant be and hereby is solely liable for:

Initial Filing Fee	= \$ 500.00
Total Fees	= \$ 500.00
Less payments	= \$1,575.00
Refund Due Claimant	= \$1,075.00

*As stated in the "Award" section above, Barclay and Cioffoletti are jointly and severally liable and shall reimburse Claimant for the \$500.00 filing fee.*

2. Barclay be and hereby is solely liable for:

<u>Member Fees</u>	= \$7,600.00
<u>Total Fees</u>	= \$7,600.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution, Inc.	= \$7,600.00

3. Barclay and Cioffoletti be and hereby are jointly and severally liable for:

<u>Forum Fees</u>	= \$4,800.00
<u>Total Fees</u>	= \$4,800.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution, Inc.	= \$4,800.00

All balances are due and payable to NASD Dispute Resolution, Inc.

**ARBITRATION PANEL**

Franklin P. Chapman	-	Public Arbitrator, Presiding Chair
Stanley Regenbogen	-	Public Arbitrator
John J. Duval, Sr.	-	Industry Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.



Franklin P. Chapman  
Public Arbitrator, Presiding Chair

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Signature Date

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Stanley Regenbogen  
Public Arbitrator

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Signature Date

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John J. Duval, Sr.  
Industry Arbitrator

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Signature Date

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Date of Service (For NASD office use only)

**ARBITRATION PANEL**

Franklin P. Chapman	-	Public Arbitrator, Presiding Chair
Stanley Regenbogen	-	Public Arbitrator
John J. Duval, Sr.	-	Industry Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

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Franklin P. Chapman  
Public Arbitrator, Presiding Chair

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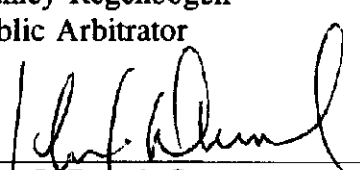
Signature Date

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Stanley Regenbogen  
Public Arbitrator

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Signature Date



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John J. Duval, Sr.  
Industry Arbitrator

11/26/01

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Signature Date

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Date of Service (For NASD office use only)