

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Donald A. Ostrower

94-00025

Name of Respondents

A. R. Baron & Co., Inc.

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CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on December 31, 1993, Claimant Donald A. Ostrower, who appeared Pro Se, alleged that prior to June 15, 1993 he opened an account with Respondent A. R. Baron & Co., Inc. and purchased 500 shares of Cypros Pharmaceutical Corp. stock, 1,500 shares of Health Professional, Inc. stock and 4500 shares of Cryomedical Sciences, Inc. stock. Claimant contended that his broker at Respondent offered to sell him 2000 shares of Innovir Laboratories, Inc. ("Innovir") stock pursuant to an Initial Public Offering ("IPO") and requested that Claimant mail him a check on September 7, 1993. Claimant further contended that he mailed Respondent a check to cover the purchase price of the 2000 shares of Innovir stock on September 7, 1993. Claimant alleged that his broker at Respondent never told him on September 7, 1993 that sending this check would only constitute an offer to purchase subject to the rules of an offering statement. Claimant further alleged that his broker at Respondent led him to believe that he could accept the offer to purchase the Innovir shares by tendering payment. Claimant contended that Respondent did not acquire the Innovir stock for Claimant, since according to Respondent the check was never received. Claimant further contended that he subsequently purchased Innovir Class "B" warrants from Respondent. Claimant alleged that on September 21, 1993, after the value of the Innovir warrants began to decline, he instructed his broker at Respondent to sell all of the securities held in his account with Respondent. Claimant further alleged that on September 21, 1993, Respondent sold his Cryomedical Sciences, Inc.

stock, but did not sell any of the other securities in his account with Respondent. Claimant contended that the other securities in his account were not sold until September 23, 1993. Claimant further contended that the check he sent to Respondent on September 7, 1993 was in fact received and cashed by Respondent, and that Respondent billed Claimant a second time for the purchase of the Innovir Class "B" warrants. In Claimant's Reply to the Statement of Answer, Claimant alleged that Respondent's offer to sell the 2000 Innovir shares, and Claimant's acceptance thereof, occurred on September 7, 1993, before Claimant was aware of, or had received the offering statement. As a result of the above, Claimant contended that he has suffered damages for which the Respondent should be held liable.

Respondent A. R. Baron, Inc., through its counsel Norris D. Wolff, Esq., of Kleinberg, Kaplan, Wolff & Cohen, P.C., New York, New York, maintained that Claimant's failure to participate in the IPO of Innovir was due to his own failure to comply with the express terms of the offering and Respondent's clear and enumerated instructions. Respondent further maintained that as a matter of basic contract law it reserved the right to allocate the Innovir stock among the potential subscribers as it so determined, and that it had a legal right, pursuant to the prospectus, not to sell this stock to the Claimant. Respondent contended that Claimant's check for the purchase of the Innovir stock was received by Respondent on September 20, 1993, six days after the IPO offering date, and that the check was not made payable to the right party. Respondent further contended that Claimant failed to supply the required information sheet in connection with the IPO. Respondent maintained that pursuant to Claimant's request, the check received on September 20, 1993 was applied to cover the September 15, 1993 purchase of 5500 Innovir Class "B" warrants. Respondent further maintained that Claimant's claim for the untimely sale of three securities in his account is factually and legally insufficient, and that Respondent should not be held liable for market conditions. Respondent contended that Claimant, in calculating the amount of "losses" he claims concerning the three securities sold from his account on September 23, 1993, does not take into account the allowable 5% markdown Respondent would have been allowed to take if the trades were executed on September 21, 1993. As a result of the above, Respondent maintained that it should not be held liable in this matter.

#### **RELIEF REQUESTED**

Claimant Donald A. Ostrower requested \$8,960.00 in actual damages, plus interest from September 28, 1993.

Respondent A. R. Baron & Co., Inc. requested that the Claimant's Statement of Claim be dismissed in its entirety, and that costs be assessed against Claimant.

**AWARD**

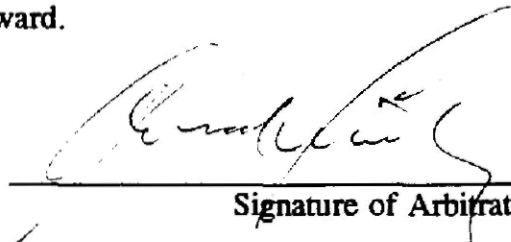
Pursuant to Section 13 of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure, a single public arbitrator, Arnold Linsky, was selected to review and determine the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on June 20, 1994 and not by the Respondent as required by Sections 12 & 13 of the NASD Code of Arbitration Procedure.

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. Respondent A. R. Baron & Co., Inc. is liable and shall pay to Claimant Donald A. Ostrower \$2,099.50 in actual damages.
2. Respondent A. R. Baron & Co., Inc. is liable and shall pay to Claimant Donald A. Ostrower simple interest at the rate of 8% per annum from October 1, 1993 to the date of payment of the award.
3. The parties shall bear their respective costs, including attorney's fees.
4. 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. Respondent A. R. Baron & Co., Inc. is liable and shall pay to Claimant Donald A. Ostrower \$150.00 as reimbursement of the filing fee.

**AFFIRMATION**

I, **ARNOLD LIMSKY**, do hereby affirm upon my oath of arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.

  
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Signature of Arbitrator

DATE OF DECISION: August 5, 1994

STATE OF NY ss.:

COUNTY OF NY

On this 3 day of August 1994, before me personally appeared to me known and known before me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same. . .

Deborah De Jesus

DEBORAH A. DEJESUS  
Notary Public, State of New York  
No. 02DE5022979  
Qualified in New York County 96  
Commission Expires January 24, 1996