

NASD Arbitration & Mediation

National Association of Securities Dealers, Inc. * NASD Financial Center * 33 Whitehall Street * New York, NY 10004 * Fax 212-858-4429
Washington DC Satellite office at: 1735 K Street, NW - 10th Floor * Washington, DC 20006 * Fax 202-728-6952

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Jerry and Peggy Esterman

95-03912

Name of Respondents

Joseph Esposito
J.W. Barclay & Co., Inc.

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on August 14, 1995, Claimants Jerry and Peggy Esterman ("Claimants"), who appeared Pro Se, alleged that Respondent J.W. Barclay & Co. ("JWB"), through its broker, Respondent Joseph Esposito ("Esposito"), failed to execute their orders to sell their investment. Claimants further alleged that they purchased from the Respondents 2000 shares of Phoenix Technologies ("PTEC") and instructed Esposito to sell the stock when it reached \$12.00/share. Claimants contended that Esposito did not sell when the stock reached 12, and then 12 1/2, and that he was unavailable when Claimants tried to contact him. Claimants further contended that they finally did reach Esposito and instructed him to sell the stock, but that he refused to do so, and told Claimants that the stock price would climb higher. Claimants alleged that on the next day, the stock fell way below 12, and that due to Respondents' non-compliance with their instructions, they have suffered a loss for which the Respondents should be held liable.

Respondent Joseph Esposito, who appeared Pro Se, maintained that he held Claimants' investment in PTEC, and that Claimants asked if they should put a stop limit order on it at 12. Esposito further maintained that he advised them that he did not take such orders on OTC accounts and that they decided to "play it by ear". Esposito contended that when the stock fell below 12, he tried to contact Claimants, but by the time his call was returned, the stock was at 11 3/4 and Claimants were very upset. Esposito further contended that he informed Claimants that he could not have sold without their order to sell, and that he committed no wrongdoing, and therefore, he should not be held liable for Claimants' loss.

Respondent J.W. Barclay & Co., Inc., through its representative and in-house counsel, Thomas Cerna, Esq., maintained that Claimants called Mr. Cerna's office complaining that Esposito failed to execute their order to sell 2000 shares of PTEC at \$12.00 per share on July 18, 1995. JWB further maintained that on that day, PTEC fell below \$12.00/share soon after the market opened and that Claimants' limit order was not executed because the stock's price went straight through the \$12.00 limit. JWB contended that Claimants' order to sell the stock must be tempered with the fact that the stock's price was moving higher and the limit price had been entered. Respondent further contended that Esposito committed no wrongdoing and therefore, JWB should not be held liable.

RELIEF REQUESTED

Claimants Jerry and Peggy Esterman, requested \$2,000.00 in actual damages, plus interest and fees.

Respondent Joseph Esposito, requested that the claims of the Claimant be dismissed in their entirety.

Respondent J.W. Barclay & Co., Inc., requested that the claims of the Claimant be dismissed in their entirety.

AWARD


Pursuant to Section 13 of the NASD, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Stanley H. Labinger, was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimants Jerry and Peggy Esterman, on August 7, 1995, and by the Respondent J.W. Barclay & Co., on April 19, 1996, and not by the Respondent Joseph Esposito, as required by Sections 12 and 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. Respondents Joseph Esposito and J.W. Barclay & Co., Inc. are jointly and severally liable, and shall pay to the Claimants Jerry and Peggy Esterman, \$408.98 in actual damages.
2. All other relief requests are denied.
3. The parties shall bear their respective costs.
4. The \$50.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimants Jerry and Peggy Esterman, shall be retained by the NASD, Inc. The Respondents Joseph Esposito and J.W. Barclay & Co., Inc., are jointly and severally liable, and shall pay to the Claimant Jerry and Peggy Esterman, \$25.00 as reimbursement of one-half of the filing fee.

AFFIRMATION

I, **STANLEY H. LABINGER**, 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.


STANLEY H. LABINGER

DATE OF DECISION: May 29, 1996