

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Mark Lottis, Claimant v. McDonald Investments Inc. and Jonathan Levine, Respondents

Case Number: 02-05131

Hearing Site: Portland, Oregon

Nature of Dispute: Customer v. Member and Associated Person

REPRESENTATION OF PARTIES

For Claimant:

Alan N. Ariav, Esq.
DeConcini McDonald Yetwin
& Lacy, P.C.
Tucson, Arizona

For Respondents:

Justin C. Sawyer, Esq.
Miller Nash LLP
Portland, Oregon

CASE INFORMATION

Statement of Claim filed: September 7, 2002

Claimant's Uniform Submission Agreement signed: September 24, 2002

Statement of Answer filed by Respondents McDonald Investments, Inc. and Jonathan Levine:
January 15, 2003

Respondent McDonald Investments, Inc.'s Uniform Submission Agreement signed:
November 27, 2002

Respondent Jonathan Levine's Uniform Submission Agreement signed: January 9, 2003

CASE SUMMARY

In the initial Statement of Claim, Claimant alleged negligence, breach of fiduciary duty; failure to supervise, misrepresentations; unsuitability, violation of the NASD and NYSE rules of fair practice, violation of the Oregon Securities Law sections 59.005 to 59.451 and section 59.995, and violation of the RICO Act involving the purchase of Kmart Bonds shortly before Kmart filed bankruptcy.

In the Amended Statement of Claim, Claimant alleged common law fraud. In addition, Claimant withdrew his cause of action for violation of the RICO Act and violations of Oregon Securities Law.

Respondents denied the allegations of wrongdoing set forth in the Claimant's Initial Statement of Claim and Amended Statement of Claim and asserted various affirmative defenses including assumption of risk, waiver, ratification, estoppel and failure to mitigate damages.

RELIEF REQUESTED

In the initial Statement of Claim, Claimant requested unspecified compensatory damages, unspecified punitive damages, triple damages under the RICO Act, reasonable attorney's fees, interest, lost investment opportunity and costs. At the hearing, Claimant amended his statement of statement of claim to include a request for compensatory damages in the sum of \$180,000.00.

Respondents requested dismissal of the Claimant's Statement of Claim in its entirety.

OTHER ISSUES CONSIDERED AND DECIDED

On November 13, 2003 the panel granted Claimant's Motion to Amend the Statement of Claim to include a claim for fraud against Respondent McDonald Investments, Inc. and to dismiss his claim for violation of the RICO Act and violation of Oregon Securities Law.

At the hearing, the Panel granted Claimant's oral Motion to Amend the Statement of Claim to include a request for compensatory damages in the sum of \$180,000.00 less the amount recovered upon resale of the bonds.

At the hearing, the Panel granted Respondents' oral motion for summary determination of the fraud claim against McDonald Investments, Inc. The panel ruled that there was insufficient evidence to prove fraud as to Respondents McDonald Investments, Inc. and Jonathan Levine.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

FINDINGS AND CONCLUSIONS

The Panel finds that Respondent Jonathan Levine made an unsuitable recommendation to Claimant when he recommended the purchase of \$198,250.00 in bonds on January 7, 2002. Although the Claimant had previously invested in high yield securities through Respondent McDonald Investments, Inc., it was negligent to recommend placing such a large percentage of Claimant's investment portfolio in one security. The Panel finds that it was inappropriate to

invest more than \$50,000.00 in high yield bonds from a single issuer.

After Kmart filed bankruptcy, Respondents McDonald Investments, Inc. and Jonathan Levine scheduled a meeting with Claimant to review his options. At that time, Respondents McDonald Investments, Inc. and its representatives presented various points of view regarding whether to sell or hold the bonds. The panel finds that Claimant assumed the risk regarding any increases or decreases in the value of the bonds thereafter. The value as of that meeting, which was 40.50 per \$100.00, should be deducted from Claimant's purchase price to determine his damages. The net loss would be \$117,250.00. Claimant is entitled to recover 75% of the net loss, which would be \$87,937.50. In addition, Claimant is entitled to interest at the rate of 2% per annum for lost opportunity for a period of two years, for a total of \$3,517.50. In total the amount awarded is \$91,455.00. Under the doctrine of respondeat superior, McDonald Investments, Inc. is jointly and severally liable for its employee's unsuitable recommendations made in the course of his employment. (See award section below)

AWARD

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

- 1) Respondents McDonald Investments, Inc. and Jonathan Levine are jointly and severally liable to and shall pay Claimant the sum of \$91,455.00 in compensatory damages (which includes an Award of interest in the of amount \$3,517.50 for lost investment opportunity from January 15, 2002 through January 15, 2004.)
- 2) Claimant's request for punitive damages is denied.
- 3) Claimant's fraud claims are denied.
- 4) Claimant's request for attorney's fees is denied.
- 5) The parties shall bear their respective costs, including attorney's fees.
- 6) All other relief requested and not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$ 250.00
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Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm McDonald Investment, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$1,500.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$2,200.00
Total Member Fees	= \$4,450.00

Adjournment Fees

The following adjournment fees are assessed:

August 14-15, 2003, adjournment (stipulated request by all parties)	Waived
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Forum Fees and Assessments

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Arbitrator/Chair. The following fees are assessed:

(2) Pre-hearing conference session(s) with the Panel @ \$1,000.00/session	= \$ 2,000.00
Pre-hearing conference(s): April 23, 2003	1 session
November 13, 2003	1 session
(6) Hearing sessions @ \$1,000.00/session	= \$ 6,000.00
Hearing: November 17, 2003	2 sessions
November 18, 2003	1 session
November 19, 2003	2 sessions
November 20, 2003	1 session
Total Forum Fees	= \$ 8,000.00

1. The Panel assessed \$4,800.00 of the forum fees to Claimant, Mark Lottis.
2. The Panel assessed \$3,200.00 of the forum fees jointly and severally to Respondents, McDonald Investments, Inc. and Jonathan Levine.

Fee Summary

1. Claimant Mark Lottis is charged with the following fees and costs:

Initial Filing Fee	= \$ 250.00
Forum Fees	= \$ 4,800.00
<hr/> Total Fees	<hr/> = \$ 5,050.00
Less payments	= \$(1,250.00)
<hr/> Balance Due NASD Dispute Resolution	<hr/> = \$ 3,800.00
2. Respondent McDonald Investments, Inc. is charged with the following fees and costs:

Member Fees	= \$ 4,450.00
Less payments	= \$(4,450.00)
<hr/> Balance Due NASD Dispute Resolution	<hr/> = \$ 0.00
3. Respondents, McDonald Investments, Inc. and Jonathan Levine are charged jointly and severally with the following fees and costs:

Forum Fees	= \$3,200.00
Less payment by Respondent McDonald Investments, Inc.	= \$ (200.00)
<hr/> Balance Due NASD Dispute Resolution	<hr/> = \$3,000.00

All balances are payable to NASD Dispute Resolution and are due upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

Laura J. Walker, Esq.	-	Public Arbitrator, Presiding Chair
Gordon MacMillan	-	Public Arbitrator
Bruce R. Winthrop	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures



Laura J. Walker, Esq.
Chair, Public Arbitrator

December 9, 2003

Signature Date

Gordon MacMillan
Public Arbitrator

Signature Date

Bruce R. Winthrop
Non-Public Arbitrator

Signature Date

December 10, 2003

Date of Service

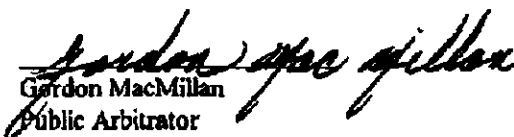
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Gordon MacMillan	-	Public Arbitrator
Bruce R. Winthrop	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Laura J. Walker, Esq.
Chair, Public Arbitrator

Signature Date


Gordon MacMillan
Public Arbitrator

12/9/03
Signature Date

Bruce R. Winthrop
Non-Public Arbitrator

Signature Date

December 10, 2003
Date of Service

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Gordon MacMillan	-	Public Arbitrator
Bruce R. Winthrop	-	Non-Public Arbitrator


Concurring Arbitrators' Signatures

Laura J. Walker, Esq.
Chair, Public Arbitrator

Signature Date

Gordon MacMillan
Public Arbitrator

Signature Date



Bruce R. Winthrop
Non-Public Arbitrator

12-10-03

Signature Date

December 10, 2003

Date of Service