

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant
Debra L. Byrne

Case Number: 02-07045

Name of the Respondent
TD Waterhouse Investor Services, Inc.

Hearing Site: Philadelphia, PA

Nature of the Dispute: Customer vs. Member.

REPRESENTATION OF PARTIES

Claimant, Debra L. Byrne, hereinafter referred to as "Claimant", was represented by Thomas J. Byrne, Marlton, New Jersey.

Respondent, TD Waterhouse Investor Services, Inc. ("TD Waterhouse"), hereinafter referred to as "Respondent", was represented by Eric A. Michaels, Esq., Hertz, Schram & Saretsky, P.C., Bloomfield, Michigan.

CASE INFORMATION

Statement of Claim filed on: January 20, 2002.

Claimant signed the Uniform Submission Agreement on: November 26, 2002.

Preliminary Response to the Statement of Claim filed by Respondent on: January 28, 2003.

Statement of Answer and Affirmative Defenses filed by Respondent on: July 7, 2003.

A representative of Respondent signed the Uniform Submission Agreement on: January 28, 2003.

Claimant filed a Motion to Bar Respondent from Presenting Any Facts or Defenses Not Included in Their Preliminary Response to the Statement of Claim on: January 30, 2003.

Respondent filed a Response to Claimant's Motion to Bar Respondent from Presenting Any Facts or Defenses Not Included in Their Preliminary Response to the Statement of Claim on: March 10, 2003.

CASE SUMMARY

In 1999, prior to any of the events that transpired in this matter, Milestone Properties Inc. (hereinafter "Milestone") retired its preferred stock. All of its preferred stock had been issued under a CUSIP number, the last three digits of which were 207 (hereinafter "CUSIP 207"). The settlement provided that the CUSIP 207 preferred shareholders were to have the option of selling the shares back to Milestone at a price of \$3.00 per share, or alternatively trading the CUSIP 207 shares, on a one for one basis, for a new series of preferred stock bearing a CUSIP number for which the last three digits were 306 (hereinafter "CUSIP 306"). Once all of the shares were

either repurchased or converted, Milestone formally retired the CUSIP 207 Preferred Stock.

In August and September 2000, Claimant directed Respondent to purchase an aggregate of 3500 shares of Milestone CUSIP 306 convertible preferred stock on her behalf. Although not relevant to the issue herein, the purchases were in lots and the prices for the lots varied from \$3.00 to \$5.00 per share.

Pursuant to Claimant's then existing open order to sell all of its shares at \$10.00 per share, on or about December 28, 2000 Respondent sold 500 shares of CUSIP 306, leaving Claimant with the 3000 shares of CUSIP 306 that form the basis of this action. Thereafter, on expiration of the \$10.00 open order to sell, on February 16, 2001, Claimant issued another open order to sell all of her shares at \$7.00 per share. There were no buyers, and this open order expired on April 17, 2001. Overlapping the lifespan of the \$7.00 open order, on March 28, 2001, Claimant issued a third open order to sell all of her CUSIP 306 stock at \$5.00. There were no buyers under this open order and it expired on May 22, 2001. Thus, on May 23, 2001, Claimant was still on Respondent's books as the owner of 3000 shares of Milestone CUSIP 306 preferred stock.

On or about April 2, 2003, Claimant received notice of a forced merger between Milestone and another company. The price offered for the CUSIP 306 stock in the merger was \$2.91 per share. Any holder of CUSIP 306 shares who did not agree with this price could file an appraisal action in the Chancery Court of the State of Delaware, where Milestone was incorporated.

Claimant then notified Respondent that she intended to protest the merger value and seek an appraisal in the Delaware Court. Thereafter, during the interval between April 2001 and February 2002, Claimant and Respondent (including Respondent's branch offices, and home offices) were involved in numerous oral (in person and telephonic), written, and electronic (e-mail) communications, regarding whether or not 3000 shares of Milestone CUSIP 306 preferred stock were actually purchased for Claimant by Respondent. Respondent acknowledges that it had a duty to purchase the specified stock for Claimant, but claims that it did so, and did not breach its duty. Respondent contends that if, in fact, there was an error, it was the fault of either the contra-broker used by Respondent, the stock depository holding the shares, or Milestone itself, none of which constituted a breach of duty by Respondent. Further, Respondent contended that at all times, on its books, it recognized that Claimant was the owner of these shares, and that this was the standard manner in which the stock purchasing system utilized by Respondent operated.

On or about November 5, 2001, while still unable to obtain from Respondent satisfactory proof of ownership, and faced with a statute of limitations governing the time in which she could protest the \$2.91 value, Claimant retained counsel and filed an appraisal action in Delaware. In answering, Milestone contended that Claimant was not a registered owner of its CUSIP 306 preferred stock.

On December 5, 2001 Respondent posted to Claimant's account, a "sale" of 1500 shares of Milestone Preferred (CUSIP 306). As a result of this "sale" the account showed an increase of cash in the amount of \$4,475.00 reflecting \$3.00 per share less a \$25.00 brokerage fee. Claimant

advised Respondent that this should not have occurred. This "sale" could be traced to a notice sent to Respondent by Depository Trust Company and provided to Claimant during discovery. The notice confirmed the liquidation of 1500 shares of CUSIP 306 preferred stock at \$3.00 per share. The payment had a record date of Aug. 30, 2001, a payable date of Aug. 31, 2001 and a posting date of December 2, 2001 and reflected a reorganization allocation.

Subsequently, on February 2, 2002, Respondent posted to Claimants account a second "sale" of 1500 shares of Milestone Preferred (CUSIP uncertain). As a result of this "sale" the account showed another increase of cash in the amount of \$4,475.00 again reflecting \$3.00 per share less a \$25.00 brokerage fee. Testimony at the hearing indicated that this posting was the result of a payment by the contra-broker for improperly sold CUSIP 207 shares.

At this point, Claimant determined that it was no longer possible for her to have an ownership interest in any of the shares on which she had based her Delaware appraisal action. Thus, Claimant settled her action against Milestone for the nominal amount of \$750.00, representing \$0.25 per share.

Claimant contends that had Respondent properly and timely advised her that she did not own the subject shares of CUSIP 306 Milestone preferred stock, she would not have filed the appraisal action in Delaware, nor would she have incurred a \$1500.00 fee for the services of a Delaware attorney.

In this Arbitration, Claimant contends that Respondent never obtained proper ownership rights for her to any or the CUSIP 306 shares, and, as a result, she never owned any of these shares, *vis-à-vis* any right she may have had to maintain an appraisal action against Milestone. In support of her position, Claimant points to testimony by Respondent's employees to the effect that the February 2, 2002 "sale" was the result of a payment by the contra-broker for improper delivery of 1500 CUSIP 207 shares, and the December 5, 2001 payment of the liquidation received from the Depository Trust Co., both of which should have been at \$2.91, and not \$3.00, had they been for CUSIP 306 preferred Stock. Claimant also relied on testimony by Respondent's employees to the effect that no actual, physical shares for Claimant's CUSIP 306 preferred stock were ever received by Respondent from the Depository having physical possession of the shares.

Claimant contends that Respondent was negligent in failing to provide her with actual ownership of the shares she purchased. Claimant seeks to be put in the same positions as she would have been had Respondent actually purchased the 3000 shares of Milestone preferred stock, CUSIP 306, including, *inter alia*, the right to demand appraisal of the shares in Court.

Additionally, although not specifically referenced in the Statement of Claim, at the hearing, Claimant asserted that Respondent's actions were willful, intentional, reckless, malicious, and done with intent to harm. Claimant also contends that Respondent's actions constitute common law fraud.

Unless specifically admitted in its Answer, Respondent denied all of Claimant's contentions, and asserted that Claimant has been paid full fair market value for her stock. Further, Respondent

contends Claimant had actual possession of at least 1500 shares of the CUSIP 306 stock, and that Milestone erred by asserting that Claimant did not own any of the CUSIP 306 stock. Respondent also asserted the following affirmative defenses: failure to state a valid cause of action and statutes of limitations.

RELIEF REQUESTED

Claimant in her Statement of Claim requested that the Arbitrators find that the fair market value of the stock as of the date of the forced merger was \$10.00 per share. Thus, Claimant seeks \$21,000 compensatory damages for the stock (\$10.00 per share less the \$3.00 per share already credited to Claimants account = \$7.00 per share x 3000 shares = \$21,000.00). Claimant also demands Respondent be made to reimburse her for the fees she paid to the Delaware attorney (\$1500.00). Claimant states that Respondent is entitled to a credit for the \$750.00 she received as a result of her settlement with Milestone. Claimant, also formally demands:

- a) Assessment of all forum fees against Respondent,
- b) Pre-award interest from August 8, 2001 at a rate of 5%,
- c) Post-award interest at a rate of 5%,
- d) Reimbursement of costs incurred in typing and reproduction of records (\$200.00), and
- e) Reimbursement of transcription costs (\$103.50).

Claimant also seeks \$64,000.00 in punitive damages because, as alleged in the statement of claim, Respondent "...acted in an outrageous manner by not admitting their error and forcing me to go to arbitration."

Respondent requested that the Statement of Claim be dismissed in its entirety and that Respondent be reimbursed for attorneys' fees and costs on the theory that Claimant pursued this action in bad faith.

OTHER ISSUES CONSIDERED AND DECIDED

The Panel denied Claimant's Motion to Bar Respondent from Presenting Any Facts or Defenses Not Included in Their Preliminary Response to the Statement of Claim on June 16, 2003.

Prior to the hearing, one of the Arbitration Panel (the "Panel") members had to withdraw due to emergency circumstances. All parties agreed to proceed to the hearing on the merits with a Panel consisting of two arbitrators.

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. Neither the evidence nor the record of what transpired during the course of this arbitration supports a finding that Claimant at any time acted in bad faith, and the Panel specifically finds that Claimant did not act in bad faith. Respondent's request for attorney's fees, therefore, is denied in full and dismissed, with prejudice;

2. The evidence does not support a finding by the Panel that Respondent ... acted in an outrageous manner by not admitting their error and forcing me to go to arbitration," nor does the evidence support a finding by the Panel that Respondent's actions were willful, intentional, reckless, malicious, and done with intent to harm, or that Respondent's actions amounted to "common law fraud," for which it was liable to Claimant for punitive damages. Claimant's claim for punitive damages, in any and all multiples and/or for any amount, is denied in full and dismissed, with prejudice;

3. The Panel finds that Respondent unintentionally, but, nevertheless, negligently failed to meet its duty with respect to its purchase of Milestone Preferred Stock, CUSIP 306 for Claimant. Claimant never owned the 1500 shares traceable to the contra-broker. It is also doubtful that Claimant ever had actual ownership of any of the 1500 shares traceable to the Depository. Thus it is most probable that Claimant never had actual ownership of any of the 3,000 shares, which are the subject of this arbitration. The panel concludes that on November 5, 2001, the date the Delaware appraisal action was filed, Claimant did not own any of the shares;

4. The Panel awards to Claimant damages in the amount of \$21,750, together with pre and post-award interest as permitted by law. Calculation of pre-award interest shall commence as of August 8, 2001. The 5% interest rate demanded by Claimant shall be superceded by the legal interest rate permitted on judgments in New Jersey. Since Claimant resides in New Jersey and the transactions involved in this action arose in New Jersey, it is the finding of the Arbitrators that New Jersey Law governs the award of interest;

5. The Panel finds that all of the costs associated with this arbitration, including, but not limited to all filing fees and all forum fees are to be assessed against Respondent. Respondent is liable for 100% of all such fees. Claimant shall not be charged for any costs or forum fees and shall be reimbursed any costs or forum fees already paid, and such fees charged to Respondent. Thus, Respondent is liable to and shall pay to Claimant \$225 as reimbursement for filing fees paid by Claimant;

6. The Panel finds that Respondent shall pay to Claimant the costs associated with typing and reproduction of records in the amount of \$200, and transcription costs of \$103.50; and,

7. All other claims by any party not specifically addressed in this award are denied in their entirety and with prejudice. All claims, based on any Statute, whether or not set forth in the Statement of Claim are denied in full and with prejudice.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$ 225
--------------------------	----------

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 person(s) at the time of the events giving rise to the dispute. Accordingly, Respondent TD Waterhouse is a party.

Member surcharge	= \$ 1,100
Pre-hearing process fee	= \$ 750
Hearing process fee	= \$ 1,700
Total Member Fees	= \$ 3,550

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

February 26 – 27, 2004, adjournment by Respondent	= waived
---	----------

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Three (3) Pre-hearing sessions with Panel @ \$ 750	= \$ 2,250
Pre-hearing conferences:	
June 16, 2003	1 session
November 18, 2003	2 sessions

Seven (7) Hearing sessions @ \$ 750	= \$ 5,250
Hearing Dates:	
June 8, 2004	2 sessions
June 9, 2004	3 sessions
June 10, 2004	2 sessions

Total Forum Fees	= \$ 7,500
------------------	------------

The Panel has assessed \$ 7,500 of the forum fees to Respondent.

FEE SUMMARY

1. Claimant is assessed and shall pay the following fees:

Initial Filing Fee	= \$ 225
Total Fees	= \$ 225

Less payments	= \$ 975
Refund owed to Claimant	= \$ 750

2. Respondent is assessed and shall pay the following fees:

Member Fees	= \$ 3,550
Forum Fees	= \$ 7,500
Total Fees	= \$ 11,050
Less payments	= \$ 3,550
Balance Due NASD Dispute Resolution	= \$ 7,500

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

ARBITRATION PANEL

Nickolas F. Monteforte, Esq.	-	Public Arbitrator, Presiding Chairperson
Dolores Williams Trojak, CPA	-	Non-Public Arbitrator, Panelist

Concurring Arbitrators' Signatures

Nickolas F. Monteforte, Esq.
Public Arbitrator, Presiding Chairperson

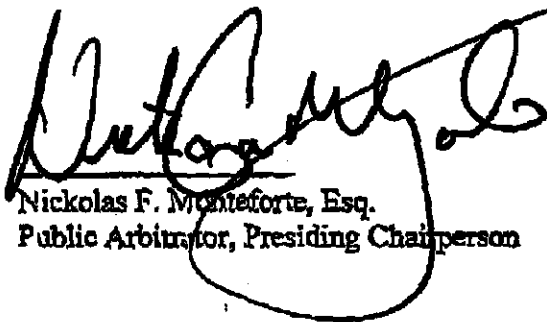
Signature Date

Dolores Williams Trojak, CPA
Non-Public Arbitrator, Panelist

Signature Date

Date of Service (For NASD Dispute Resolution office use only)

Concurring Arbitrators' Signatures



Nickolas F. Monteforte, Esq.
Public Arbitrator, Presiding Chairperson

June 16, 2004
Signature Date

Dolores Williams Trojak, CPA
Non-Public Arbitrator, Panelist

Signature Date

June 22, 2004
Date of Service (For NASD Dispute Resolution office use only)

Concurring Arbitrators' Signatures

Nickolas F. Monteforte, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

Dolores Williams Trojak, CPA
Dolores Williams Trojak, CPA
Non-Public Arbitrator, Panelist

June 22nd, 2004

Signature Date

June 22, 2004

Date of Service (For NASD Dispute Resolution office use only)