



N.A.S.D. AWARD

Arbitration

NATIONAL ASSOCIATION OF SECURITIES DEALERS

National Association of
Securities Dealers, Inc.
NASD Financial Center
33 Whitehall Street
New York, New York 10004

In the Matter of the Arbitration Between

Name of Claimant(s)

Donald E. Massey; Don Massey Cadillac Inc.
Don Massey Cadillac, Inc. Revised &
Amended Employees' Profit Sharing Plan & Trust

CONSOLIDATED MATTERS

#89-02952; #89-89-02953

#89-02949

ind case

Name of Respondent(s)

PaineWebber, Inc.
Michael Alioto

REPRESENTATION

For Claimants: Mark J. Briol, Esq. of Briol & Wilmes.

For Respondent, PaineWebber, Inc.: Joseph F. Generelli, Esq.

Respondent, Michael Alioto, appeared pro se.

CASE INFORMATION

Statement of Claim filed: Case #89-02949-10/20/89.
Case #89-02952-10/23/89.
Case #89-02953-10/23/89.

Claimant's Submission Agreement signed on: Case #89-02949-10/19/89
Case #89-02952-10/19/89
Case #89-02953-10-19-89

Respondent, PaineWebber, Inc.'s Acknowledgment for Corporation and Submission
Agreement signed by John A. Borgese on: Case #89-02949-1/12/90
by Joseph Generelli on: Case #89-02952-3/21/90
by John A. Borgese on : Case #89-02953-2/05/90

Respondent, Michael Alioto's Submission Agreement signed:
Case #89-02949-03/07/91
Case #89-02952-03/07/91

HEARING INFORMATION

Hearing Dates: March 7, 1991-Two (2) Sessions

March 8, 1991-Two (2) Sessions

June 13, 1991-One (1) Session

August 29, 1991-Two (2) Sessions

August 30, 1991-Two (2) Sessions

Total number of hearing sessions - Nine (9)

Hearing Location: Southfield, MI

CASE SUMMARY

Three separate cases were instituted against the Respondents by: The Don Massey Cadillac, Inc., Revised and Amended Employees' Profit Sharing Plan & Trust (the Profit Sharing Plan); Donald E. Massey, Individually; and Don Massey Cadillac, Inc. The Cases were consolidated for hearing.

Claimants alleged that Respondents:

1. Violated Section 12(2), 1933 Securities Act, 15 USC 77(2);
2. Violated Section 17(a), 1933 Securities Act, 15 USC 77Q(a);
3. Violated Section 10(b), Securities Exchange Act of 1934, 15 USC 78J(b);
4. Violated Section 20(a), Securities Exchange Act of 1934; 15 USC 78t;
5. Violated Rule 9b, 17 CFR 240.9b;

6. Violated Rule .10-b-5, 17 CFR .10b-5;
7. Violated Section 1962(a)(c)(d), Racketeering Influence in Corrupt Organizations (RICO), 18 USC 1962(c) (a);
8. Violated Rule 401 New York Stock Exchange Rules on Conduct of Accounts;
9. Violated Rule 405 New York Stock Exchange Rules on Conduct of Accounts;
10. Violated Rule 408 New York Stock Exchange Rules on Conduct of Accounts;
11. Violated Article III, Section 2, National Association of Securities Dealers' Rules of Fair Practice;
12. Violated Michigan Uniform Securities Act, Section 101, MCL 451.501;
13. Violated Michigan Uniform Securities Act, Section 102, MCL 451.502;
14. Violated Michigan Uniform Securities Act, Section 410, MCL 451.810;
15. Committed Common Law Fraud;
16. Were Negligent;
17. Breached Common Law Fiduciary Obligations; and
18. Breached Fiduciary Duties under ERISA, 29 USC 404(a).

Claimants alleged that the specific acts constituting violations of the foregoing statutes and rules were as

follows:

1. Misrepresenting or failing to disclose risks inherent in the trading of naked options and other high risk securities;
2. Placing a substantial portion of the Profit Sharing Account in high risk securities and engaging in the trading of naked options unsuitable for the Profit Sharing Investment objectives;
3. Engaging in excessive trading in order to increase commissions;
4. Failing to follow industry and regulatory rules, policies and practices with respect to the Retirement Plan;
5. Failing to sell securities which had become improper to hold, exposing the accounts to undue risk;
6. Failing to develop a logical pattern of trading and disclosing to Claimants the pattern of trading;
7. Engaging in unauthorized trading;
8. Failure of Paine Webber to adequately supervise the activities of Michael Alioto;
9. Failure to perform statutory and common law fiduciary duties; and
10. Failing to provide options disclosure documents.

Respondent Paine Webber answered and admitted that three separate accounts were opened (i.e. one for each Claimant)

and that Donald Massey, the individual, was the Trustee of the Profit Sharing Plan. Paine Webber asserted that the losses which occurred in each account were the result of legitimate market fluctuations and/or unforeseeable market conditions.

Respondent Michael Alioto filed no pleadings.

Respondent Paine Webber filed cross claims for indemnity and contribution against Donald Massey.

RELIEF REQUESTED

In all three cases, Claimants requested a Judgment against Respondents, jointly and severally, for actual damages, trebled as provided in RICO; commissions, fees and interest charges, transfer taxes; punitive or exemplary damages; interest, costs and actual attorney fees.

Respondent, Paine Webber, filed two cross claims against the Claimants. In the case filed by the Corporation, Paine Webber filed a third party claim against Donald Massey, individual, as Agent and Representative of Don Massey Cadillac, Inc. for the full amount of any award, because Donald Massey had a fiduciary relationship with the Corporation and was responsible for supervising, directing and approving all trading in the corporate account. Further, it was asserted that if Paine Webber was liable to the Corporation, its liability was a result of following directions of Donald Massey on behalf of the Corporation.

In answer to this cross claim, Claimant Corporation asserted that a claim for breach of fiduciary duty may only be brought by a shareholder of a Corporation, not a third party.

Respondent, Paine Webber, also filed a cross claim against Donald Massey, Trustee of the Profit Sharing Plan, for the full amount of any award given in favor of the Plan. Claimant responded that such a claim could only be brought by a participant, a beneficiary, or a Fiduciary of the Plan.

DECISION

Previous to the commencement of hearings, the Arbitrators reviewed the pleadings, motions and correspondence. Hearings were held on March 7, 1991, March 8, 1991, June 13, 1991, August 29, 1991 and August 30, 1991. The Arbitrators held two sessions following conclusion of the hearings in preparing their decision.

The Arbitrators find as follows:

1. Respondents did not misrepresent or fail to disclose risks inherent in the trading of naked options and other high risk securities.

2. Respondents did not engage in excessive trading in order to increase commissions.

3. Respondents did not fail to follow "established and accepted industry and regulatory rules, policies and practices" concerning naked option trading for ERISA-Regulated Retirement Plans.

4. Respondents did not fail to sell securities in an account which had become improper to hold.

5. Respondents did not fail to develop a logical pattern of trading nor did Respondents fail to disclose the plan and pattern of trading.

6. Respondents did not engage in unauthorized trading.

7. Respondents did not fail to provide option disclosure documents.

8. Respondents did not violate Section 1962(a)(c)(d) Racketeering Influence in Corrupt Organizations (RICO), 18 USC 1962.

9. Respondents did place a substantial portion of the Profit Sharing Plan account funds in high risk securities and engaged in trading of naked options unsuitable for the Profit Sharing Plan.

10. Respondent, Paine Webber, did fail to adequately supervise the activities of Michael Alioto with respect to the Profit Sharing Plan.

11. Respondents did breach their statutory fiduciary duties with respect to the Profit Sharing Plan.

12. Respondents did breach their common law fiduciary duties with respect to the Profit Sharing Plan.

13. Paine Webber, Michael Alioto and Donald Massey were fiduciaries of the Profit Sharing Plan under the provisions of ERISA and the Plan. ERISA describes a fiduciary as follows:

a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so...

The Profit Sharing Plan and Trust describes a fiduciary as follows:

1.13 "Fiduciary" means any person who (a) exercises any discretionary authority or discretionary control respecting management of the Plan or exercising any authority or control respecting management or disposition of its assets, (b) renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of the Plan or has any authority or responsibility to do so, or (c) has any discretionary authority or discretionary responsibility in the administration of the Plan, including, but not limited to, the Trustee, the Employer and its representative body, and the Administrator.

14. The cross claim of Paine Webber against the Trustee, Donald Massey, is not barred. Donald Massey is liable under ERISA as a fiduciary for contribution to Defendant, Paine Webber, and is also liable to contribute to Paine Webber under the theory of breach of common law fiduciary duty and negligence. 29 USC 1105(a) & (b) provides:

(a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another

fiduciary with respect to the same plan in the following circumstances: (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (2) if, by his failure to comply with section 404(a)(1)[29 USCS 1104(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach. (2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) or any other provision of this part.

15. Donald Massey was negligent in that he didn't advise Respondents that the Profit Sharing Plan assets were too limited for the leverage, and he failed to advise the brokers of the Profit Sharing Plan's amendment prohibiting trading in naked puts. Also, he breached his fiduciary duties as Trustee. 29 USC 1104(a)(1)(A), (B), (C), & (D) provide:

A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and - (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (D) in accordance with the

documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

16. Respondent, Paine Webber, was negligent (i) under the theory of respondeat superior with respect to the actions of Michael Alioto and Al Paulikas for failure to know the amount and nature of the limited Profit Sharing Plan's assets before permitting trading in naked puts; (ii) for failure to follow Paine Webber rules and regulations, and (iii) for failure to have the Senior Registered Options Principal approve trading in naked puts.

17. Respondent, Michael Alioto was negligent for (i) failure to satisfy himself that the Profit Sharing Plan permitted trading in naked puts and had adequate collateral, (ii) failure to know the total assets of the Profit Sharing Plan, failure to have trading in naked puts approved by the legal advisor for Paine Webber, and (iii) for continuing option trading contrary to directions of Paine Webber.

18. In light of the high leverage and known assets of the Profit Sharing Plan, selling naked puts by the Profit Sharing Plan was risky and unsuitable. The Profit Sharing Plan did not have the financial capacity and liquidity to meet margin requirements and to buy the underlying interests. In light of the high leverage, Respondents had a duty to know the assets in the Profit Sharing Plan.

19. Under ERISA, a fiduciary who is guilty of a breach of fiduciary duties must make good the losses and restore profits which would have been made. 29 USC 1109(a) provides:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary...

20. An award is entered in favor of Claimant, Don Massey Cadillac, Inc. Revised And Amended Employees' Profit Sharing Plan and Trust, against Paine Webber and Michael Alioto in the sum of \$577,370.00 plus interest of \$212,151.24 or a total of \$789,521.24. Paine Webber has a right of contribution from Donald Massey, individually in the sum of \$263,174.00 and against Michael Alioto in the sum of \$263,174.00. To assist in allocating the award among the appropriate participants in the Profit Sharing Plan, as they may have changed from year to year, statutory interest is awarded and computed as follows:

INTEREST

11-1-87 - 12-31-87	8.5%	x 577,370	6 =	\$ 8,179.41
1-1-88 - 6-30-88	9.39%	x 557,370	2 =	27,107.52
7-1-88 - 12-31-88	9.21%	x 577,370	2 =	26,587.89
1-1-89 - 6-30-89	10.05%	x 577,370	2 =	29,012.84
7-1-89 - 12-31-89	10.105%	x 577,370	2 =	29,171.62
1-1-90 - 6-30-90	9.015%	x 577,370	2 =	26,024.95
7-1-90 - 12-31-90	9.538%	x 577,370	2 =	27,534.78
1-1-91 - 6-30-91	9.26%	x 577,370	2 =	26,732.23
6-30-91 - 9-30-91	8.175%	x 577,370	4 =	<u>11,800.00</u>
				\$212,151.24

\$212,901
577,370
\$789,521 3 = \$263,174.00

Statutory Interest (MCL 600.6013(5)) shall continue until the Award is paid.

21. Michael Alioto filed no pleadings and has no right to contribution.

22. This Award shall inure to the benefit of all participants in the Profit Sharing Plan except Donald E. Massey. Donald E. Massey shall receive no money from this Award.

23. The Arbitrators find no cause of action for the claims of Donald E. Massey, individually and Don Massey Cadillac, Inc.

24. Each Party shall be responsible for its own attorneys fees and costs.

25. All Claims for Punitive Damages are dismissed.

FORUM FEES

Pursuant to Section 43(c) and 43(d) of the Code of Arbitration Procedure, the following Forum Fees are assessed:

9 sessions X \$1,000.00 = \$9,000.00.

Forum fees assessed against:

1- Claimants, in the amount of \$3,000.00; however, Claimants may use their \$3,000.00 hearing session deposit to offset this fee, thereby Claimant is assessed no forum fees;

2- Respondent, PaineWebber, Inc., in the amount of \$3,000.00; however, Respondent, PaineWebber, Inc., may use its \$2,600.00 hearing session deposit to offset this fee, thereby PaineWebber is assessed forum fees in the amount of \$400.00;

3- Respondent, Michael Alioto shall pay forum fees in the amount of \$3,000.00.

All fees are payable to the National Association of Securities Dealers, Inc.

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24. Each party shall be responsible for its own attorney fees and costs.

25. The costs of arbitration are assessed 1/3rd to Claimants, 1/3rd to Respondent, Paine Webber, and 1/3rd to Respondent, Michael Alioto.

Arbitrators:

H. Rollin Allen
H. Rollin Allen, Esq.

Carol M. Crosby
Carol M. Crosby, Esq.

William Lasko

Dated: Detroit, Michigan
September 30, 1991

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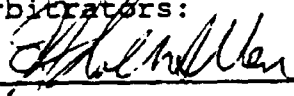
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Arbitrators:



Dated: Detroit, Michigan
September 30, 1991