

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of Arbitration Between

Name of Claimants

Sammie H. Nasur  
Robert Frolich  
Amelia Polakowski

vs.

Case # 92-01426

Name of Respondents

PaineWebber, Inc.  
Prescott, Ball & Turben  
Thomas Potter  
Jeffrey Rush

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**REPRESENTATION**

For Claimants Sammie H. Nasur, Robert Frolich and Amelia Polakowski, ("Claimants") John F. Chambers Esq. from the law firm of Chambers Steiner Mazur Ornstein and Amlin.

For Respondent, PaineWebber, Inc. ("PaineWebber") and Jeffrey Rush ("Rush"), Joseph F. Generelli, Esq., in-house counsel of PaineWebber.

For Respondent, Prescott, Ball & Turben ("Prescott"), William H. Falin, Esq. of the law firm of Arter & Hadden.

For Respondent, Thomas Potter ("Potter"), William S. Farr, Esq. from the law firm of Farr and Osterhouse.

**CASE INFORMATION**

Nasur's Statement of Claim filed on April 27, 1992.

Nasur's Submission Agreement signed on March 10, 1992.

Nasur's Amended Statement of Claim filed on May 1, 1992.

Polakowski's Statement of Claim filed on April 27, 1992.  
Polakowski's Submission Agreement signed on April 7, 1992.

Frolich's Statement of Claim filed on April 27, 1992.  
Frolich's Submission Agreement signed on April 7, 1992.

Joint Statement of Answer filed by PaineWebber and Jeffrey Rush on July 10, 1992.  
Jeffrey Rush's Submission Agreement signed on December 16, 1992.  
PaineWebber's Submission Agreement signed on December 16, 1992.

Prescott's Statement of Answer filed on August 12, 1992.  
Prescott's Submission Agreement signed on July 14, 1992.

Potter's Statement of Answer filed on August 6, 1992.  
Potter's Submission Agreement signed on August 5, 1992.

#### **HEARING INFORMATION**

Hearing Dates/Sessions:	April 13, 1993	-	2 sessions
	April 14, 1993	-	2 sessions
	October 26, 1993	-	2 sessions
	October 27, 1993	-	2 sessions
	October 28, 1993	-	2 sessions

Hearing Location: Embassy Suites, Southfield Michigan

#### **CASE SUMMARY**

Nasur alleged that he met Potter in July of 1990 when Potter was a broker in the Grand Rapids Michigan office of PaineWebber. Nasur alleged that Potter indicated that his success as a broker was a result of his acting as financial advisor to large corporations and banks and that he was able to allow a few selected people to ride the coat tails of these customers and make money. Nasur alleged that he informed Potter that as an investor he invested almost exclusively in certificated of deposits and that he wanted Potter to invest his money in AAA rated insured municipal bonds. Nasur alleged that he informed Potter that he intended to live off the interest from these bonds.

Nasur alleged that he told Potter that he knew nothing about the stock market and had never purchased stocks. Nasur alleged that he called Potter because he was confused about the

statement he had received from PaineWebber. Nasur alleged that Potter informed him that PaineWebber was having difficulty with their accounting firm in Chicago and they had 14 accounts that were all messed up and that Nasur's was one of them. Nasur alleged that he was told that one client had a \$12 million account that was messed up and that as soon as they clear up that client's account they were going to begin to work on Nasur's account. Nasur alleged that the confusion with his statements involved two stocks purchased by Potter and were no longer showing and he did not see any indication in the statements that they were sold. Nasur alleged that it turned out that these were options that had expired. Nasur alleged that PaineWebber failed to properly check Potter's background, properly supervise Potter's conduct and allowed him to trade in securities in Nasur's account that were unsuitable, allowed Potter to trade at Potter's discretion without a signed discretionary trading agreement, misrepresented the terms of Great Western Life Insurance Company and one of the stock purchased for Nasur by Potter and other violations of Federal securities laws.

Frolich alleged that he had an account with Prescott that was handled by Thomas Potter. Frolich alleged that the account was subsequently moved to PaineWebber. Frolich alleged that Potter never secured a discretionary trading agreement for Frolich, purchased unsuitable securities for Frolich, made misrepresentations to Frolich in violation of federal and state securities laws and disregarded Frolich's instructions that no more stock was to be purchased in Frolich's account. Frolich alleged that Potter withdrew funds from his account without authorization to purchase life insurance. Frolich alleged that PaineWebber is guilty of common law negligence, violation of Sections 10(b) and 20 of the Securities Exchange Act of 1934 by allowing Potter to churn Frolich's account and allowing Potter to purchase tax exempt municipal bonds on margin.

Polakowski alleged that shortly after the death of her husband, she became a client of Potter and Prescott. Polakowski alleged that Potter indicated that he would help her straighten out her financial affairs and that he was particularly qualified to do so because he had handled stock and life insurance pay outs after the death of his own father who had been employed at Ford Motor Company, as had the deceased husband of Polakowski. Polakowski alleged that Potter knew that she had absolutely no experience with the stock market. Polakowski alleged that Potter knew she was employed as a sales clerk at Sears and had a modest income. Polakowski alleged that, despite the knowledge of her income and unsophistication, Potter purchased highly risky scores in her account causing trading losses of \$42,861.77. Polakowski alleged that Potter purchased securities in her account without a signed trading authorization. Polakowski alleged that as a result of the unauthorized, improper and highly speculative purchases, she suffered a net real loss of \$64,431.36 during the period of time that her account was with Prescott and Potter. Polakowski alleged that Potter worked under the direct supervision of Jeffrey Rush who conspired with Potter to churn her account. Polakowski alleged that Prescott and PaineWebber are guilty of common law negligence, failing to properly check the background of Potter, failing to properly supervise the conduct of Potter and allowing Potter to trade at Potter's discretion without a signed discretionary trading agreement.

PaineWebber and Rush denied all allegations of misrepresentation, unauthorized trading, churning and suitability. PaineWebber and Rush maintained that Potter fully discussed each and every aspect of the investment strategy undertaken with Nasur, Polakowski and Frolich. PaineWebber and Rush maintained that Potter in no way misrepresented the type of investment strategy he was undertaking for any of the Claimants. PaineWebber and Rush maintained that Claimants' attempt to hold PaineWebber vicariously liable for an alleged act of its employee, Mr. Potter, is impermissible under RICO, and must be rejected. PaineWebber and Rush maintained that Claimants' statement of claim fails to state a claim upon which relief may be granted, that Claimants' alleged misfortune resulted in whole or in part from Claimants' acts or omissions and that Claimants through their own conduct, approved, authorized, and/or ratified Respondents actions and, accordingly, Claimants are estopped from recovery herein.

Respondent Prescott maintained that Potter handled Polakowski's account with reasonable skill, care and diligence and that he followed all of her instructions, knew her investment objectives and advised her of all risks associated with the trades she authorized. Prescott maintained that the evidence and applicable law preclude Claimant from recovering on her common-law negligence claims because she ratified and or failed to object to Potter's allegedly "unsuitable" or "unauthorized" trades and failed to use reasonable care to protect her own interests and mitigate her losses. Respondent alleged that Claimant's Section 20 and negligent "failure to supervise" claims against Prescott must also be denied because Prescott maintained and enforced a "good faith," reasonable and proper system for supervising and controlling Potter's conduct.

Potter denied the allegations of Nasur, Frolich and Polakowski and maintained that he discussed each and every aspect of the investment strategy undertaken with each of the Claimants. Potter maintained that each Claimant was fully apprised of the risks inherent in all transactions she voluntarily chose to engage in. Potter maintained that he did not churn any of the Claimants' accounts nor recommended or purchased any unsuitable stock for any of the Claimants. Potter maintained that the Claimant's claims failed to state claims upon which relief may be granted. Potter maintained that Claimants failed to use reasonable means to mitigate damages and through their own conduct approved, authorized and/or ratified Respondents' actions, accordingly, Claimants are estopped from recovery herein.

#### **RELIEF REQUESTED**

Nasur requested: \$593,212.14 in damages, \$30,000.00 to be paid by PaineWebber, Potter and Rush and interest cost and attorney fees.

Polakowski requested \$64,431.36 from Prescott; \$317,739.75 from PaineWebber, Potter and Rush and interest, costs and attorney fees.

Frolich requested: \$493,055.87 and interest, costs and attorney fees.

Potter requested: that claims be denied and that an assessment against the Claimants for attorney fees and costs be awarded to him.

PaineWebber and Rush requested: dismissal with prejudice with costs to be taxed against Claimants, including attorney fees.

Prescott requested: that claimants' claims be denied and costs be assessed against Claimants for the cost of these proceedings.

### **OTHER ISSUES CONSIDERED & DECIDED**

The parties have agreed to receive conformed copies of the award while the originals remain on file with the NASD.

Prescott settled all issues with Polakowski prior to the hearing. Polakowski, thus withdrew her claims against Prescott and Prescott was not required to attend the hearing. Nasur and Frolich had no claims against Prescott.

### **AWARD**

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

The Arbitrators have found liability against Respondents PaineWebber, and Thomas Potter, jointly and severally, in favor of the three respective Claimants, Robert Frolich, Sammie Nasur and Amelia Polakowski, in the following amounts:

1. <u>Robert Frolich:</u> Account losses including	
Interest to 9/30/91:	\$203,749.61
Interest at 5.75 % for	
2 years:	\$ 23,431.20
Total:	<u>\$227,180.81</u>
Plus ATTORNEY FEES	\$ 75,726.93

2.	<u>Sammie Nasur:</u> Account losses including	
	Interest to 9/30/91:	\$197,699.28
	Interest at 5.75 % for	
	2 years:	\$ 22,735.41
	TOTAL:	<u>\$220,434.69</u>
	Plus ATTORNEY FEES	\$ 73,478.23
3.	<u>Amelia</u> Account losses including	
	<u>Polakowski:</u> Interest to 9/30/91:	\$106,003.26
	Interest at 5.75 % for	
	2 years:	\$ 12,190.37
	TOTAL:	<u>\$118,193.63</u>
	Plus ATTORNEY FEES	\$ 39,397.87

The Arbitrators have found no liability against Respondent, Jeffrey Rush.

All forum fees should be assessed against Respondents, PaineWebber and Thomas Potter only. Respondents, PaineWebber and Thomas Potter shall reimburse Claimants for any fees already paid to the NASD.

The authority for the attorneys fees award (1/3 contingency fee permitted under Michigan law) is found, inter alia, at MCLA 541.810 (a), Prince v. Heritage, 109 Mich App 189 (1981), where the Court stated that "it is unfair, when broker misconduct is found to only return the customer's loss - less attorneys fees incurred to recover what never should have been lost in the first place. The only way to stop misconduct is to take the profit out of it."

#### **FORUM FEES**

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

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Non-refundable Filing Fee:	\$250.00
Hearing Session Fees:	\$1,000.00 x 10 sessions = \$10,000.00
Total:	\$10,250.00

1. PaineWebber and Thomas Potter shall pay \$10,250.00 to the NASD to represent the forum fees assessed for this arbitration. PaineWebber and Potter are liable jointly and severally.
2. PaineWebber and Potter shall satisfy the forum fees by a) reimbursing Claimants \$1,250.00, representing the filing fee and initial hearing session deposit already paid to the NASD and b) paying \$9,250.00 to the NASD representing the balance of the hearing session fees.

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

**CONCURRING ARBITRATORS' SIGNATURE**

  
Carole M. Crosby, Esq.

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Public Arbitrator

NASD Date of Decision: March 4, 1994


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**CONCURRING ARBITRATORS' SIGNATURE**

  
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Richard G. Porter, Esq.

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Public Arbitrator

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**CONCURRING ARBITRATORS' SIGNATURE**

  
Suzanne Slick

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Industry Arbitrator

NASD Date of Decision: March 4, 1994