

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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**In the Matter of the Arbitration Between**

**Name of Claimant(s)**

Daisy Wilson & The Estate of Emma Grant

94-01401

**Name of Respondent(s)**

Marc Jay Berman  
Aragon Financial Services, Inc.

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**REPRESENTATION**

For Claimants Daisy Wilson ("Wilson") and the Estate of Emma Grant ("Grant"): Russell C. Silverglate, Esq. of Dickenson, Murdoch, Rex and Sloan of Boca Raton, Florida.

For Respondent Marc J. Berman ("Berman"): Richard D. Nadel, Esq. of Nadel Group, P.A., Palm Beach Gardens, Florida.

For Respondent Aragon Financial Services, Inc. ("Aragon"): William Nortman, Esq., of Nortman & Bloom, P.A., Miami, Florida.

**CASE INFORMATION**

Statement of Claim filed: April 12, 1994.

Claimants' Submission Agreements signed on: February 1, 1994 by Carol Macay as personal representative for Grant and on April 13, 1994 by Henry Ruffolo as legal guardian for Wilson.

Statement of Answer filed by Respondent Aragon on: August 5, 1994 and amended March 24, 1995. Respondent Aragon's Submission Agreement signed on: August 4, 1994 by Douglas Lish on behalf of Aragon.

Respondent Berman's Statement of Answer filed on September 12, 1994 and amended November 1, 1995. Respondent Berman failed to sign a submission agreement as required by Rules 10301 and 10314 (formally Sections 12 and 25) of the NASD Code of Arbitration Procedure ("Code"). The panel finds that Berman was required to sign a Submission Agreement pursuant to Rules 10301 and 10314 of the Code since Berman was a person associated with an NASD member firm at the time the facts giving rise to the controversy occurred.

### **HEARING INFORMATION**

On October 23, 24 and 25, 1996 in Ft. Lauderdale, Florida, hearings lasting six sessions were conducted.

### **CASE SUMMARY**

Claimants made the following allegations: In August, 1991, Respondent Berman, a man in his early 40's and a broker with the predecessor firm to Aragon, was introduced to Claimants. At the time, Grant was 85 years of age and afflicted with Alzheimer's disease. Wilson, her younger sister, was 77 years of age and cared for Grant. Berman reviewed the blue chip stock certificates that the Claimants held in a joint safe deposit box and recommended that the sisters open two brokerage accounts with his firm, execute margin and option agreements for the accounts and liquidate the stock. On their new account forms, Claimants did not list "speculation" as one of their investment objectives. Almost immediately, Berman had Grant execute a power of attorney in favor of Wilson so that Wilson could authorize stock trades, on Berman's advice, for her and her sister's account. In September 1991, Berman began writing himself gift checks from Wilson's account, which were signed by Wilson and which Berman claimed were at Wilson's direction, totaling \$41,100.00 by October 1992.

Claimants alleged that for the ensuing nine months, Berman churned the Claimants accounts, executing numerous trades in risky, highly speculative securities, including index options and many penny stocks, despite the fact that such trades were grossly unsuitable for Claimants. Claimants alleged that all during this time, Berman was communicating on a daily basis with Wilson, sometimes more than once a day, and often visited her at her home for dinner. On at least one occasion, Claimants alleged that Berman brought champagne to have with dinner.

Claimants further alleged that, in May 1992, Berman had the Claimants execute additional new account forms which designated that Berman had trading discretion over their accounts. In the new forms, the Claimants again did not list "speculation" as one of their trading options. Through March 1993, Claimants alleged that Berman continued to churn their accounts.

Claimants further alleged that in October 1992, Wilson was found unconscious by her neighbor on her kitchen floor. She was committed to an institution under the Baker Act where she was diagnosed as being an alcoholic and having certain mental problems. Claimants alleged that during this time, Berman continued to make the described trades in Claimants' accounts and on January 27, 1993, Berman drove Wilson to the law office of Steven Rauch where Wilson executed a revocable trust and a new will. Under the will, the trust was the sole beneficiary and under the trust, Berman was the trustee and sole beneficiary. On February 5 and 6, 1993, less than two weeks later, Claimants alleged that Wilson was determined to be incapacitated and plenary guardianship was recommended.

Claimants next maintained that on August 10, 1995, the NASD District Business Conduct Committee for District 7 ("DBCC") rendered a decision on Complaint No. CO7940082, a complaint against Berman and his supervisors, which the NASD investigated in connection with

Berman's handling of the Claimants' accounts. The DBCC found that the facts of the case were "egregious" and, as a result, determined that Berman had violated Article III, Sections 1, 2, 28 and 33 of the NASD Rules of Fair Practice. Claimants averred that the DBCC's decision included the following sanctions: 1) Berman was censured; 2) Berman was fined \$25,000.00; 3) Berman was permanently barred from associating with any member of the NASD in any capacity whatsoever; and 4) Berman was ordered to disgorge commissions in the amount of \$42,291.35 (which amount Claimants allege was not paid).

Respondent Berman denied all allegations of wrongdoing and made the following allegations: In the summer of 1991, Carol Macay, Claimants' niece and her husband, Ed Macay, met Berman through a friend of Mrs. Macay's during a visit to Florida. Hearing that Berman was a stockbroker, they introduced him to the Claimants to review their financial matters. At the time in which Berman was recommended to become Claimants' stockbroker, Claimants each had general powers of attorney to each other drafted by a Florida attorney pursuant to which Wilson was caring for and handling the affairs of Grant. Respondent Berman alleged that the power of attorney was not in a form used by Aragon and a substantially similar power of attorney in the form required by Aragon was signed.

Respondent Berman further alleged that during the course of the relationship with the Claimants, all of the ordinary and usual account forms were reviewed with Wilson, Grant or both of them and signed by either or both of them in order for them to have an account with Aragon. During the course of the Claimants' relationship, Berman alleged that he kept in contact with Carol Macay and her husband telephonically, in writing and was otherwise available to them. Berman alleged that the first quarterly statement of 1992 was provided to Mr. and Mrs. Macay at their request and Mr. Macay was so pleased with the performance of the account he stated to Berman that he wished that he had more money available so Berman could handle an account for him. Respondent Berman alleged that it was not until the profits from the accounts waned somewhat that Mr. and Mrs. Macay voiced displeasure. Berman alleged that, ultimately, the total losses in Grant's account amounted to \$1,500.00 and the total losses in Wilson's account amounted to \$40,000.00 and that such losses occurred after these accounts were summarily liquidated against Berman's recommendations. Berman alleged that, had the accounts not been liquidated, the securities in the accounts would have become profitable shortly thereafter and there would not have been any losses but, rather, gains. Berman alleged that he intended that the recommendations would be profitable and in many cases believed in them to the extent that he handled his own personal account in the same manner, trade for trade.

Respondent Berman alleged that, ultimately, he and Wilson became good friends. Berman alleged that he ran errands for Wilson, helped her with her shopping and day to day affairs. Berman alleged that Mr. and Mrs. Macay, other than occasional visits once or twice a year, had largely abandoned Claimants. Berman maintained that from time to time, Wilson wrote checks to Berman as gifts for occasions such as his wedding and for a period of months, Berman refused these gifts, but, ultimately, he accepted them, as was the wish of Wilson.

Berman alleged that his friendship with Wilson grew as did the distance of Mr. and Mrs.

Macay such that, on January 27, 1993, after several meetings with attorney Steven Rauch, Wilson executed a pour over will and a living trust in order to avoid the expenses of probate and named Berman trustee and beneficiary. After years of litigation between Wilson and Grant's surviving relatives and Berman to set aside the will and trust, Respondent Berman alleged that there was a complete dismissal of the action by Wilson's guardian within ten days of Berman's Motion for Final Summary Judgment. Berman alleged that the pour over will and living trust are still deemed valid and operational in the State of Florida.

Berman alleged that, subsequent to the drafting of the will and trust, a petition for incapacity was filed regarding Wilson. Berman alleged that the doctors who examined Wilson recommended plenary guardianship and, in their depositions, both testified that they could not be certain as to the prior mental state of Wilson. Berman maintained that one doctor testified that he had no opinion as to Wilson's testamentary capacity and that it was entirely possible that she had prior testamentary capacity and that his examination was never conducted to determine testamentary capacity.

Berman also alleged that during the August 10, 1995 DBCC hearing on complaint No. CO7940082, neither Berman nor the supervisors of Aragon were represented and only 5 exhibits were presented in defense while forty-three exhibits were presented by the District Staff. While Berman recognizes the debts in relation to the DBCC's decision (\$25,000.00 fine and disgorgement of \$42,291.35 in commissions), Berman alleges that he has no present ability to pay them.

Respondent Aragon denied all allegations of wrongdoing on its part and asserted affirmative defenses including: to the extent Berman violated any law in connection with his activity, he was not authorized by Aragon to do so and acted outside the scope of his employment; approval; authorization; ratification; assumption of risk; waiver; and, the NASD Code of Arbitration Procedure Rule 10106 (formally Section 6) precludes the filing of an arbitration where there is a pending suit, action or proceeding against a party touching upon the matter referred to arbitration.

#### **RELIEF REQUESTED**

Claimants requested damages in excess of \$400,000.00 plus treble damages, punitive damages, attorney's fees, and costs. Additionally, in their closing arguments Claimants requested that the panel find that Berman's actions were based on Berman's fraud or defalcation while acting in a fiduciary capacity on behalf of Wilson and Grant, and, therefore, are a non-dischargeable debt of Respondent Berman pursuant to Section 523 of the United States Bankruptcy Code.

Respondent Berman requested dismissal of the claims.

Respondent Aragon requested dismissal of the claims.

**OTHER ISSUES CONSIDERED & DECIDED**

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. In either case, the parties have agreed to receive conformed copies of the Award while the original(s) remain on file with the NASD.

Prior to the hearing of this matter, the panel was informed that the Claimants had entered into a settlement agreement with Respondent Aragon Financial Services, Inc.. Consequently, Aragon was dismissed from this proceeding and the panel's findings and Award are limited only to Respondent Berman.

**FINDINGS OF FACT**

Based upon the evidence presented, the panel makes the following findings of facts and award.

**FACTS<sup>1</sup>**

In 1991, Emma Grant and Daisy Wilson, were elderly sisters who lived together in their condominium in Lake Park, Florida. At the time, Grant was 85 years old and Wilson was 77 years old and both women lived on a modest, fixed income derived from social security payments and dividends from blue chip stocks and utilities stocks.

On August 12, 1991, Grant executed a General Power of Attorney appointing Wilson as her Attorney-In-Fact with general powers of administration of Grant's finances. At the time, Grant was suffering from Alzheimer's disease.

Around this same time, Wilson and Grant were introduced to Respondent Berman by their niece, Carol Macay and her husband, Ed Macay. Carol Macay, who resided in Massachusetts, sought to locate someone in the Palm Beach area to assist Grant and Wilson in obtaining additional insurance benefits.<sup>2</sup> At the time, Berman was approximately 40 years old.

On August 14, 1991, Berman induced Wilson and Grant to open a margin account at Aragon

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<sup>1</sup> The Panel also adopts and incorporates the findings of facts and conclusions of law of the NASD District 7 Business Conduct Committee in Case Number CO7940082 dated August 12, 1995. The text of such findings can be found beginning on page 6 of the Committee's decision which is contained in Claimant's Exhibit #36 and which is attached hereto and incorporated by reference into this Award.

<sup>2</sup> At the time, Berman was also a financial planner and adviser employed with the NASD member firm, Aragon Financial, formerly known as NAP Financial.

with Berman designated as the account executive. Wilson and Grant<sup>3</sup> signed new account documentation including margin and option agreements. Thereafter, Wilson liquidated their holdings of primarily blue chip stocks and utilities stocks at Berman's request and purchased speculative securities based upon Berman's recommendations.<sup>4</sup> Initially, Berman made recommendations to Wilson but was later granted discretionary control by Wilson over both Wilson's and Grant's accounts and engaged in short-term trading, options trading, speculative trading, and trading on margin. During this period, Berman also became Wilson's confidant visiting her regularly and frequently at her home; sometimes the visits included champagne dinners. All this time Wilson continued to "care" for Grant, who was confined to a darkened bedroom with no working lightbulb, suffering from dementia.

Between September 30, 1991 and October 12, 1992, Berman wrote ten checks totaling \$41,100.00 made payable to himself from Wilson's personal checking account. Berman characterized these checks as "gifts" from Wilson to himself. The evidence reflects that Wilson signed each of these checks.<sup>5</sup>

On October 23, 1992, Wilson was found unconscious in her home suffering from excessive alcohol consumption. She was admitted to a hospital and diagnosed with organic brain syndrome with paranoid personality and alcohol dependence. Three days later, Wilson was committed to a mental health facility for follow-up treatment for alcohol dependence. Upon her release, Wilson returned home with care from a full time nurse.

Shortly thereafter, Berman persuaded Wilson to revise her estate planning documents. Berman thereafter located Stephen Rauch, an attorney specializing in estate planning, drove her to Mr. Rauch's office, and participated in the interview that discussed Wilson's estate planning objectives and intentions.<sup>6</sup> Berman eventually left the office, at which time, according to Rauch, Wilson again confirmed that she wished Berman to be the beneficiary of her Estate. Wilson told Rauch that Berman was good to her and that her relatives had not been good to her.

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<sup>3</sup> Berman had little to no contact with Grant since Grant was substantially incapacitated by Alzheimer's disease.

<sup>4</sup> Prior to this time, neither Grant nor Wilson had any experience in the stock market.

<sup>5</sup> Berman testified that at least one of the checks was given as a wedding gift. Notwithstanding that the receipt of such a gift was expressly prohibited by Berman's employer, Aragon, Berman had difficulty remembering his bride's name or the wedding date. Berman also contended that Wilson had him write the checks for her because she had trouble with her handwriting. This contention is suspect based upon Berman's admission that Wilson routinely paid her bills by writing a check.

<sup>6</sup> Attorney Rauch declared in his affidavit that Wilson "clearly indicated to me that she wished her property to be distributed to Marc J. Berman, and she wished Marc J. Berman to administer her Estate as Personal Representative and Trustee. Mrs. Wilson clearly and cogently indicated that she wished Marc J. Berman to be the beneficiary of her Estate and to administer same." (Affidavit of Stephen Rauch, Esquire.)

According to Rauch's affidavit, Wilson indicated that she felt no closeness to her relatives.<sup>7</sup>

Based upon that interview, Rauch concluded that Wilson was of disposing mind, responding to the interview in an independent and capable manner with logical reasoning for the purpose of her disposition. (Affidavit of Stephen Rauch, Esquire.) Accordingly, Rauch prepared a last Will and Testament of Wilson and Trust Agreement which Wilson executed on January 27, 1993.

As a result, Berman was appointed Trustee of Wilson's living trust into which Wilson's investment account was transferred. Berman also was named sole beneficiary under Wilson's revised Last Will.

Berman then accompanied Wilson to her local bank where her savings account was depleted of nearly \$73,085.00 by persons unknown.

On June 4, 1993, the Probate Division of the Circuit Court of Palm Beach County, Florida declared Wilson incapacitated and appointed Henry Ruffolo, Esquire, as plenary guardian. This arbitration was thereafter commenced by the guardians in fact.

#### DISCUSSION

In District Business Conduct Committee For District No. 7 v. Marc J. Berman, et al, case number CO7940082, dated August 10, 1995, the NASD District Conduct Committee entered an order censuring Respondent Berman and permanently barring him from association with any member of the NASD in any capacity as a result of his handling of the Claimants' accounts.<sup>8</sup> The Conduct Committee concluded that "the facts here present an egregious case . . . [in that] Respondent Berman demonstrated almost a total disregard for the suitability rule." That panel went on to conclude that "Plainly, these two elderly women would have been better off if they had left their stock certificates in a safe deposit box and continued blithely to collect the dividends. They should not have been trading on margin, they should not have been trading options (index options, no less!)[sic], they should not have been making quick in-and-out trades, they should not have been invested in penny stocks."

The District Panel found that Berman's conduct violated Article III, Sections, 1, 2, 28 and 33 of the NASD Rules. We need not readdress those issues decided by the District Panel as the evidence presented herein clearly supports those findings. As such, this panel takes arbitral notice of and adopts the District Panel's findings where applicable. However, this panel further

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<sup>7</sup> On examination by the panel, Rauch admitted that he was unaware of the \$41,000.00 "gifts" in checks given to Berman by Wilson or that Berman had written the checks to himself. Rauch testified that had he known about this, he would have considered more closely the issue of undue influence.

<sup>8</sup> Berman was also fined \$25,000.00 and ordered to repay to the Claimants the net commissions earned from trading their accounts.

finds that had Berman not churned the accounts and purchased unsuitable investments, the account value would be worth a total of \$285,023.00 as of October 25, 1996 (\$196,627 for Wilson and \$89,396.00 for Grant.)<sup>9</sup>

Additionally, this panel believes it appropriate to address the inference raised by the evidence that Berman exerted undue influence on Wilson and Grant to obtain control over their finances. We find that Berman's conduct amounted to more than mere simple influence over his elderly clients. The greater weight of the evidence suggests that Wilson and Grant were both of questionable mental and physical condition at the time Wilson confided in Berman and eventually was convinced by Berman to allow him to take complete control over their finances.

Berman conducted himself in an artful and fraudulent manner to exploit their accounts to his gain. He obtained \$41,000.00 in "gifts" from Wilson by what appears to this panel to have been deception and false pretenses. He procured exclusive testamentary rights as trustee and sole beneficiary of Wilson's estate in a manner that appears rife with undue influence. Berman located and recommended the attorney who revised Wilson's will; drove her to the Attorney's office; participated in the interview; and was aware of the contents of the will prior to its execution and at the time Wilson expressed her desire to revise her will.

The evidence supports a finding that Wilson was not simply a woman obsessed with Mr. Berman's attention and kindness. Berman actively fostered a confidential relationship using deceptive and predatory tactics against an elderly woman who was preoccupied with the care of her incapacitated sister and who, herself, was of questionable mental capacity. This is borne out by the fact that Wilson was admitted to a psychiatric hospital and diagnosed with organic brain syndrome and alcohol dependency at or about the same time that Berman succeeded in obtaining control over her finances.

Berman's explanation to counter the inference raised and the evidence presented was not credible or corroborated by the evidence. As such, we find that the presumption of undue influence raised by Berman's conduct was never satisfactorily rebutted by Berman and that Berman did exert undue influence over Wilson and Grant in order to obtain control over their finances. As such, we conclude that the damages awarded herein are based on Berman's fraud or defalcation while acting in a fiduciary capacity on behalf of Wilson and Grant.

Based upon the foregoing, this panel makes the following award:

### **AWARD**

After considering the pleadings, the testimony and the evidence presented at the hearing and

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<sup>9</sup> Although the damages provided by the Claimants through expert testimony and based on the monthly statements in evidence, varied from the NASD Conduct Committee's findings, they are not refuted in that Respondent presented no contradictory evidence with respect thereto.



post-hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Berman is found liable and shall pay to Claimant Wilson the amount of \$195,627.00 and shall pay to Claimant Grant the amount of \$89,396.00 for a total due to Claimants of \$285,023.00. This amount shall be reduced by the amount of \$95,000.00 representing the settlement between Claimants and Respondent Aragon. Two-Thirds of this offset shall be allocated to Wilson and one-third shall be allocated to Grant.
2. Respondent Berman is also found liable for Civil Theft in relation to the \$41,100.00 in checks paid by Wilson to Berman pursuant to Chapter 772, Fla. Stats. and shall pay to Claimant Wilson the further amount of \$41,100.00.
3. Based on paragraph number (2) above, the panel finds that Respondent Berman is liable for Treble Damages pursuant to Chapter 772, Fla. Stats.. Berman shall, therefore, pay to Claimant Wilson the further amount of \$123,300.00 plus interest from October 25, 1996 until the award is paid at the legal rate prevailing in the State of Florida on the date of this award. The panel finds that Berman's conduct was willful, wanton, outrageous and oppressive and amounted to fraud and civil theft and that Berman used undue influence over Wilson.
4. In light of the panel's award of Treble Damages pursuant to Chapter 772, Fla. Stats, the panel declines to award any additional punitive damages and, therefore, Claimants' request for other punitive damages is denied.
5. The panel also finds that Berman is liable and shall pay to Claimants Wilson and Grant the further amount of \$42,291.35 for commissions paid. By this ruling the panel reaffirms the decision of the NASD District 7 Business Conduct Committee in case number CO7940082 dated August 10, 1995 which ordered Berman to disgorge said commissions. Although the panel is not requiring Berman to pay this amount twice, the panel finds that Berman has not yet complied with the Committee's order.
6. Respondent Berman is also found liable to Claimants for attorney's fees. The panel leaves the amount of such attorney's fees to be determined by a court of competent jurisdiction.

#### **OTHER COSTS**

1. Respondent Berman is also found liable and shall pay to Claimants the further amount of \$2,000.00 for expert witness costs.
2. Respondent Berman is also found liable and shall pay to Claimants the further amount of \$950.00 representing the \$750.00 hearing session deposit and the \$200.00 non-refundable filing fee previously paid by Claimants to the NASD.

**FORUM FEES**

Pursuant to Rule 10332(c) (formally Section 43(c)) of the Code of Arbitration Procedure, the panel has assessed forum fees in the amount of \$4,500.00 (six sessions x \$750.00 per session).

1. Respondent Berman is hereby assessed \$4,500.00 for which the NASD shall retain the \$750.00 previously deposited by Claimants in partial satisfaction thereof leaving a balance due to the NASD of \$3,750.00.

2. The NASD shall retain the \$200.00 non-refundable filing fee previously paid by Claimants.

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

Concurring Arbitrators' Signatures

Name

Public/Industry

\_\_\_\_\_/s/\_\_\_\_\_  
Seth L. Finkel, Esq.

Public/Chairman

\_\_\_\_\_/s/\_\_\_\_\_  
Susan N. Perkins, Esq.

Public

\_\_\_\_\_/s/\_\_\_\_\_  
Irving Hanzman

Industry

Date of Decision: February 18, 1997