

## NASD REGULATION AWARD

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In the Matter of the Arbitration Between

Name of Claimant

Rose Palano

95-01776

Name of Respondents

Dean Witter Reynolds Inc.  
Bailey, Martin & Appel Inc  
Mark Perron  
Howard Appel  
Donald Bailey  
Francis Martin  
Charles Marwell, III  
Stephen Harrington  
Financial Equities Resources, Inc.  
BMA Advisors, Inc.

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### REPRESENTATION

For claimant Rose Palano ("claimant") appeared Philip M. Giordano, Esq. of the law offices Giordano & Champa, PA located in Boston, Massachusetts.

For respondent Dean Witter Reynolds ("DWR") appeared Jody E. Forcheimer, Esq. of the law offices Bingham, Dana & Gould located in Boston, Massachusetts.

For respondents Bailey, Martin, & Appel, Inc. ("BMA"), Howard Appel ("Appel"), Charles Marwell, III ("Marwell"), Stephen Harrington ("Harrington"), Financial Equities Resources, Inc. ("FER"), and BMA Advisors, Inc. ("BMA Advisors") (collectively the "BMA respondents") appeared Daniel J. Dugan, Esq., of the law offices Spector Gadon & Rosen, PC located in Philadelphia, Pennsylvania.

For respondent Mark Perron ("Perron") appeared Michael V. Morisi, Esq. of the law offices Morisi & Associates, located in Quincy, Massachusetts.

Respondent Donald Bailey ("Bailey") appeared pro se.

Respondent Francis Martin ("Martin") did not enter an appearance in this matter.

### CASE INFORMATION

Statement of Claim was filed on: April 8, 1995.

Claimant's Submission Agreement was signed on: April 5, 1995.

Respondent DWR did not file a Statement of Answer or a properly executed Submission Agreement.

A Joint Statement of Answer was filed by the BMA respondents on: July 10, 1995.

BMA did not file a properly executed Submission Agreement.

Appel did not file a properly executed Submission Agreement.

Marwell did not file a properly executed Submission Agreement.

Harrington did not file a properly executed Submission Agreement.

FER did not file a properly executed Submission Agreement.

BMA Advisors did not file a properly executed Submission Agreement.

A Statement of Answer was filed by Perron on: June 5, 1995.

A Supplemental Statement of Answer was filed by Perron on: May 1, 1996.

Perron did not file a properly executed Submission Agreement.

A Statement of Answer was filed by Bailey on: December 3, 1996.

Bailey did not file a properly executed Submission Agreement.

Martin did not file a Statement of Answer or a properly executed Submission Agreement.

### HEARING INFORMATION

Hearing Dates/Sessions:	December 11, 1996	Two Sessions
	December 12, 1996	Two Sessions
	December 13, 1996	Two Sessions
	February 4, 1997	Two Sessions
	February 5, 1997	Two Sessions
	February 6, 1997	Two Sessions
	April 16, 1997	One Session
	April 17, 1997	Two Sessions
	May 20, 1997	Two Sessions
	May 21, 1997	Two Sessions

The hearings held on December 11, 1996, May 20, and 21, 1997 were conducted at the offices of NASD Regulation, Inc. located in Boston, Massachusetts.

The hearings held on December 12, and 13, 1996 were conducted at the Ritz Carlton located in Boston, Massachusetts.

The hearings held on February 4, 5, and 6, 1997, April 16, and 17, 1997 were conducted at the offices of the American Arbitration Association located in Boston, Massachusetts.

### CASE SUMMARY

Claimant alleged that, in or about 1987, when Perron first became her broker, she advised him that she had limited financial sophistication and was extremely conservative in her objectives and approach. In addition, claimant alleged that she informed Perron that she did not want high risk, non-liquid, short term or speculative investments in her portfolio. Claimant also alleged that she informed Perron that she sought to protect her principal as invested, with reasonable and conservative growth and capital appreciation. Claimant contended that she trusted and relied upon the advice of Perron and that, as time passed, Perron became more involved with her financial affairs.

Claimant maintained that, in or about 1988, when Perron left E.F. Hutton and moved to DWR, she transferred her investments to DWR. Claimant contended that while employed by DWR, Perron began to solicit her to purchase shares of an unsuitable investment and improperly solicited her to make investments on the basis of unsubstantiated rumors and tips from sources at DWR. Claimant maintained that DWR failed to adequately supervise Perron's activities. Further, claimant maintained that when Perron moved from DWR to BMA, DWR improperly and fraudulently concealed Perron's activities from its customers, and did not inform or warn her of Perron's improper actions or of the circumstances regarding his departure.

In addition, claimant alleged that, in or about May 1989, after Perron left DWR and went to BMA she transferred her portfolio to BMA. Claimant contended that, in or about April 1989, Perron failed to inform her that BMA and its principals, including Appel, Bailey and Martin, had a lengthy disciplinary history. Claimant alleged that the BMA respondents failed to advise her of the conflicts of interest existing between Appel, Bailey and Martin and some of her investments. Claimant also alleged that the BMA respondents never told her that one of the investments recommended by Perron and Marwell was a "penny stock" with substantial risk and which was extremely speculative and likely to result in the loss of her entire investment. Claimant further contended that, between September 1989 and March 1995, the BMA respondents completely failed to apprise claimant as to the investments being made or as to material events which occurred with respect to her investments.

The BMA respondents and Bailey maintained that the NASD had no jurisdiction to arbitrate any claims in this matter because there was no enforceable arbitration agreement running between them and claimant. In addition, the BMA respondents and Bailey contended that NASD had no jurisdiction to arbitrate any claims in this matter because there were no claims against them which survived applicable statutes of limitations.

Marwell alleged that claimant was never his client and that he only spoke with her on one occasion, that he never gave claimant investment advice, and that he never received any type of compensation with respect to claimant's account. In addition, Marwell contended that he was never an officer, official or signer for BMA and that the title of Vice President was only an honorary title due to his experience.

Perron alleged that because claimant initially told him that her investment objectives were to earn a higher rate of return than she was earning in bank accounts or certificates of deposit and that she wanted to diversify her investments, he advised claimant to invest in two mutual funds. Perron contended that, in early 1987, claimant advised him that she wanted to become more aggressive with her investment objectives and that, as a result, he explained that she could buy individual stocks. Perron further contended that he explained to claimant that there was greater risk in owning individual stocks as opposed to mutual funds and that claimant accepted those risks. Perron maintained that, based upon his knowledge of his customer, he made suggestions about investments but, it was claimant who made the ultimate decision about where to invest her money. In addition, Perron maintained that, as his relationship with claimant evolved, claimant developed a stronger tolerance for risk and he executed transactions reflecting those preferences.

### **RELIEF REQUESTED**

Claimant requested that the panel:

- a. determine that respondents' liability for all damages, losses, and costs alleged herein was joint and several;
- b. determine and award claimant the actual losses sustained by her as a result of the respondents' violations of both the federal and state securities laws, as set out herein;
- c. determine and award claimant the actual losses sustained by her as a result of all of the causes of action, including but not limited to respondents' breach of fiduciary duty, breach of contract, fraud and deceit, negligent misrepresentation, breach of duty of reasonable care, respondeat superior, agency, and breach of duty to supervise;
- d. determine the damages sustained by claimant as a result of the respondents' violations of M.G.L. c. 93A, SS2 & 9 and award the claimant treble damages, costs, and reasonable attorneys' fees;
- e. determine and award the claimant the amount of each respondents' unjust enrichment resulting from their violations of federal and state securities laws and state common laws, as set out above;
- f. determine and award the claimant the losses suffered by her as a result of the lost economic opportunity and/or market-adjusted damages caused by respondents' violations of federal and state securities laws, and state common law, as set out above;
- g. award the claimant her costs in bringing this action, including reasonable attorneys' fees;
- h. award the claimant punitive damages in an amount to be determined; and

- i. any additional relief which the panel deemed just and proper.

The BMA respondents requested that the Statement of Claim be dismissed in its entirety and that the cost of this proceeding be assessed against the claimant.

Perron requested that all claims be dismissed in their entirety.

Bailey requested that the Statement of Claim be dismissed in its entirety and that the cost of this proceeding be assessed against claimant.

Marwell requested that he be dismissed from this action.

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

The panel reviewed all submissions regarding Respondents' Motion to Strike and Disregard Claimant's Post-Hearing Memorandum and, after due deliberation, determined to grant this motion.

By letter dated October 21, 1995, claimant dismissed all claims against DWR. Therefore, no representative for DWR appeared at the hearing.

The panel made the following determinations concerning respondents DWR, BMA, Appel, Marwell, Harrington, FER, BMA Advisors, and Perron who did not file a Submission Agreement in this matter; concerning respondent Bailey who did not file a Submission Agreement and did not appear at the hearing in this matter; and concerning respondent Martin who did not file a Statement of Answer or a Submission Agreement and who did not appear at the hearing in this matter.

1. Pursuant to Rule 10101 of the Code of Arbitration Procedure (the "Code"), the panel found subject matter jurisdiction over this entire controversy.
2. The panel found that Appel, Marwell, Harrington, Perron, Bailey and Martin were persons associated with a member of the NASD at the time this controversy arose. In addition, the panel found that DWR, BMA, FER, and BMA Advisors were members of the NASD at the time this controversy arose. Accordingly, the panel found personal jurisdiction over DWR, BMA, Appel, Marwell, Harrington, FER, BMA Advisors, Perron, Bailey and Martin pursuant to Rule 10301 of the Code.
3. The panel found that Appel, Marwell, Harrington, Perron, Bailey, Martin, DWR, BMA, FER, and BMA Advisors were required to file a Statement of Answer and a Submission Agreement with NASD Regulation pursuant to Rule 10314(b) of the Code. In this regard, the panel found that the Statement of Claim was properly served upon Appel, Marwell, Harrington, Perron, Bailey, Martin, BMA, FER, and BMA Advisors pursuant to Rule 10314(a) of the Code.

4. In addition, in accordance with Rules 10310, 10315 and 10318 of the Code, the panel found that NASD Regulation provided Bailey and Martin with "due notice" of the hearings conducted in this matter by regular and certified mail. The panel further determined to proceed with the hearing without Bailey and Martin whose absences were unexcused.

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 originals remain on file with the NASD.

#### **AWARD**

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

1. Compensatory damages totaling **SEVENTY THOUSAND DOLLARS (\$70,000.00)** plus interest at the statutory rate of 12% from date of award until date of payment are hereby awarded to claimant and are to be allocated amongst respondents as follows:
  - a. Perron be and hereby is liable for and shall pay to claimant the sum of **THREE THOUSAND FIVE HUNDRED DOLLARS (\$3,500.00)** plus interest at the statutory rate of 12% from date of award until date of payment.
  - b. Harrington be and hereby is liable for and shall pay to claimant the sum of **TWENTY TWO THOUSAND DOLLARS (\$22,000.00)** plus interest at the statutory rate of 12% from date of award until date of payment.
  - c. Appel and BMA be and hereby are jointly and severally liable for and shall pay to claimant the sum of **FORTY FOUR THOUSAND FIVE HUNDRED DOLLARS (\$44,500.00)** plus interest at the statutory rate of 12% from date of award until date of payment.
2. Claimant's request for punitive damages is hereby denied.
3. Claimant's request for treble damages is hereby denied.
4. Attorneys' fees totaling **TWENTY THOUSAND DOLLARS (\$20,000.00)** are hereby awarded to claimant and are to be allocated amongst respondents as follows:
  - a. Perron be and hereby is liable for and shall pay to claimant the sum of **One Thousand Dollars (\$1,000.00)**.

b. Harrington be and hereby is liable for and shall pay to claimant the sum of Six Thousand Four Hundred Dollars (\$6,400.00).

c. Appel and BMA be and hereby are jointly and severally liable for and shall pay to claimant the sum of Twelve Thousand Six Hundred Dollars (\$12,600.00).

5. All other requests are hereby denied.

#### FORUM FEES

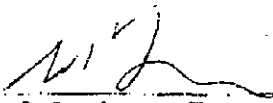
Pursuant to Rule 10332(c) of the NASD Code of Arbitration Procedure, the undersigned arbitrators have determined that NASD Regulation, Inc. shall retain the \$200.00 non-refundable filing fee previously paid by claimant and have assessed the following forum fees:

19 Hearing Sessions x \$750.00	=	\$14,250.00
member surcharge for DWR	=	\$ 500.00
member surcharge for BMA	=	\$ 500.00
Total Forum Fees	=	\$15,250.00
<u>Hearing Session Deposit</u>	=	<u>\$ 750.00</u>
Total Forum Fees Outstanding	=	\$14,500.00

1. Respondent Mark Perron be and hereby is liable for and shall pay the sum of \$675.00, representing 5% of the total forum fees outstanding.
2. Respondent Stephen Harrington be and hereby is liable for and shall pay the sum of \$4,320.00, representing 32% of the total forum fees outstanding.
3. Respondent Howard Appel be and hereby is liable for and shall pay the sum of \$8,505.00, representing 63% of the total forum fees outstanding.
4. Respondent Dean Witter Reynolds be and hereby is liable for and shall pay the sum of \$500.00, representing the member surcharge.
5. Respondent BMA be and hereby is liable for and shall pay the sum of \$500.00, representing the member surcharge.

Fees are payable to NASD Regulation, Inc.

ARBITRATORS' SIGNATURES

  
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Mark J. Levinson, Esq.  
Chairperson-Public Arbitrator

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Edgar H. Scholl  
Public Arbitrator

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Richard A. Baum  
Industry Arbitrator

Date of Decision: December 30, 1997



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Mark J. Levinson, Esq.  
Chairperson-Public Arbitrator

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Edgar H. Scholl  
Public Arbitrator

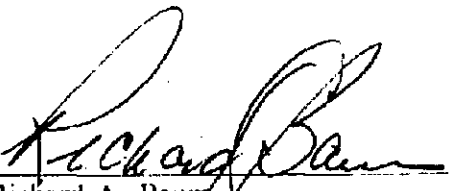
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Richard A. Baum  
Industry Arbitrator

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Richard A. Baum  
Industry Arbitrator

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