

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Mary Krill-Eriksen

Case Number: 18-03313

vs.

Respondents
Berthel Fisher & Company Financial Services, Inc.,
John W. Carroll,
Brian M. Lehner,
Berthel Fisher & Company,
BFC Planning, Inc.,
Lehner Capital Management, LLC,
Lehner Carroll Shope Capital Management, and
Lehner Investment Corp.

Hearing Site: Cleveland, Ohio

Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

Nature of the Dispute: Customer vs. Member, Associated Persons, and Non-Members

This case was decided by a majority-public panel.

REPRESENTATION OF PARTIES

For Claimant Mary Krill-Eriksen (“Claimant”): Dennis E. Murray, Jr., Murray & Murray Co., L.P.A., Sandusky, Ohio.*

For Respondents Berthel Fisher & Company Financial Services, Inc. (“BFCFS”) and John W. Carroll (“Carroll”): Cory D. Olson, Esq., Anthony Ostlund Baer & Louwagie P.A., Minneapolis, Minnesota.

For Respondent Brian M. Lehner (“Lehner”): Scott C. Matasar, Esq. and Kevin S. Lampone, Esq., Matasar Jacobs LLC, Cleveland, Ohio.

Respondents Berthel Fisher & Company (“BFC”), BFC Planning, Inc. (“BFCPI”), Lehner Capital Management, LLC (“LCM”), Lehner Carroll Shope Capital Management (“LCSCM”), and Lehner Investment Corp. (“LIC”) did not enter an appearance in this matter.

*FINRA recorded the appearance of Claimant’s counsel at the time of filing of the Statement of Claim. Counsel’s representation of Claimant may have ended with the parties’ settlement.

Please see the Other Issues Considered and Decided section of this Award for information on whether Claimant's counsel appeared at the expungement hearing.

CASE INFORMATION

Statement of Claim filed on or about: September 21, 2018.
Claimant signed the Submission Agreement: September 20, 2018.

Statement of Answer filed by BFCFS and Carroll on or about: June 13, 2019.
BFCFS and Carroll signed the Submission Agreement: June 13, 2019.

Statement of Answer filed by Lehner on or about: September 20, 2019.
Lehner signed the Submission Agreement: September 28, 2019.

BFC, BFCPI, LCM, LCSCM, and LIC did not file a Statement of Answer or sign the Submission Agreement.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: negligence/suitability; negligent hiring/supervision; fraud; and breach of fiduciary duty. The causes of action related to Claimant's allegation that portions of her portfolio were diverted into unsuitable investments, including business development corporations ("BDCs"), and that fraudulent documents were prepared to overstate Claimant's income and net worth in order to make the investments appear more suitable.

Unless specifically admitted in the Statement of Answer, BFCFS and Carroll denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

Unless specifically admitted in the Statement of Answer, Lehner denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested compensatory damages, punitive damages, interest, attorneys' fees, expenses, and any other relief the Panel deems just and equitable.

In the Statement of Answer, BFCFS and Carroll requested that the Panel dismiss BFC and BFCPI as improper parties to the claim, dismiss the claims against BFCFS and Carroll on the merits and with prejudice, assign all forum costs to Claimant, and grant such other and further relief as the Panel deems just under the circumstance.

In the Statement of Answer, Lehner requested expungement of all references to this arbitration from his registration records maintained by the Central Registration Depository ("CRD"); dismissal of all claims against him on the merits and with prejudice; assignment of all forum costs, other than costs related to expungement, to Claimant and/or BFCFS and Carroll; and any further relief the Panel determines is just and equitable.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

BFC, BFCPI, LCM, LCSCM, and LIC are not members or associated persons of FINRA and did not voluntarily submit to arbitration. Therefore, the Panel made no determination with respect to the claims against BFC, BFCPI, LCM, LCSCM, and LIC.

On May 10, 2021, Claimant dismissed her claims against BFCFS and Carroll with prejudice. Therefore, the Panel made no determination with respect to any of the relief requests contained in the Statement of Claim against BFCFS and Carroll.

Also on May 10, 2021, Lehner filed a request for an expungement hearing, to which no response was filed.

On May 11, 2021, Claimant dismissed her claims against BFC, Lehner, and BFCPI, with prejudice. Therefore, the Panel made no determination with respect to any of the relief requests contained in the Statement of Claim against BFC, Lehner, and BFCPI.

The Panel conducted a recorded, telephonic hearing on July 6, 2021, so the parties could present oral argument and evidence on Lehner's request for expungement.

Claimant, through counsel, participated in the expungement hearing but did not oppose the request for expungement.

The Panel reviewed Lehner's BrokerCheck® Report. The Panel noted that a prior arbitration panel or court has not previously ruled on expungement of the same occurrence in the CRD.

The Panel also reviewed the settlement documentation, considered the amount of payment made to any party to the settlement, and considered other relevant terms and conditions of the settlement. The Panel noted that the settlement was not conditioned on any party to the settlement not opposing the request for expungement and that Lehner did not contribute to the settlement amount.

In recommending expungement, the Panel relied upon the following documentary or other evidence: Statement of Claim, Lehner's BrokerCheck® Report, Lehner's Amended Prehearing Brief in Support of Expungement Relief Exhibits F-I, and Lehner's testimony.

The Award in this matter may be executed in counterpart copies.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and any post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. The Panel recommends the expungement of all references to the above-captioned arbitration (Occurrence Number 2002674) from registration records maintained by the CRD for Respondent Brian Michael Lehner (CRD Number 1985449) with the understanding that, pursuant to Notice to Members 04-16, Respondent Brian Michael Lehner must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to Rule 12805 of the Code of Arbitration Procedure (“Code”), the Panel has made the following Rule 2080 affirmative finding of fact:

The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

The Panel has made the above Rule 2080 finding based on the following reasons:

Claimant's claims arose out of four BDC investments. The evidence presented showed that the last of these investments was purchased in December 2013, at which time Carroll was Claimant's sole financial advisor at BFCFS. Lehner did not join BFCFS until June 2015. Further, the evidence presented showed that Lehner did not become associated with Claimant's account until 2017, after which he advised Claimant to consider divesting her investments in BDCs several times, but Claimant declined to do so. The evidence also showed that Lehner neither served in a supervisory role at BFCFS and nor did he ever supervise Carroll's activities.

2. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages, treble damages, and attorneys' fees, are denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

FINRA Dispute Resolution Services assessed a filing fee* for each claim:

Initial Claim Filing Fee = \$ 1,575.00

**The filing fee is made up of a non-refundable and a refundable portion.*

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as party, BFCFS is assessed the following:

Member Surcharge = \$ 1,900.00
Member Process Fee = \$ 3,750.00

Hearing Session Fees and Assessments

The Panel has assessed hearing session 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), which lasts four (4) hours or less. Fees associated with these proceedings are:

Five (5) pre-hearing sessions with the Panel @ \$1,125.00/session	= \$	2,250.00
Pre-Hearing Conferences: July 12, 2019	1 session	
April 21, 2020	1 session	WAIVED
November 10, 2020	1 session	WAIVED
November 18, 2020	1 session	WAIVED
June 15, 2021	1 session	
One (1) hearing session on expungement request @ \$1,125.00/session	= \$	1,125.00
Hearing: July 6, 2021	1 session	
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Total Hearing Session Fees	= \$	3,375.00

The Panel has assessed \$375.00 of the hearing session fees to Claimant.

The Panel has assessed \$375.00 of the hearing session fees jointly and severally to BFCFS and Carroll.

The Panel has assessed \$2,625.00 of the hearing session fees to Lehner.

All balances are payable to FINRA Dispute Resolution Services and are due upon receipt.

ARBITRATION PANEL

Jeffrey M. Bain	-	Public Arbitrator, Presiding Chairperson
Eileen B. Vernon	-	Public Arbitrator
William Joseph Baker	-	Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument, which is my award.

Concurring Arbitrators' Signatures

Jeffrey M. Bain

Jeffrey M. Bain
Public Arbitrator, Presiding Chairperson

07/14/2021

Signature Date

Eileen B. Vernon

Eileen B. Vernon
Public Arbitrator

07/14/2021

Signature Date

William Joseph Baker

William Joseph Baker
Non-Public Arbitrator

07/13/2021

Signature Date

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July 14, 2021

Date of Service (For FINRA Dispute Resolution Services use only)