

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimants

Diane M. Ranck and Robert C. Ranck

Case Number: 20-01028

vs.

Respondents

Berthel Fisher & Company Financial
Services, Inc. and Ausdal Financial
Partners, Inc.

Hearing Site: Des Moines, Iowa

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: Customers vs. Members

This case was decided by an all-public panel.

REPRESENTATION OF PARTIES

For Claimants Diane M. Ranck and Robert C. Ranck (collectively, “Claimants”): Bradford M. Gucciardo, Esq. and Anthony C. Ciaccio, Esq., Gucciardo Law Group, P.A., Lakewood Ranch, Florida.

For Respondent Berthel Fisher & Company Financial Services, Inc. (“Berthel Fisher”): Cory D. Olson, Esq., Vincent D. Louwagie, Esq., Peter J. McElligott, Esq., and Austin D. Keller, Esq., Anthony Ostlund Baer & Louwagie P.A., Minneapolis, Minnesota.

For Respondent Ausdal Financial Partners, Inc. (“Ausdal”): Gary M. Saretsky, Esq., Janine M. Lucas, Esq., and Irit Walters, Esq., Saretsky Hart Michaels + Gould PC, Birmingham, Michigan.

CASE INFORMATION

Statement of Claim filed on or about: March 30, 2020.

Claimants signed the Submission Agreement: March 27, 2020.

Statement of Answer filed by Berthel Fisher on or about: May 20, 2020.

Berthel Fisher signed the Submission Agreement: May 20, 2020.

Statement of Answer and Motion to Sever filed by Ausdal on or about: June 13, 2020.

Ausdal signed the Submission Agreement: June 29, 2020.

CASE SUMMARY

In the Statement of Claim, Claimants asserted the following causes of action: common law fraud, negligence (gross negligence), breach of fiduciary duty, and breach of contract. The causes of action relate to Claimants' allegation that Respondents made unsuitable investment recommendations in numerous real estate investment trusts ("REIT"), limited partnership investments, and annuities, including, but not limited to, a Columbia Property Trust, Inc. REIT, a Behringer Harvard REIT, United Development Funding III LP, and Jackson National annuities, and failed to properly supervise Claimants' financial adviser.

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

Unless specifically admitted in the Statement of Answer and Motion to Sever, Ausdal denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimants requested compensatory damages of at least \$100,000.00; punitive damages of at least \$300,000.00; pre-award and post-award interest for Claimants' loss of use of capital; attorneys' fees; all costs and fees incurred in this action including forum fees, expert witness fees, and any additional costs and fees incurred by Claimants' counsel; and such further relief as the Arbitrators deem just and appropriate.

In the Statement of Answer, Berthel Fisher requested that the Panel dismiss the claims as ineligible for arbitration, or in the alternative, dismiss the Statement of Claim in its entirety. Berthel Fisher also requested that the Panel award it with its costs and expenses, including its FINRA filing and hearing fees and surcharges, incurred in defending this matter and such other and further relief as the Panel deems just under the circumstances.

In the Statement of Answer and Motion to Sever, Ausdal requested that the claims against it be severed from those against Berthel Fisher and that Claimants' claims against it be denied and dismissed in their entirety.

OTHER ISSUES CONSIDERED AND DECIDED

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

On June 23, 2020, Berthel Fisher filed a Response to Ausdal's Motion to Sever. On June 26, 2020, Claimants filed a Response to Ausdal's Motion to Sever. On July 8, 2020, Ausdal filed a Reply in Support of its Motion to Sever. In an Order Dated July 21, 2020, after oral argument on July 20, 2020, the Panel held Ausdal's Motion to Sever in abeyance.

On July 29, 2020, Ausdal filed a Motion to Dismiss pursuant to Rule 12504 of the Code of Arbitration Procedure ("Code") ("Ausdal's Motion to Dismiss"). On September 14, 2020, Claimants withdrew all claims against Ausdal with prejudice. Accordingly, Ausdal's Motion to Sever and Motion to Dismiss became moot and were not decided by the Panel.

On August 31, 2020, Berthel Fisher filed a Motion to Dismiss pursuant to Rule 12206 of the Code (“Berthel Fisher’s Motion to Dismiss”). On September 30, 2020, Claimants filed an Opposition to Berthel Fisher’s Motion to Dismiss. On October 7, 2020, Berthel Fisher filed a Reply Memorandum in Support of its Motion to Dismiss. On January 6, 2021, the Panel heard oral arguments on Berthel Fisher’s Motion to Dismiss and, herein, grants Berthel Fisher’s Motion to Dismiss on the following grounds:

It is uncontested that Claimants voluntarily ended their relationship with Berthel Fisher in 2013 when they transferred to another firm and took the unsatisfactory investments, purchased during 2006-2009, to the new firm. They had no further customer-broker relationship with Berthel Fisher. Claimants filed their cause of action with FINRA in March 2020, more than six years after the occurrence giving rise to any claim against Berthel Fisher.

Berthel Fisher’s Motion to Dismiss pursuant to Rule 12206 of the Code is granted by the Panel without prejudice to any right Claimants have to file in court; Claimants are not prohibited from pursuing their claims in court pursuant to Rule 12206(b) of the Code.

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

AWARD

After considering the pleadings, Berthel Fisher’s Motion to Dismiss and all responses thereto, and all arguments presented at the pre-hearing conference on January 6, 2021, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants’ claims are dismissed in their entirety pursuant to Rule 12206 of the Code.
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	= \$ 1,425.00
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**The filing fee is made up of a non-refundable and a refundable portion.*

FINRA Dispute Resolution Services previously deferred Claimants’ filing fee of \$ 1,425.00. Upon conclusion of the matter, the Panel determined to waive the non-refundable portion of Claimant’s filing fee in the amount of \$300.00.

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 parties, Berthel Fisher and Ausdal are each assessed the following:

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

Late Pre-hearing Cancellation Fees

Fees apply when a pre-hearing conference is cancelled within three business days of the scheduled conference:

November 17, 2020, cancellation requested by Claimants	= \$	300.00
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Total Last-Minute Cancellation Fees	= \$	300.00

The Panel has assessed the total late pre-hearing cancellation fees, jointly and severally, to Claimants.

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:

Three (3) pre-hearing sessions with the Panel @ \$1,125.00/session	= \$	3,375.00
Pre-Hearing Conferences: July 10, 2020	1 session	
July 20, 2020	1 session	
January 6, 2021	1 session	
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Total Hearing Session Fees	= \$	3,375.00

The Panel has assessed \$750.00 of the hearing session fees, jointly and severally, to Claimants.

The Panel has assessed \$1,875.00 of the hearing session fees to Berthel Fisher.

The Panel has assessed \$750.00 of the hearing session fees Ausdal.

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

ARBITRATION PANEL

Tracy L. Allen	-	Public Arbitrator, Presiding Chairperson
Alain Frecon	-	Public Arbitrator
John Edward Jackson, III	-	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

Tracy L. Allen

Tracy L. Allen
Public Arbitrator, Presiding Chairperson

01/13/2021

Signature Date

Alain Frecon

Alain Frecon
Public Arbitrator

01/13/2021

Signature Date

John Edward Jackson, III

John Edward Jackson, III
Public Arbitrator

01/13/2021

Signature Date

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January 13, 2021

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