

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimants

Beth A. Bernstein
Bernstein-Jewell Family Living Trust dtd 7/22/2000
Beth A. Bernstein IRA

Case Number: 20-01898

vs.

Respondents

Berthel Fisher & Company Financial Services, Inc.
Independent Financial Group, LLC

Hearing Site: Phoenix, Arizona

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 Beth A. Bernstein, Bernstein-Jewell Family Living Trust dtd 7/22/2000, and Beth A. Bernstein IRA (“Claimants”): Gregory Tendrich, Esq., Dickenson Murphy Rex and Sloan, Austin, Texas.

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

For Respondent Independent Financial Group, LLC (“Independent”): Edward Zusman, Esq., Markun Zusman Freniere & Compton LLP, San Francisco, California.

CASE INFORMATION

Statement of Claim filed on or about: June 16, 2020.

Claimants signed the Submission Agreement: May 12, 2020.

Statement of Answer filed by Berthel Fisher on or about: December 3, 2020.

Berthel Fisher signed the Submission Agreement: December 1, 2020.

Independent did not file a Statement of Answer or sign the Submission Agreement.

CASE SUMMARY

In the Statement of Claim, Claimants asserted the following causes of action: fraudulent concealment, violation of common law fraud, violation of common law negligent misrepresentation, breach of fiduciary duty, negligent failure to supervise, and negligence. The causes of action relate to investments in alternative investments and real estate investment trusts ("REITs"), including Icon Fund 12, Atel GC4, Cornerstone Core Properties REIT, United Development Fund III, Noble Royalty Access Fund VII, Atel 12, Walton Silver Reef 90 LLC, Walton Cottonwood LP, Walton Bluff Springs Land LP, Blue Rock Total Income & Real Estate, and Griffen Institutional Access Real Estate.

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

RELIEF REQUESTED

In the Statement of Claim, Claimants requested:

1. Compensatory damages in an amount between \$100,000.00 and \$500,000.00 or such other amount as proven at hearing;
2. Forum fees;
3. Filing fees;
4. Interest;
5. Costs, expenses and disbursements, including expert witness fees; and
6. Such other relief as the Arbitration Panel deems just and proper.

In the Statement of Answer, Berthel Fisher requested:

1. The Statement of Claim be dismissed in its entirety;
2. Costs and expenses, including FINRA filing and hearing fees and surcharges; and
3. Such other and further relief as the Panel deems just under the circumstances.

OTHER ISSUES CONSIDERED AND DECIDED

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

On July 7, 2020, Claimants filed a notice of voluntary dismissal of Independent from the arbitration with prejudice. Therefore, the Panel made no determination with respect to any of the relief requests contained in the Statement of Claim in regard to Independent.

On March 25, 2021, Berthel Fisher filed a Motion to Dismiss pursuant to Rule 12206 of the Code of Arbitration Procedure ("Code"). On April 22, 2021, Claimants filed a response opposing the Motion to Dismiss. On April 27, 2021, Berthel Fisher filed a reply in support of the Motion to Dismiss. On June 2, 2021, the Panel heard oral arguments on the Motion to Dismiss. On June 2, 2021, the Panel granted the Motion to Dismiss for the reasons stated in the Findings section below.

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.

FINDINGS

There was no dispute that any involvement that Berthel Fisher had with Claimants ended when Claimants' accounts were transferred to another broker dealer. The registered representative handling those accounts left Berthel Fisher's employ to handle those accounts at the new broker-dealer firm. All of this occurred more than six years before the Statement of Claim in this case was filed. Likewise, no actions were taken by Berthel Fisher after the registered representative and Claimants' accounts were transferred out, nor did it owe any further duty to Claimants, that would give rise to a finding of equitable tolling of the eligibility period.

AWARD

After considering the pleadings, the testimony and evidence presented at the June 2, 2021 recorded pre-hearing conference, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

Claimants' claims are dismissed without prejudice, pursuant to FINRA 12206.

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.*

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute.

Accordingly, as a party, Berthel Fisher is assessed the following:

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

Accordingly, as a party, Independent is assessed the following:

Member Surcharge	= \$	1,900.00
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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 Arbitrators, including a pre-hearing conference with the Arbitrators, which lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) pre-hearing sessions with the Panel @ \$1,125.00/session	= \$	2,250.00
Pre-Hearing Conferences: January 13, 2021	1 session	
June 2, 2021	1 session	
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Total Hearing Session Fees	= \$	2,250.00

The Panel has assessed \$1,687.50 of the hearing session fees to Claimants.

The Panel has assessed \$562.50 of the hearing session fees to Berthel Fisher.

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

ARBITRATION PANEL

Marc Kalish	-	Public Arbitrator, Presiding Chairperson
William B. Morgan	-	Public Arbitrator
Garnett Sailor	-	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

Marc Kalish

Marc Kalish
Public Arbitrator, Presiding Chairperson

06/08/2021

Signature Date

William B. Morgan

William B. Morgan
Public Arbitrator

06/09/2021

Signature Date

Garnett Sailor

Garnett Sailor
Public Arbitrator

06/10/2021

Signature Date

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June 10, 2021

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