

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimants

Thomas W. McCullough &
Beverly R. McCullough,
on Behalf of Their Living Trust
and Separate Property Subtrust Accounts

Case Number: 20-02767

vs.

Respondents

KCD Financial, Inc.
and Christopher Charles Fess

Hearing Site: Dallas, Texas

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. Member and Associated Person

This case was decided by an all-public panel.

REPRESENTATION OF PARTIES

For Claimants Thomas W. McCullough & Beverly R. McCullough, on Behalf of Their Living Trust and Separate Property Subtrust Accounts (“Claimants”): Kirk G. Smith, Esq., Shepherd, Smith, Edwards & Kantas, LLP, Houston, Texas.*

For Respondents KCD Financial, Inc. (“KCD”) and Christopher Charles Fess (“Fess”), collectively, referred to as “Respondents”: Charles M. O’Rourke, Esq., Woodbury, New York.

*FINRA recorded the appearance of Claimants’ counsel at the time of filing of the Statement of Claim. Counsel’s representation of Claimants may have ended with the parties’ settlement. Please see the Other Issues Considered and Decided section of this Award for information on whether Claimants’ counsel appeared at the expungement hearing.

CASE INFORMATION

Statement of Claim filed on or about: August 25, 2020.

Claimants signed the Submission Agreement: August 6, 2020.

Statement of Answer filed on or about: October 14, 2020.

KCD signed the Submission Agreement: October 15, 2020.

Fess signed the Submission Agreement: September 1, 2020.

CASE SUMMARY

In the Statement of Claim, Claimants asserted the following causes of action: breach of contract and warranties, promissory estoppel; violation of state securities statutes; violation of Section 27.01 of the Texas Business and Commerce Code; violation of consumer protection statutes; claims under common law; and vicarious liability. The causes of action related to Claimants' allegation that Respondents abused their trust by overconcentrating their assets in mostly privately traded securities and unsuitably recommended a variable annuity.

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

RELIEF REQUESTED

In the Statement of Claim, Claimants requested an award be entered ordering Respondents to pay to Claimants an amount between \$500,000.00 and \$1,000,000.00, plus interest and costs, including all direct and/or consequential damages and statutory and/or market adjusted damages and/or punitive damages; plus interest and costs as provided by statute, in an amount which Claimants reserve the right to amend at any time including during hearings held on these matters, as follows:

- A. All sums lost in Claimants' accounts on any or all transactions made or not made; plus, additionally or alternatively,
- B. All lost opportunities incurred as a result of acts and/or omissions; plus, additionally or alternatively,
- C. Rescission of any or all transactions as sought; plus, additionally or alternatively,
- D. Statutory damages as provide by applicable law; plus, additionally or alternatively,
- E. Punitive damages in an amount that the Panel shall deem appropriate; plus,
- F. Pre-award and pre-judgment interest on all sums invested from the date deposited until the date of the award and/or judgment and until such sums are paid, all at the highest rate allowed by law; plus, additionally or alternatively,
- G. All costs of these proceedings and for recovery of damages incurred, including legal fees, including on appeal, if any, and for collection; plus, additionally or alternatively, and
- H. Any and all other relief available to Claimants, in law or equity or otherwise, which may be granted to Claimant by the Panel.

In the Statement of Answer, Respondents requested that all claims be dismissed and that all references to this matter be expunged from Fess' Central Registration Depository ("CRD") registration records.

OTHER ISSUES CONSIDERED AND DECIDED

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

On October 15, 2021, Claimant filed a notice of voluntary dismissal with prejudice against Fess.

On October 19, 2021, Claimant filed a notice of voluntary dismissal with prejudice against KCD. Therefore, the Panel made no determination with respect to any of the relief requests contained in the Statement of Claim.

On October 20, 2021, Respondents filed a Motion for Expungement to which Claimants took no position.

The Panel conducted a recorded, telephonic hearing on November 3, 2021, so the parties could present oral argument and evidence on Fess's request for expungement.

Neither Claimants nor their counsel participated in the expungement hearing.

The Panel reviewed Fess' 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 Fess did not contribute to the settlement amount.

In recommending expungement, the Panel relied upon the following documentary or other evidence: Fess' testimony and Respondents' exhibits 1 - 8.

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:

The Panel recommends the expungement of all references to the above-captioned arbitration (Occurrence Number 2077128) from registration records maintained by the CRD for Respondent Christopher C. Fess (CRD Number 1335361) with the understanding that, pursuant to Notice to Members 04-16, Respondent Christopher C. Fess 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 claim, allegation, or information is false.

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

The Panel finds that Claimants' allegations of unsuitability are false in that they are not supported by the testimony or evidence presented at the hearing. There is no indication that the investments complained of were unsuitable for Claimants in conjunction with their entire portfolio, objectives, and risk tolerance level. Claimants had significant investment experience, including prior experience in alternative investments. Claimants realized a gain from their investment in FS Investment Corporation, an alternative investment. Then, they rolled this profit into a second offering by the same sponsor, FS Energy and Power (another alternative investment) and subsequently, sustained a loss. Fess served as the Customers' financial advisor at Respondent for about 10 years. During this time, Fess met with the Customers every 2 months (over 60 times) in his office to review their investments. They had a diversified portfolio of annuities, bonds, stocks, and mutual funds which were liquid assets. Fess performed a suitability analysis, conducted due diligence, and made risk disclosures orally and in writing to the Customers in connection with the investments that lost money. Respondent specifically warned, in writing, of the risks of investing more than 20% of one's net worth in illiquid / alternative investments. The Customers reviewed and signed the risk disclosure documents indicating their understanding and acceptance of the risks. Their stated objectives were growth, and they were willing to accept above average risks. They indicated they could afford to lose their entire investment in FS Energy and Power because they had other money and liquidity.

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	= \$	1,725.00
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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 firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as a party, KCD is assessed the following:

Member Surcharge	= \$	2,475.00
Member Process Fee	= \$	5,075.00

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:

One (1) pre-hearing session with the Panel @ \$1,300.00/session	= \$	1,300.00
Pre-Hearing Conference: December 15, 2020	1 session	

One (1) hearing session on expungement request @ \$1,300.00/session	= \$	1,300.00
Hearing: November 3, 2021 1 session		
<hr/> Total Hearing Session Fees	= \$	2,600.00

The Panel has assessed \$650.00 of the hearing session fees jointly and severally to Claimants.

The Panel has assessed \$650.00 of the hearing session fees jointly and severally to Respondents.

The Panel has assessed \$1,300.00 of the hearing session fees to Fess.

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

ARBITRATION PANEL

Mary Elizabeth Skelnik	-	Public Arbitrator, Presiding Chairperson
William A. Fynes, III	-	Public Arbitrator
Melissa Nycole Hearon	-	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

Mary Elizabeth Skelnik

Mary Elizabeth Skelnik
Public Arbitrator, Presiding Chairperson

11/10/2021

Signature Date

William A. Fynes, III

William A. Fynes, III
Public Arbitrator

11/10/2021

Signature Date

Melissa Nycole Hearon

Melissa Nycole Hearon
Public Arbitrator

11/09/2021

Signature Date

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November 10, 2021

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