

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Kevin O'Sullivan

Case Number: 20-03583

vs.

Respondent
David Lerner Associates, Inc.

Hearing Site: New York, New York

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

This case was decided by an all-public panel.

REPRESENTATION OF PARTIES

For Claimant Kevin O'Sullivan: Matt E. Wolper, Esq., Wolper Law Firm, P.A., Plantation, Florida.*

For Respondent David Lerner Associates, Inc.: Gene L. Small, Esq., Eugene L. Small, P.C., New York, New York.

*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: October 21, 2020.

Kevin O'Sullivan signed the Submission Agreement: October 21, 2020.

Statement of Answer filed by Respondent on or about: January 11, 2021

David Lerner Associates, Inc. signed the Submission Agreement: January 11, 2021.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: unsuitability; breach of fiduciary duty; negligence/gross negligence; negligent misrepresentation; intentional

misrepresentation/omission; negligent hiring, retention, and supervision; and breach of contract. The causes of action relate to investments in Energy 11, L.P. and the Spirit of America Energy Fund.

Unless specifically admitted in the Statement of Answer, Respondent 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 in an amount to be determined at trial, but between \$100,000.00-\$250,000.00 plus interest; costs; forum fees; rescission; attorneys' fees; underperformance damages; and punitive damages.

In the Statement of Answer, Respondent requested the Statement of Claim be dismissed in its entirety and that the costs of this proceeding be assessed against Claimant; attorneys' fees and expert witness costs; expungement of all references to the above-captioned arbitration from the registration records of Unnamed Party Glenn Werner maintained by the Central Registration Depository ("CRD"); and any other relief that the Panel deems appropriate.

OTHER ISSUES CONSIDERED AND DECIDED

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

On December 27, 2021, Claimant filed a notice of voluntary dismissal with prejudice. Therefore, the Panel made no determination with respect to any of the relief requests contained in the Statement of Claim.

On January 11, 2021, Respondent filed a Motion for Expungement on behalf of Unnamed Party Glenn Werner, to which no response was filed.

The Panel conducted a recorded, telephonic hearing on February 2, 2022 so the parties could present oral argument and evidence on Respondent's request for expungement on behalf of Unnamed Party Glenn Werner.

Claimant and counsel did not participate in the expungement hearing and did not oppose the request for expungement.

The Panel reviewed Glenn Werner'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 Glenn Werner did not contribute to the settlement amount. The Panel also noted that the settlement agreement is from June 2018 but the instant matter was filed in October 2020. The Panel noted that Claimant had a prior

attorney, the parties reached a settlement agreement through his prior counsel, but failed to inform Claimant of the settlement. Hence, the reason Claimant withdrew this arbitration claim.

In recommending expungement, the Panel relied upon the following documentary or other evidence: the pleadings, Claimant's account application, Claimant's Assumption of Risk Form, and other client communications

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 2095634) from registration records maintained by the CRD for Unnamed Party Glenn Werner (CRD Number 6118112) with the understanding that, pursuant to Notice to Members 04-16, Unnamed Party Glenn Werner must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

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 factually impossible or clearly erroneous.

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

The Panel found that the evidence presented at the expungement hearing shows that Claimant had full knowledge of the risk of these investments and as such the claim is false. The Panel found no evidence of wrongdoing by Unnamed Party Glenn Werner.

FEES

Pursuant to the Code of Arbitration Procedure ("Code"), the following fees are assessed:

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Filing Fees

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

Initial Claim Filing Fee	= \$	1,425.00
Expungement 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 that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as a party, Respondent David Lerner Associates, Inc., is assessed the following:

Member Surcharge	= \$	1,700.00
Member Process Fee	= \$	3,250.00

Late Pre-Hearing Cancellation Fees

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

December 28, 2021, cancellation requested by the parties	= \$	100.00
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Total Late Pre-Hearing Cancellation Fees	= \$	100.00

The Panel has assessed \$50.00 of the late pre-hearing cancellation fees to Claimant.

The Panel has assessed \$50.00 of the late pre-hearing cancellation fees to Respondent.

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:

One (1) pre-hearing session with the Panel @ \$1,125.00/session	= \$	1,125.00
Pre-Hearing Conference: February 19, 2021	1 session	
One (1) hearing session on expungement request @ \$1,125.00/session	= \$	1,125.00
Hearings: February 2, 2022	1 session	
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Total Hearing Session Fees	= \$	2,250.00

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

The Panel has assessed \$1,687.50 of the hearing session fees, including the fees for the expungement hearing, to Respondent.

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

ARBITRATION PANEL

Steven C. Kasarda	-	Public Arbitrator, Presiding Chairperson
Veronica Ann Williams	-	Public Arbitrator
Sofia Balile	-	Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

Concurring Arbitrators' Signatures

Steven C. Kasarda

Steven C. Kasarda
Public Arbitrator, Presiding Chairperson

03/02/2022

Signature Date

Veronica Ann Williams

Veronica Ann Williams
Public Arbitrator

03/02/2022

Signature Date

Sofia Balile

Sofia Balile
Public Arbitrator

03/02/2022

Signature Date

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March 07, 2022

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