

**Award**  
**FINRA Office of Dispute Resolution**

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In the Matter of the Arbitration Between:

Claimant

██████████

Case Number: ██████████

vs.

Respondent

Berthel, Fisher & Company Financial  
Services, Inc.

Hearing Site: Des Moines, Iowa

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Nature of the Dispute: Associated Person vs. Member

**REPRESENTATION OF PARTIES**

For Claimant ██████████ (“Claimant”): Michael Bessette, Esq., AdvisorLaw, LLC,  
Broomfield, Colorado.

For Respondent Berthel, Fisher & Company Financial Services, Inc. (“Respondent”):  
Shelley Davenport, VP Legal & Regulatory Matters, Berthel Fisher & Company, Inc.,  
Cedar Rapids, Iowa.

**CASE INFORMATION**

Statement of Claim filed on or about: July 26, 2017.

Claimant signed the Submission Agreement: July 26, 2017.

Statement of Answer filed on or about: September 18, 2017.

Respondent signed the Submission Agreement: September 18, 2017.

**CASE SUMMARY**

Claimant asserted the following cause of action: expungement. The cause of action related to Claimant’s allegation that two occurrences reflected on his registration records involving customers should be expunged. The customers in Occurrence Number ██████████ asserted, in a FINRA arbitration, that their investment in AirLink stock, pursuant to a Private Placement Memorandum, was “unsuitable and misrepresented” (“Underlying Complaint”). The customer in Occurrence Number ██████████ asserted that Respondent “gave incorrect information” regarding the transfer of investments from John Hancock Venture III variable annuities to Pacific Life Choice variable annuities

Unless specifically admitted in the Statement of Answer, Respondent did not take a position on Claimant’s expungement request.

### **RELIEF REQUESTED**

In the Statement of Claim, Claimant requested expungement of Occurrence Number [REDACTED] from his registration records maintained by the Central Registration Depository ("CRD"), expungement of Occurrence [REDACTED] from his registration records maintained the CRD or an amendment to his registration records relating to his contribution to the settlement amount in Occurrence [REDACTED], an award of \$1.00 in compensatory damages, and other appropriate relief.

At the hearing, Claimant withdrew his request for compensatory damages.

In the Statement of Answer, Respondent requested that the Arbitrator deny Claimant's request for damages, that no other relief be awarded, and that all FINRA fees be assessed to Claimant.

### **OTHER ISSUES CONSIDERED AND DECIDED**

The Arbitrator acknowledges that he has read the pleadings and other materials filed by the parties.

On or about August 9, 2017, Claimant submitted notices of service of the Statement of Claim on the (lead) customer in Occurrence Number [REDACTED] and the customer in Occurrence Number [REDACTED].

In the Initial Prehearing Conference Scheduling Order, dated November 30, 2017 ("IPHCSO"), the Arbitrator ordered Claimant to submit various documents, including the Award pertaining to Occurrence Number [REDACTED] and the settlement agreement pertaining to Occurrence Number [REDACTED], as well as supplemental notice to all customers in Occurrence Number [REDACTED] and the sole customer in [REDACTED] of the timing of hearing on expungement and the opportunity to introduce documents, as well as appear and testify, at the hearing on expungement.

On or about December 14, 2017, Claimant submitted notice of service of the date of the hearing on expungement to the (lead) customer in Occurrence Number [REDACTED]

On or about December 14, 2017, Claimant submitted notice of service of the date of the hearing on expungement to the customer in Occurrence Number [REDACTED]

On or about February 5, 2018, Claimant submitted notices of service of the Statement of Claim and notice of the hearing on expungement to the other customers in Occurrence Number [REDACTED]

In correspondence dated March 21, 2018, Claimant addressed the items requested by the Arbitrator in the IPHCSO.

In the Addendum to the IPHCSO, dated March 19, 2018, the Arbitrator ordered Claimant to provide the customer in Occurrence Number [REDACTED] with copies of exhibits related to Occurrence Number [REDACTED], by March 23, 2018.

Claimant provided an Affidavit of Service, dated March 28, 2018, of items specified in the Addendum to the IPHCSO.

The Arbitrator conducted a recorded telephonic hearing on March 30, 2018, so the parties could present oral argument and evidence on Claimant's request for expungement.

Respondent did not participate in the expungement hearing and did not contest the request for expungement. In its Answer, Respondent stated that it would not attend the hearing.

The customers in Occurrence Number [REDACTED] did not appear at the hearing and did not contest Claimant's request for expungement.

The customer in Occurrence Number [REDACTED] appeared at the hearing and contested Claimant's request for expungement. The customer in Occurrence Number [REDACTED] submitted a Response to Claimant's Statement of Claim, a Supplemental Response to Claimant's Statement of Claim, and six exhibits in support of her position opposing Claimant's request for expungement.

The Arbitrator reviewed Claimant's BrokerCheck® Report. The Arbitrator found that there was not a settlement relating to Occurrence Number [REDACTED]. The Arbitrator reviewed the settlement documents, considered the amount of payments made to any party, and considered other relevant terms and conditions of the settlement relating to Occurrence Number [REDACTED].

The Arbitrator found that Claimant did not previously file a claim requesting expungement of the same disclosures in the CRD.

In recommending expungement the Arbitrator relied upon the following documentary or other evidence: Investor Presentation Portfolio, Statement of Claim in the Underlying Complaint, Statement of Answer in the Underlying Complaint, Award in the Underlying Complaint, investment applications, including Private Placement Memorandums, filed by each of the investors involved in Occurrence Number [REDACTED], and the testimony of Claimant.

### **AWARD**

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

1. Claimant's request for expungement of Occurrence Number [REDACTED] from his CRD records is denied.
2. Claimant's request to amend his CRD records relating to his contribution to the settlement amount in Occurrence Number [REDACTED] is denied.
3. The Arbitrator recommends the expungement of all references to Occurrence Number [REDACTED] from registration records maintained by the CRD for Claimant

[REDACTED] (CRD # [REDACTED]) with the understanding that, pursuant to Notice to Members 04-16, Claimant [REDACTED] 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 13805 of the Code, the Arbitrator has made the following Rule 2080 affirmative finding of fact:

The claim, allegation, or information is false.

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

The investment involved a private placement of stock sold to individuals who qualified themselves as “accredited investors” under securities laws, who understood the risky nature of the investment. The sales pitch for the investment was made by the CEO of AirLink, the company that was being sold. The CFO of Respondent and Claimant were present at the sales seminar, but did not participate in the presentation of the investment opportunity. After approximately two years, the company failed because of the cancellation of a contract by the company’s major supplier. Approximately four years after making the investment, Claimant’s clients, along with approximately 17 other investors, filed a FINRA arbitration claim against Respondent claiming breach of fiduciary duty, lack of suitability, failure to conduct proper due diligence, failure to supervise, misrepresentation, constructive fraud, breach of contract, control person liability, and ERISA violations. Claimant was not listed as a respondent in the arbitration claim. After nine days of hearing, the FINRA arbitration panel denied the customers’ claims.

4. Any and all claims for relief not specifically addressed herein are denied.

### **FEES**

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

#### **Filing Fees**

FINRA Office of Dispute Resolution assessed a filing fee\* for each claim:

Initial Claim Filing Fee = \$ 50.00

*\*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 and Claimant's former firm, Respondent is assessed the following:

Member Surcharge = \$ 150.00

**Hearing Session Fees and Assessments**

The Arbitrator 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), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) pre-hearing session with a single arbitrator @ \$50.00/session	= \$ 50.00
Pre-hearing conference: November 30, 2017 1 session	
One (1) hearing session on expungement request @ \$50.00/session	= \$ 50.00
Hearing Date: March 30, 2018 1 session	
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Total Hearing Session Fees	= \$100.00

The Arbitrator has assessed the \$100.00 of hearing session fees to Claimant.

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

**ARBITRATOR**

Gerald W. Hepp - Sole 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.

**Arbitrator's Signature**

/s/ Gerald W. Hepp  
\_\_\_\_\_  
Gerald W. Hepp  
Sole Public Arbitrator

04/06/18  
\_\_\_\_\_  
Signature Date

04/06/18  
\_\_\_\_\_  
Date of Service (For FINRA Office of Dispute Resolution office use only)

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**ARBITRATOR**

Gerald W. Hepp - Sole 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.

**Arbitrator's Signature**



April 6, 2018

\_\_\_\_\_  
Gerald W. Hepp  
Sole Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Date of Service (For FINRA Office of Dispute Resolution office use only)