

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimants

Elizabeth Kitsis
Richard Kitsis

Case Number: 19-02323

vs.

Respondent

FSC Securities Corporation

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: Customers vs. Member

This case was decided by an all-public panel.

REPRESENTATION OF PARTIES

For Claimants Elizabeth Kitsis, and Richard Kitsis: Sam A. Silverstein, Esq., Kaufmann Gildin & Robbins LLP, New York, New York.

For Respondent FSC Securities Corporation: Steven E. Mellen, Esq., and Denis Dice, Esq., Winget, Spadafora & Schwartzberg, LLP, 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: August 15, 2019.

Elizabeth Kitsis signed the Submission Agreement: August 14, 2019.

Richard Kitsis signed the Submission Agreement: August 14, 2019.

Statement of Answer filed by Respondent on or about: November 1, 2019.

FSC Securities Corporation did not sign the Submission Agreement.

CASE SUMMARY

In the Statement of Claim, Claimants asserted the following causes of action: failure to disclose material info; material misrepresentations/omissions; breach of fiduciary duties; violation of FINRA Conduct Rules; and negligent supervision. The causes of action relate to the purchase of NT-REITs.

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, Claimants requested approximately \$224,067.00 as a result of the recommendation, purchase and sale of the ARC Trust V, Inc. ; rescission of the Healthcare Trust NT-REIT purchase in exchange for the repayment of the principal invested minus any interest or cash dividends the Claimants received from it; an award of New York's legal rate of interest less any cash distributions received from the NT-REITs at issue; attorney's fees and expert fees and all arbitration-related costs; and such other and further relief as the Panel deems appropriate.

In the Statement of Answer, Respondent requested an award denying the claims against FSC in their entirety; expunging this matter from John Sklencar's CRD records; and granting such other and further relief as the Panel deems just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

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

Respondent did not file a properly executed Submission Agreement but is required to submit to arbitration pursuant to the Code of Arbitration Procedure ("Code") and having answered the claim, appeared, and testified at the hearing is bound by the determination of the Panel on all issues submitted.

On February 3, 2022, Claimants 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 6, 2022, counsel for Unnamed Party John Sklencar filed a request that the arbitration case remain open to allow him to seek his expungement relief from this arbitration panel.

On February 24, 2022, Respondent filed a Motion for Expungement on behalf of Unnamed Party John Sklencar, to which no response was filed.

The Panel conducted a recorded, telephonic hearing on April 27, 2022, so the parties could present oral argument and evidence on Unnamed Party John Sklencar's request for expungement.

Claimants and their counsel did not participate in the expungement hearing. The Panel found that the Claimants had notice of the expungement request and hearing.

The Panel reviewed Unnamed Party John Sklencar'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 Unnamed Party John Sklencar did not contribute to the settlement amount.

In recommending expungement, the Panel relied upon the following documentary or other evidence: the pleadings; correspondence; Unnamed Party John Sklencar's testimony, and BrokerCheck® Report; and the exhibits.

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

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, 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 2046547) from registration records maintained by the CRD for Unnamed Party John Sklencar (CRD Number 1136052) with the understanding that, pursuant to Notice to Members 04-16, Unnamed Party John Sklencar 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 findings of fact:

The claim, allegation, or information is factually impossible or clearly erroneous; and the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

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

The claim by Claimants that the risks of two complained of REIT investments were not adequately disclosed is clearly erroneous. Numerous disclosures were made in documents such as offering documents, subscription agreements, and sales presentations. Such disclosures contained discussions of the risks of investing in non-publicly traded investment vehicles, particularly that of illiquidity until an exit event.

Claimants' issue, based on emails reviewed by the panel, seems to revolve around the lack of disclosure about a fraud committed by officers of sponsor company of the REIT investments which impacted the valuation of the sponsor company's own stock and affected its reputation, leading to Claimants' desire to immediately liquidate their investments. The fraud itself had its origin in the miscomputation of funds from operations at the sponsor level which the sponsor company's officers failed to disclose in a timely manner leading to a fraud on the stockholders of the sponsor company.

It is clearly erroneous to expect the Associated Person to have the ability to predict a fraud of this nature and to make disclosure to Claimants prior to an investment in the REITS. The Associated Person had no involvement in the computation of funds from operations at the sponsor level, nor can he be expected to have knowledge of miscalculation and the cover-up thereof. Similarly, the Associated Person had no insight into the on-going investigations of the fraud after its occurrence in late 2014 until an indictment was issued against the sponsor company officers in 2017, and he was in no position to apprise Claimants of the details thereof, especially in light of the fact that Claimants had transferred their account to a different firm sometime in 2015. But the fact remains that the fraud at issue occurred at the sponsor company level, not at the REIT investments level.

The Claimants also erroneously claim that the REIT investments were unsuitable. Documents and testimony of the Associated person presented at the hearing clearly showed that the Associated Person considered, among many factors, the age and investment experience of the Claimants, their high-income earning history and capacity, their level of sophistication as highly educated and prominent physicians with many years of investment experience, the percentage of liquid assets of the Claimants which would be made illiquid by the investments (i.e., less than 10% of their total of \$5+ million in liquid investments), the ability of claimants to fund their living expenses and other liquidity needs out of remaining liquid assets, and the ability of Claimants to withstand the complete loss of their investments in the REITs (which did not happen and which, according to testimony of the Associated Person, would have resulted in a tidy capital gain in addition to periodic distributions if held to maturity (ranging from 3 to 6 years)). The Associated Person also testified that he went over the projected cash flow and expected returns from the investments with Claimants, answered their questions and addressed their interest and concern in obtaining a better return than could be had from low interest-bearing treasury securities. The Panel finds that the REIT investments were suitable for the Claimants given the totality of their circumstances.

FEES

Pursuant to the Code of Arbitration Procedure (“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

**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 FSC Securities Corporation 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 18, 2020, cancellation requested Parties =\$ 100.00

Total Late Pre-Hearing Cancellation Fees =\$ 100.00

The Panel has assessed \$100.00 of the late pre-hearing cancellation fees jointly and severally to Claimants.

Postponement Fees

Postponements granted during these proceedings for which fees were assessed or waived:

June 16-19-2020, postponement requested by Claimant Waived

April 27-30, 2021, postponement requested by Parties Waived

November 30 & December 1-3, 2021, postponement requested by Parties. =\$1,125.00

Total Postponement Fees =\$1,125.00

The Panel has assessed \$562.50 of the postponement fees jointly and severally to Claimants.

The Panel has assessed \$562.50 of the postponement 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:

Three (3) pre-hearing sessions with the Panel @ \$1,125.00/session	= \$ 3,375.00
Pre-Hearing Conferences: December 6, 2019	1 session
June 22, 2020	1 session
February 9, 2021	1 session
Two (2) hearing sessions on expungement request @ \$1,125.00/session	= \$ 2,250.00
Hearings: April 27, 2022	2 sessions
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Total Hearing Session Fees	= \$ 5,625.00

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

The Panel has assessed \$3,937.50 of the hearing session fees to Respondent, which includes the fees for the expungement hearing.

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

ARBITRATION PANEL

Paul C. Tang	-	Public Arbitrator, Presiding Chairperson
Howard D. Jacob	-	Public Arbitrator
Suzanne L. Ulicny	-	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

Paul C. Tang

Paul C. Tang
Public Arbitrator, Presiding Chairperson

05/17/2022

Signature Date

Howard D. Jacob

Howard D. Jacob
Public Arbitrator

05/17/2022

Signature Date

Suzanne L. Ulicny

Suzanne L. Ulicny
Public Arbitrator

05/18/2022

Signature Date

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.

May 18, 2022

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