

**Award**  
**FINRA Dispute Resolution Services**

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In the Matter of the Arbitration Between:

Claimant

Cynthia M. Foster, individually and on behalf of  
her IRAs

Case Number: 20-01681

vs.

Respondents

Kovack Securities, Inc. and  
Susan E. Penney

Hearing Site: Oklahoma City, Oklahoma

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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 Claimant Cynthia M. Foster, Individually and on behalf of her IRAs (“Claimant”): Kirk G. Smith, Esq., Shepherd, Smith, Edwards & Kantas, LLP, Houston, Texas.\*

For Respondents Kovack Securities, Inc. (“Kovack”) and Susan E. Penney (“Penney”) (collectively, “Respondents”): Debra A. Jenks, Esq., Jenks & Harvey LLP, West Palm Beach, Florida.

\*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: May 29, 2020.

Claimant signed the Submission Agreement: May 21, 2020.

Statement of Answer filed on or about: August 10, 2020.

Respondents signed Submission Agreements: August 10, 2020.

### **CASE SUMMARY**

In the Statement of Claim, Claimant asserted the following causes of action: suitability, 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, including the Texas Deceptive Trade Practices Act; intentional and negligent misrepresentations of material fact; unjust enrichment; breach of fiduciary duty and duty of good faith and fair dealing; intentional infliction of harm, negligence, and/or gross negligence; and vicarious liability. The causes of action relate to Claimant's allegation that Respondents misled and enticed Claimant to invest a large portion of her portfolio in unsuitable non-public real estate investment trusts ("REITs"). The REITs included, but were not limited to, Bluerock Residential, Hines Global, and Preferred Apartment Communities. Claimant further alleges that Respondents recommended a series of risky stocks, exchange traded funds, and gold investments.

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, Claimant requested damages in an amount between \$100,000.00 and \$500,000.00, as follows:

- A. All sums lost in Claimant's 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 provided 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 while on appeal, if any, and for collection; plus, additionally or alternatively,
- H. Any and all other relief available to Claimant, in law or equity or otherwise, which may be granted to Claimant by the Panel.

In the Statement of Answer, Respondents requested that the Panel dismiss Claimant's claims in their entirety and grant expungement of all references to this matter (Occurrence Number 2077844) from Penney's registration records maintained by the Central Registration Depository ("CRD").

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

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

On September 22, 2020, Claimant withdrew her claims against Respondents with prejudice. Therefore, the Panel made no determination with respect to any of the relief requests contained in the Statement of Claim.

On November 5, 2020, Penney filed a Memorandum of Authorities in Support of Her Prior Request for Expungement, to which no response was filed.

The Panel conducted a recorded, telephonic hearing on November 17, 2020, so the parties could present oral argument and evidence on Penney's request for expungement.

Neither Claimant nor her counsel participated in the expungement hearing.

The Panel reviewed the BrokerCheck® Report for Penney. 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 documents, considered the amount of payments 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 Penney paid the entire settlement amount.

In recommending expungement, the Panel relied upon the following documentary or other evidence: Penney's testimony, the pleadings, and Respondents' 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, 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 2077844) from registration records maintained by the CRD for Respondent Susan E. Penney (CRD Number 1238195) with the understanding that, pursuant to Notice to Members 04-16, Respondent Susan E. Penney 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 factually impossible or clearly erroneous.

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

Based on Penney’s credible testimony and the documents submitted, the Panel found that the recommendations made by Penney were suitable and not negligent. Claimant fully understood all of the investments and the tax issues involved with the REITs. Penney fulfilled her contractual duties, without violating any statutes or breaching any other duty owed to Claimant.

### **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 firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as a party, Kovack is assessed the following:

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

#### **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 Arbitrators, including a pre-hearing conference with the Arbitrators, which lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) hearing session on expungement request @ \$1,125.00/session	= \$ 1,125.00
Hearing Date: November 17, 2020 1 session	

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Total Hearing Session Fees	= \$ 1,125.00
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The Panel has assessed the total hearing session fees jointly and severally to Respondents.

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

**ARBITRATION PANEL**

Raymond C. Kerr	-	Public Arbitrator, Presiding Chairperson
Randy Paul Bowser	-	Public Arbitrator
Ben Hilfiger	-	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**

***Raymond C. Kerr***

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Raymond C. Kerr  
Public Arbitrator, Presiding Chairperson

**12/31/2020**

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

***Randy Paul Bowser***

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Randy Paul Bowser  
Public Arbitrator

**12/24/2020**

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

***Ben Hilfiger***

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Ben Hilfiger  
Public Arbitrator

**12/23/2020**

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

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January 06, 2021

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