

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

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In the Matter of the Arbitration Between:

Claimant  
Kevin O'Neill

Case Number: 20-02099

vs.

Respondents  
National Securities Corporation  
Worden Capital Management LLC  
Aegis Capital Corp.  
Cetera Advisors LLC  
Mark Sam Kolta

Hearing Site: New York, New York

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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: Customer vs. Members and Associated Person

This case was decided by an all-public panel.

The evidentiary hearing was conducted by videoconference.

**REPRESENTATION OF PARTIES**

For Claimant Kevin O'Neill: Jason J. Kane, Esq. and Tom De Bow, Esq., Peiffer Wolf Carr Kane & Conway, APLC, Rochester, New York.

For Respondent National Securities Corporation ("National"): Fred N. Knopf, Esq., National Holdings Corporation, New York, New York.

For Respondent Worden Capital Management LLC ("Worden"): William M. Dailey, Esq., Dailey Law Group, Rye, New York.

For Respondent Aegis Capital Corp.: Timothy Treble, Aegis Capital Corp., New York, New York.

For Respondent Cetera Advisors LLC: Christina M. Rieker, Esq., Winget, Spadafora & Schwartzberg, LLP, New York, New York.

For Respondent Mark Sam Kolta ("Kolta"): Tosh Grebenik, Esq., Judex Law, LLC, Broomfield, Colorado.

### **CASE INFORMATION**

Statement of Claim filed on or about: July 2, 2020.  
Answer to Kolta's Counterclaim filed on or about: October 5, 2020.  
Kevin O'Neill signed the Submission Agreement: July 2, 2020.

Statement of Answer filed by Respondent National on or about: September 28, 2020.  
National Securities Corporation signed the Submission Agreement: September 28, 2020.

Statement of Answer filed by Respondent Worden on or about: October 29, 2020.  
Worden Capital Management LLC did not sign the Submission Agreement.

Respondent Aegis Capital Corp. did not file a Statement of Answer or sign the Submission Agreement.

Respondent Cetera Advisors LLC did not file a Statement of Answer or sign the Submission Agreement.

Statement of Answer and Counterclaim filed by Respondent Kolta on or about: September 17, 2020.  
Mark Sam Kolta signed the Submission Agreement: September 25, 2020.

### **CASE SUMMARY**

In the Statement of Claim, Claimant asserted the following causes of action: violation of FINRA Rules 2110 and 2111; negligence; misrepresentations and omission of material facts; and breach of fiduciary duty. The causes of action relate to investments in annuities and alternative investments, including NYC REIT and Prudential annuities.

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

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

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

Unless specifically admitted in the Answer to Counterclaim, Claimant denied the allegations made in Respondent Kolta's Counterclaim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

In the Statement of Claim, Claimant requested unspecified compensatory damages; attorneys' fees, costs, and other expenses; pre-judgment and post-judgment interest; all other sums Claimant is entitled to at law or equity; and punitive damages.

In the Statement of Answer, Respondent National requested that the Statement of Claim be dismissed in its entirety; costs and expenses, including forum fees and attorneys' fees; and any

additional relief that is just and proper.

In the Statement of Answer, Respondent Worden requested that all claims be denied; that Claimant pay all costs associated with defending against this claim; and any and all other and further relief as deemed just and equitable.

In the Statement of Answer and Counterclaim, Respondent Kolta requested that the Statement of Claim be denied and dismissed in its entirety, with prejudice; and \$18,000.00 in compensatory damages to pay an attorney to pursue expungement of this claim.

In the Answer to Kolta's Counterclaim, Claimant requested that the Counterclaim be dismissed; and such other and further relief as deemed just and proper.

At the hearing, Claimant requested damages of \$254,295.25 and punitive damages at the discretion of the Panel:

At the hearing, Respondent Kolta requested damages of \$40,775.00, plus anticipated fees for expungement in the amount of \$18,000.00.

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

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

Respondent Worden 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 is bound by the determination of the Panel on all issues submitted.

Respondents Aegis Capital Corp. and Certera Advisors LLC did not file Statements of Answer or a properly executed Submission Agreements but are required to submit to arbitration pursuant to the Code of Arbitration Procedure ("Code") and are bound by the determination of the Panel on all issues submitted.

On March 31, 2021, Respondent Kolta filed a Motion to Dismiss pursuant to Rules 12504 and 12206 of the Code of Arbitration Procedure ("Code"). On April 30, 2021, Claimant filed a response opposing the Motion to Dismiss. On May 7, 2021, Kolta filed a reply in support of the Motion to Dismiss.

On March 31, 2021, Respondent Worden filed a Motion to Dismiss pursuant to Rules 12504 and 12206 of the Code. On April 30, 2021, Claimant filed a response opposing the Motion to Dismiss. On May 7, 2021, Worden filed a reply in support of the Motion to Dismiss.

On May 3, 2021, Respondent National filed a Motion to Dismiss pursuant to Rule 12206 of the Code. On June 2, 2021, Claimant filed a response opposing the Motion to Dismiss. On June 8, 2021, National filed a reply in support of the Motion to Dismiss.

On June 14, 2021, the Panel heard oral arguments on the three Motions to Dismiss. On June 17, 2021, the Panel denied Respondents Kolta and National's Motions to Dismiss and granted

Respondent Worden's Motion to Dismiss. The Panel granted Respondent Worden's Motion to Dismiss on the grounds that:

At the time Claimant purchased the REITs that are the subject of the complaint he was a customer of National Securities Corporation ("National"). Kolta was Claimant's broker and financial advisor. Kolta was a registered representative of National. In support of their motions to dismiss for ineligibility, Respondents point out that Claimant purchased REITs in 2011 or 2012 (from the Statement of Claim Page 2), and 2014 (issued on July 2 but acquired on June 23, 2014). Claimant filed his Statement of Claim on July 2, 2020. The securities in issue were acquired while Claimant was a customer of National. At no time was Claimant a customer of Worden.

In opposition to the Respondents' ineligibility argument, Claimant states that his relationship with Kolta did not terminate until 2019 "when he realized the disastrous consequences of his annuity advice and stopped trusting him. Quite literally, it was the events of 2019 and 2020, that are the 'occurrences or events' that give rise to the underlying claims." If Claimant is correct, then Rule 12206(a) is not applicable.

The crux of the eligibility argument focuses on the construction of "occurrence or event giving rise to the Claim." Respondents argue that it is the purchase date that triggers the six-year rule. So construed, then eligibility arguably expired earlier than filing the Statement of Claim. However, if (as Claimant argues, taking into account alleged ongoing representations of suitability and other claims of misconduct) the measuring date continues running until Claimant's relationship with Kolta terminated, which occurred in 2019, then his claim is within the six-year period of eligibility.

The question posed, then, is whether FINRA Rule 12206(a) is a statute of limitations or a statute of repose? If it is a statute of limitations, an argument for equitable tolling cannot be determined without full disclosure of facts supporting that proposition, and that can only happen at the evidentiary hearing.

The crux issue has generated a substantial body of law both before and after the U.S. Supreme Court weighed in on the issue in *Howsam v. Dean Witter Reynolds, Inc.* 537 U.S. 79 (2002). The Panel finds that Kolta and National's reliance on *pre-Howsam* case authority unavailing. In addressing FINRA's eligibility rule the Supreme Court held that it presented a procedural issue. That is, the resolution of the issue was "a matter presumptively for the arbitrator, not for the judge." *Id.* At 85.

The Court in *Mid -Ohio Sec's Corp v. Estate of Burns*, 790 F. Supp. 2d 1261m 1271 (D, Nev.2011) after noting that "*Howsam* undermined the basic premise which courts relied upon to determine eligibility rules like Rule 12206" went on to hold that this also undermined "the entire line of cases that suggest Rule 12206 is not subject to tolling."

It makes no logical sense (particularly post-*Howsam*) to turn a blind eye on alleged statements of suitability by Respondent concerning recommended securities. In this case, there are contested factual issues that cannot be resolved on a motion to dismiss on eligibility grounds. FINRA Rule 12206(a) cannot be applied so rigidly as to exclude a claim, even if ultimately on a full exposure of the facts, claims of unsuitability investment recommendations and breach of fiduciary duty are found to lack merit. The Panel notes Respondents' arguments that they are

not insurers of performance and that performance of Claimant's portfolio of securities has nothing to do with suitability. However, it concludes that the matter to be determined on these motions is limited to the specific terms of FINRA's Rules.

Worden's argument that the Statement of Claim must be dismissed because it was "not associated with the account(s), security(ies), or conduct at issue" rest on a surer foundation. It states in its Reply to Claimant's argument that "Claimants' claims are based on *investment adviser* advice (not broker-dealer recommendations) that Respondent Kolta gave Claimant. Respondent Worden is only a broker-dealer; it is *not* an investment adviser. Respondent Kolta's investment adviser registration is *separate and apart* from Respondent WCM, thus, Respondent WCM has no control over Respondent Kolta's investment adviser activities."

Further, Claimant has presented no evidence that it was a customer of Worden and Worden has persuasively demonstrated that although Kolta is registered with it as a broker, he owns a separate business entity offering financial advice. He does not act in that capacity as a Worden broker and for this reason Worden is not responsible for supervising Kolta's conduct as a financial advisor.

Accordingly, for the above stated reasons, Worden's motion to dismiss the Statement of Claim pursuant to FINRA Rule 12504(a)(6)(B) that it was not associated with the accounts, securities, or conduct at issue is granted.

On August 30, 2020, Claimant filed a notice dismissing without prejudice, his claims against Respondent Aegis Capital Corp. Therefore, the Panel made no determination with respect to any of the relief requests contained in the Statement of Claim against Respondent Aegis Capital Corp.

On December 2, 2020, Claimant filed a notice dismissing without prejudice, his claims against Respondent Cetera Advisors, LLC. Therefore, the Panel made no determination with respect to any of the relief requests contained in the Statement of Claim against Respondent Cetera Advisors, LLC.

On October 14, 2021, Claimant filed a notice dismissing with prejudice, his claims against Respondent National. Therefore, the Panel made no determination with respect to any of the relief requests contained in the Statement of Claim against Respondent National.

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. Claimant's claims are denied in their entirety.
2. Respondent Mark Sam Kolta's Counterclaim is denied in its entirety.
3. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages, and attorneys' fees, are denied.

## 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	=\$ 1,575.00
Counterclaim Filing Fee	=\$ 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 firms that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as parties, Respondents National Securities Corporation, Worden Capital Management LLC, Aegis Capital Corp, and Cetera Advisors LLC are each assessed the following:

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

### Postponement Fees

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

August 10-13 & 31, 2021, September 1-3, 2021, postponement requested by the parties = \$ 1,125.00

= \$ 1,125.00

January 18-21, 2022, postponement requested by the parties

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Total Postponement Fees	=\$ 2,250.00
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The Panel has assessed \$1,687.50 of the postponement fees to Claimant.

The Panel has assessed \$562.500 of the postponement fees jointly and severally to Respondent National and Kolta.

### Last-Minute Cancellation Fees

Fees apply when a hearing on the merits is cancelled within ten calendar days before the start of a scheduled hearing session:

August 10-13 & 31, 2021 & September 1-3, 2021, cancellation requested by Parties.	=\$ 1,800.00
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Total Last-Minute Cancellation Fees	=\$ 1,800.00
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The Panel has assessed \$900.00 of the last-minute cancellation fees to Claimant.

The Panel has assessed \$900.00 of the last-minute cancellation fees jointly and severally to Respondent National and Kolta.

**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 a single Arbitrator @ \$450.00/session = \$ 450.00  
Pre-Hearing Conference: February 15, 2021 1 session

Six (6) pre-hearing sessions with the Panel @ \$1,125.00/session = \$ 6,750.00  
Pre-Hearing Conferences: October 19, 2020 1 session  
May 3, 2021 1 session  
May 26, 2021 1 session  
June 14, 2021 1 session  
August 11, 2021 1 session  
November 18, 2021 1 session

Three (3) hearing sessions @ \$1,125.00/session = \$ 3,375.00  
Hearings: January 31, 2022 2 sessions  
February 1, 2022 1 session

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Total Hearing Session Fees = \$ 10,575.00

The Panel has assessed the total hearing session fees to Claimant.

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

**ARBITRATION PANEL**

Gerald M. Levine	-	Public Arbitrator, Presiding Chairperson
Richard W. Vallario	-	Public Arbitrator
Lori H. Carena	-	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**

***Gerald M. Levine***

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Gerald M. Levine  
Public Arbitrator, Presiding Chairperson

***02/22/2022***

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Signature Date

***Richard W. Vallario***

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Richard W. Vallario  
Public Arbitrator

***02/22/2022***

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Signature Date

***Lori H. Carena***

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Lori H. Carena  
Public Arbitrator

***02/23/2022***

\_\_\_\_\_  
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.

February 23, 2022

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