

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Dan Kozan Production Retirement Trust

95-02114

Name of Respondent

Smith Barney, Inc.

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**REPRESENTATION**

For Claimant, Dan Kozan Production Retirement Trust, appeared John Kolenda, Esq. a sole practitioner located in New York, New York.

For Respondent, Smith Barney Shearson, Inc., appeared Linda R. Alpert, Esq. in house counsel at Smith Barney Shearson, Inc., located in New York, New York.

**CASE INFORMATION**

Statement of Claim filed: May 2, 1995

Claimant's Submission Agreement signed on: May 7, 1995

Statement of Answer filed by Respondent on: July 6, 1996

Respondent's Submission Agreement signed on: July 6, 1995

**HEARING INFORMATION**

Hearing Dates/Sessions: June 26, 1996 - Two Sessions

The hearings were held at the offices of the National Association of Securities Dealers, Inc. located in New York, New York.



### CASE SUMMARY

Claimant alleged that it originally opened Account No. 692-20263 (the "Account") with Shearson Lehman Hutton ("Shearson") and that the Account was set up by Dan Kozan Productions Inc. pursuant to a lawfully adopted Trust Agreement. Claimant further alleged that the Trust Agreement reposed in Dan Kozan ("Kozan"), the president of Dan Kozan Production, Inc., as the Trustee and Administrator of the Trust, full authority and responsibility for maintaining the Trust for all of Dan Kozan Productions employees. Claimant also alleged that pursuant to this grant of authority Kozan made all purchase and sale decisions in the Account.

Claimant alleged that in May 1989, the Account had a value of approximately \$180,000.00, with one-half invested in Shearson money market funds and the other half in stocks of individual companies, primarily American Express, Bell Atlantic, Paramount Communications, Inc. and Sovran Financial Corp. Claimant alleged that while Kozan's Retirement Trust investment strategy was on the whole conservative, he also, on occasion, invested in speculative issues, including Circle K Corp. and Radiation Disposal Systems, Inc. Claimant further alleged that after the Retirement Trust purchased the shares of Circle K Corp., its Trustee placed a good until canceled sell order for all of these shares at 12 1/2 (\$12.50).

In addition, Claimant alleged that in January 1989, Kozan's wife commenced an action in Supreme Court, New York County for a judgement of divorce and sought an order to temporarily restrain Kozan from transferring or utilizing any of the separate or marital assets or property, in order to assure equitable distribution. Claimant contended that Kozan was restrained and stayed from transferring any and all marital property except for everyday living expenses and/or in the ordinary course of business. Claimant further alleged that pursuant to that order, Shearson not only froze Mr. and Mrs. Kozan's personal securities account, but also, in June 1989, Shearson's Legal Department, per Margarita Di Molfette, unilaterally decided that the Order also prohibited all further activity, of any kind, in the Retirement Trust's Account.

Specifically, Claimant alleged that on June 2, 1989, Shearson without authorization canceled the Retirement Trust's good until canceled stop loss sell orders for its Circle K position and that in June, 1989 Shearson refused to reinstate those sell orders or execute market orders to sell out the Retirement Trust's Radiation Disposal System's Inc. position. Claimant alleged that Shearson, and its successor, Respondent Smith Barney, refused to comply with its client's direction and thus violated its fiduciary duty as the Retirement Trust's broker/agent, and prevented the Account's Trustee and Administrator from administering the Account. Claimant further alleged that the Order only prevented the Retirement Trust from making a distribution of marital assets, and never restrained the Trust's use of stop loss orders on the shares of Circle K Corp. or the sale of Radiation Disposal Systems, Inc.

Claimant also alleged that Respondent could not properly ignore the Retirement Trust's Administrator orders to perform actions necessary to protect the Trust's assets from declining in value, nor could Respondent prevent the Administrator from otherwise fulfilling the investment obligations imposed upon him, without making itself responsible for their performance and, liable for losses resulting from their non-performance. Claimant asserted that

Respondent improperly and unlawfully canceled the Retirement Trust's outstanding stop loss sell orders and that it refused either to accept or execute stop loss sell orders from the Retirement Trust's authorized Trustee and Administrator, and accordingly, Respondent must be found to have assumed responsibility for the Administrator's statutorily mandated investment obligations of "prudence" and "exclusive purpose." Claimant further asserted that Respondent is liable for the losses sustained by the Retirement Trust's Account as a direct and proximate result of its refusal to execute the stop loss sell orders for the Account's Circle K Corp. shares and the sale of Radiation Disposal Systems, Inc. position, before they became worthless.

Respondent denied that it ever agreed to act as a fiduciary for Claimant's Retirement Trust. Respondent maintained that it acted appropriately in obeying the various court orders and subpoenas it was served with concerning Claimant's account.

Respondent maintained that the freeze on Claimant's account only prevented transfers out of the account; it did not prevent the entry of liquidating sales. Respondent further maintained that although Claimant attempted to blame it for his failure to sell certain stocks, it was entirely Claimant's choice whether to sell the securities in question or to hold them. Respondent also maintained that Claimant chose not to sell, and cannot now blame Respondent for that, and that Respondent was merely a stockholder, and had no fiduciary duty towards the Retirement Trust. Respondent contended that Claimant is simply a disgruntled investor who is making a hindsight attack on investments which he authorized and approved.

#### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$38,750.00 plus interest, and costs.

Respondent requested that all claims be dismissed in their entirety, with costs assessed against Claimant.

#### **OTHER ISSUES CONSIDERED & DECIDED**

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

### **AWARD**

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

1. All claims against Respondent are dismissed in their entirety;
2. The parties shall bear their respective costs, including attorneys' fees; and,
3. All other requests for relief are denied.

### **FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the arbitrators have assessed the following forum fees:

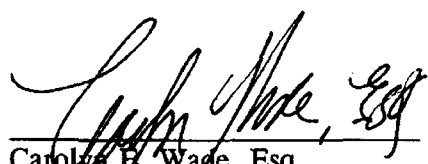
Total Forum Fees:               \$800.00           (2 Sessions x \$400)

Claimant is assessed the sum of \$400.00 representing one-half of the total forum fees assessed, less \$400.00 previously deposited, leaving \$0.00 due.

Respondent is assessed the sum of \$400.00 representing one-half of the total amount of forum fees assessed. Respondent is liable and shall pay to the NASD the sum of \$400.00.

Fees are payable to the National Association of Securities Dealers, Inc.

I, **Carolyn E. Wade, Esq.**, do hereby affirm, pursuant to Article 7505 of the Civil Practice Law and Rules, that this is my decision in the above captioned matter.

  
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Carolyn E. Wade, Esq.

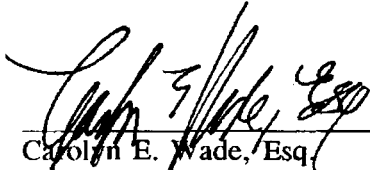
I, **Joseph S. Mascia**, do hereby affirm, pursuant to Article 7505 of the Civil Practice Law and Rules, that this is my decision in the above captioned matter.

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Joseph S. Mascia

I, **Barbara Glenns, Esq.**, do hereby affirm, pursuant to Article 7505 of the Civil Practice Law and Rules, that this is my decision in the above captioned matter.

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Barbara Glenns, Esq.

**ARBITRATORS' SIGNATURES**



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Carolyn E. Wade, Esq.  
Public Chairperson

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Joseph S. Mascia  
Public Arbitrator

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Barbara Glenns, Esq.  
Industry Arbitrator

Date of Decision: October 23, 1997