

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Louisa Esposito, (Claimant) vs. Donald & Co. Securities, Inc. and Otto Kozak, (Respondents)

Case Number: 00-02595

Hearing Site: New York, New York

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**REPRESENTATION OF PARTIES**

Claimant, Louisa Esposito, hereinafter referred to as "Claimant": Deidre S. Venables, Esq., a sole practitioner, Southampton, NY.

Respondent, Donald & Co. Securities, Inc. ("Donald"): Barbara Bennett, Esq., Director, Legal, Donald & Co. Securities, Inc., New York, NY.

Respondent, Otto Kozak ("Kozak"): Robert L. Herskovits, Esq., Law Offices of Michael F. Bachner, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: June 14, 2000.

Claimant signed the Uniform Submission Agreement: May 12, 2000.

Statement of Answer filed by Donald on or about: August 31, 2000.

Donald signed the Uniform Submission Agreement: August 31, 2000.

Statement of Answer filed by Kozak on or about: August 31, 2000.

Kozak did not sign a Uniform Submission Agreement.

**CASE SUMMARY**

Claimant asserted the following causes of action: misrepresentation and omission of material facts; unsuitability; unauthorized transactions; failure to follow instructions; failure to properly supervise; fraud; breach of conduct; breach of duty; negligence; violations of federal and state securities laws; and violations of the rules and regulations of the NASD. Claimant's claim involved a variety of stocks.

Unless specifically admitted in its Answer, Donald denied the allegations made in the Statement of Claim and asserted the following defenses: the Statement of Claim fails to state a claim upon which relief may be granted; Claimant's action or inaction bars her from recovery under the Statement of Claim by reason of the doctrines of waiver and estoppel; Claimant has suffered no damages as a result of any alleged wrongful action or inaction on the part of Donald; Claimant's claim is barred or reduced by reason of her own negligence and failure to exercise such diligence with respect to her investments as would be expected of a reasonable person under the same circumstances; Claimant's claims are barred, in whole or in part, by the applicable statute of limitations; and Claimant waived any and all claims alleged by continuing to pursue her investment strategy after receiving knowledge of the risk involved.

Unless specifically admitted in his Answer, Kozak denied the allegations made in the Statement of Claim and asserted the following defenses: the Statement of Claim fails to state a cause of action upon which relief may be granted; Claimant had full control over her investment decisions; any losses incurred were the result of market price fluctuations; Kozak cannot be held responsible for losses incurred as a result of securities Claimant purchased at another brokerage firm; Claimant's claims are barred by the defenses of ratification and waiver; Claimant failed to mitigate any alleged damages; Claimant's claims are barred by the doctrine of laches; Claimant had full knowledge of all material facts concerning her account including the positions held and the transactions made therein and therefore is estopped from bringing this claim; Claimant is an experienced investor who knowingly, willingly, and voluntarily assumed the risk of her investments; Claimant made her own investment decisions voluntarily and cannot shift to Respondents the burden of any investment losses; Claimant's losses, if any, were caused by her own conduct; at all times, Kozak conducted his business in a professional manner and acted in good faith, without knowledge of or participation in any alleged improper activity; Claimant did not rely to her detriment on any action or inaction of Kozak; pursuant to New York law, attorneys' fees are not allowed in securities arbitration; Donald is not a New York Stock Exchange member firm, therefore New York Stock Exchange rules have no bearing upon this arbitration; and no private right of action exists for an alleged violation of an SRO rule.

#### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$150,000.00, plus costs, expenses, disbursements, reasonable attorney's fees, and such other relief as the Panel deems just, proper, and equitable.

Donald requested that the Panel deny the relief requested by Claimant and order Claimant to reimburse Donald reasonably for its attorney's fees and other out-of-pocket costs incurred by the firm as a result of having to defend against Claimant's baseless claim.

Kozak requested that the Panel dismiss the Statement of Claim in its entirety; order that all references to this arbitration be expunged from the Central Registration Depository with respect to Kozak; award Kozak all costs and fees incurred in connection with this arbitration; and award Kozak all other relief which is just and proper.

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

Kozak did not file with NASD Dispute Resolution, Inc. a properly executed submission to arbitration but is required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure and, having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

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.

### **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. Claimant's claims are hereby dismissed in their entirety.
2. All other requests for relief are hereby denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = WAIVED

**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. In this matter, Donald & Co. Securities, Inc. is a party.

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$2,500.00

**Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator x \$450.00	= \$ 450.00
Pre-hearing conference: November 27, 2000	1 session
Four (4) Hearing sessions x \$1,125.00	= \$4,500.00
Hearing Dates: February 20, 2001	2 sessions
February 21, 2001	2 sessions
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Total Forum Fees	= \$4,950.00

1. The Panel has assessed \$1,650.00 of the forum fees against Claimant.
2. The Panel has assessed \$1,650.00 of the forum fees against Donald.
3. The Panel has assessed \$1,650.00 of the forum fees against Kozak.

**Fee Summary**

1. Claimant be and hereby is solely liable for:	
<u>Forum Fees</u>	= \$1,650.00
<u>Total Fees</u>	= \$1,650.00
<u>Less payments</u>	= \$ 0.00
<u>Balance Due NASD Dispute Resolution, Inc.</u>	= \$1,650.00

2. Donald be and hereby is solely liable for:

Member Fees	= \$4,600.00
<u>Forum Fees</u>	<u>= \$1,650.00</u>
Total Fees	= \$6,250.00
<u>Less payments</u>	<u>= \$4,600.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$1,650.00

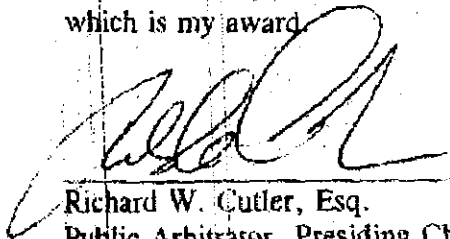
3. Kozak be and hereby is solely liable for:

<u>Forum Fees</u>	<u>= \$1,650.00</u>
Total Fees	= \$1,650.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$1,650.00

All balances are due and payable to NASD Dispute Resolution, Inc.

Concurring Arbitrators' Signatures

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.



Richard W. Cutler, Esq.  
Public Arbitrator, Presiding Chair

3/27/01  
Signature Date

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Robin R. Henry  
Public Arbitrator

Signature Date

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Kenneth L. Lampert  
Industry Arbitrator

Signature Date

March 28, 2001

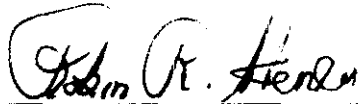
Date of Service (For NASD office use only)

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Richard W. Cutler, Esq.  
Public Arbitrator, Presiding Chair

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Signature Date



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Robin R. Henry  
Public Arbitrator

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

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Kenneth L. Lampert  
Industry Arbitrator

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

March 28, 2001

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Richard W. Cutler, Esq.  
Public Arbitrator, Presiding Chair

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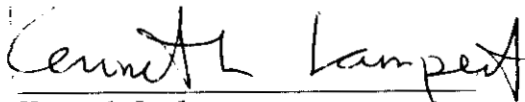
Signature Date

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Robin R. Henry  
Public Arbitrator

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Signature Date



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Kenneth L. Lampert  
Industry Arbitrator

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3/23/01  
Signature Date

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March 28, 2001  
Date of Service (For NASD office use only)