

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

---

In the Matter of the Arbitration Between

Name of Claimant

Lily Cates

vs.

AWARD  
#92-01565

Name of Respondents

Merrill Lynch Pierce Fenner & Smith, Inc.  
Shearson Lehman Brothers, Inc.  
Astrid M. Berg

---

**REPRESENTAION**

For Claimant Edward T. Swanson, Esq., Santa Monica, CA

For Respondents, Shearson Lehman Brothers, Inc., and Astrid Berg Samuel A. Turvey, Esq.,  
of Shearson Lehman located in New York, New York.

For Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc., Dennis M. Pape, Esq. in house  
counsel at Merrill Lynch located in New York, New York.

**CASE INFORMATION**

Statement of Claim filed on: May 6, 1992

Claimant's Submission Agreement signed on: April 13, 1992

Statement of Answer filed by Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc on: July  
14, 1992.

Statement of Answer filed by Respondents, Shearson Lehman Brothers, Inc. and Astrid M.  
Berg on: July 13, 1992.

=

Page 2  
Award #92-01565

Respondent. Merrill Lynch, Pierce, Fenner & Smith Incorporated's Submission Agreement signed on: July 13, 1992.

Respondents. Shearson Lehman Brothers, Inc. and Astrid M. Berg, did not execute Submission Agreements.

### HEARING INFORMATION

Pre-Hearing Conference: May 27, 1993 - 1 Session

Hearing Dates/Sessions:

June 15, 1993	- 2 Sessions
June 16, 1993	- 2 Sessions
June 17, 1993	- 2 Sessions
June 18, 1993	- 2 Sessions
February 10, 1994	- 1 Session
February 14, 1994	- 2 Sessions
February 15, 1994	- 2 Sessions
February 16, 1994	- 2 Sessions
February 17, 1994	- 2 Sessions
February 18, 1994	- 2 Sessions
February 23, 1994	- 2 Sessions
February 24, 1994	- 2 Sessions
February 25, 1994	- 2 Sessions
February 28, 1994	- 1 Session
March 01, 1994	- 2 Sessions

Hearing Location: NASD Inc., 33 Whitehall Street, New York, New York.

### CASE SUMMARY

Claimant, Lily Cates, alleged that she met with Respondent, Astrid Berg ("Berg"), on September 23, 1987, on advice from her accountant to diversify the \$300,000 she had in a checking account. During the meeting at the offices of Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc., ("Merrill Lynch"), Claimant alleged that when asked by Berg if she was familiar with limited partnership investments funds she stated that she had a little experience with real estate limited partnership and further stated that she was not knowledgeable concerning securities investments, and would rely on Berg's expertise. Claimant alleged that it was also at this time when she told Berg that she had a form of dyslexia which made it difficult for Claimant to read documents.

Claimant alleged that she deposited \$300,000 into an account with Berg for investment; that Berg invested \$200,000 in ML-Lee Acquisition Fund, Limited Partnership (the "ML Acquisition Fund"); and that when asked if the investment was liquid, Berg compared it to a blue chip stock. Claimant alleged that a \$200,000 purchase of a highly speculative investment by a new customer should have alerted Merrill Lynch to the precarious position of the account; that Merrill Lynch should have contacted Claimant to inquire about the risky position of the account but no such inquiries of Claimant were made. Claimant maintained that she was not aware of the risky investment position Berg had chosen for the account and that she relied on Berg's representations when she decided to transfer \$310,000 from another account to Berg in November of 1987.

Claimant alleged that in December of 1987, Berg began to purchase securities on margin for Claimant's account and Berg sent a note Claimant a note summarizing the performance of the equity portion of Claimant's account. Claimant alleged, however, that the statement was misleading, in that, it did not take into account margin or commission expenses and that it said nothing about the ML Acquisition Fund.

It is maintained by Claimant that in the second half of 1988, Berg changed firms from Merrill Lynch to Shearson Lehman Brothers, Inc. ("Shearson") and with that the Claimant transferred her account to Shearson with Berg. Claimant further maintained the net value of the Shearson account on December 31, 1988, was approximately \$587,000 and that over the last twelve months Berg bought and sold over \$5.4 million in securities or nearly ten times the net value of the account. It was alleged by Claimant that during this year Claimant paid over \$58,000 in margin interest and an estimated \$55,000 dollars in commissions to Shearson. Claimant also maintained that she had never given any discretionary authority for her account and that it was not until the beginning of 1992 that Claimant realized the amount of transactions made by Berg or the amount of commissions paid.

It was for the alleged reasons set forth above that Claimant believed the Respondents misrepresented the nature of the investments made on Claimant's behalf, committed fraud against Claimant, breached their fiduciary duty to Claimant, churned and excessively traded Claimant's account (in the cases of Berg and Shearson), used discretionary authority without written authorization and made unsuitable investment recommendations.

Respondent, Merrill Lynch, denies all claims and alleged on opening the account Claimant stated her investment objectives as "income" and "trading"; and that she had ten years investment experience in stocks and bonds; and that her prior trading was active.

Merrill Lynch alleged that when Claimant purchased units of ML Acquisition Fund, a confirmation of the purchase was sent to Claimant along with a prospectus which stated in bold letters on the front page that, this investment involved a high degree of risk and was not liquid; that at no time did Claimant make any complaint to Merrill Lynch that she had not authorized these purchases; that the investment did not meet her investment objectives or that the nature of this investment was not as it was represented.

Merrill Lynch further alleged that, although it was true that the ML Acquisition Fund made up the bulk of the Claimants portfolio at Merrill Lynch, the investment only represented a small portion of the Claimant's investment assets. Merrill Lynch also alleged that this investment was an income paying investment that, as of May 1992, paid the Claimant \$70,540 in cash distributions.

In addition, Merrill Lynch maintained that every trade executed in the Claimant's account at Merrill Lynch was authorized prior to entry and ratified by the Claimant; all trades recommended for Claimant's account were suitable; no misrepresentations were made to Claimant; and that Merrill Lynch was not negligent, or was Berg while employed at Merrill, in handling the Claimant's account. Merrill Lynch also maintained that at the time Berg left Merrill Lynch to join Shearson, Claimant elected to transfer her account with Berg, and at no time did Claimant make any Complaint to Merrill Lynch about any transaction that had taken place in her account, or did she ever express any dissatisfaction with Berg.

Respondents, Shearson and Berg, deny each and every allegation by the Claimant and allege that any losses in the Claimant's account were caused by market conditions rather than wrongdoing on the part of Shearson or Berg.

Shearson and Berg alleged that Claimant's opening account documentation reflected investment objectives of "appreciation with risk" and "speculation" and that Claimant expressed an interest in option trading at which time she was provided with disclosures pertaining to option trading, including a written confirmation of her investment objectives.

Respondents, Shearson and Berg, further alleged that during the maintenance of the account, Berg routinely informed Claimant of all activities in the account; that Berg regularly explained her investment strategies, including risks, to the Claimant; and that the Claimant was informed prior to every transaction made in her account.

Shearson and Berg also alleged that monthly statements and confirmations for all purchases were sent to the Claimant; that the Claimant never complained or indicated any dissatisfaction to any of the transactions made in the account; and that when contacted by Shearson's branch manager in order to assure the trading activity met with the Claimant's wishes. Claimant's response, if anything, was that she would like to trade more aggressively. Respondents, Shearson and Berg, contended that they acted in a proper, prudent and professional manner in handling the Claimant's account.

### **RELIEF REQUESTED**

Claimant requested rescission of the ML Acquisition Fund transactions in the sum of \$200,000 less cash distributions received to date but including interest from the time of purchase to the present; damages in the amount to be proven which Claimant believes to be in excess of \$500,000 together with interest thereon from the time the damages occurred to the present.

Respondent, Merrill Lynch, respectfully requested that all claims against it be dismissed and asks for cost to be assessed against Claimant.

Respondents, Shearson and Berg, requested that the Claimant's claim be dismissed in all respects.

### **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 arbitrator's has decided in full and final resolution of the issues submitted for determination as follows:

- 1) Respondent. Shearson is liable to Claimant for SEVENTY THOUSAND DOLLARS (\$70,000.00). Interest is awarded from April 17, 1990, to March 31, 1994, at an interest rate of six percent per annum.
- 2) Respondents. Shearson and Berg, are jointly and severally liable to Claimant for THIRTY THOUSAND ONE HUNDRED THIRTY DOLLARS (\$30,130.00). Interest is awarded on this amount from April 17, 1990, to March 31, 1994, at an interest rate of six percent per annum.
- 3) Respondent. Merrill Lynch is liable to the Claimant for FIFTY FOUR THOUSAND DOLLARS (\$54,000.00). No interest is awarded.
- 4) Respondents. Merrill Lynch and Berg, are jointly and severally liable for SIX THOUSAND DOLLARS (\$6,000.00). No interest is awarded.

#### **FORUM FEES**

Pursuant to Section 43(c) of the *Code of Arbitration Procedure*, the following Forum Fees are assessed.

Non-Refundable Filing Fee: \$250.00  
Pre Hearing Conference Fee: \$300.00  
Hearing Session Fees: \$26,000.00 (26 Sessions x \$1000)

Total Forum Fees = \$26,550.00

Total forum fees are hereby assessed as follows:

- 1) Respondent, Shearson Lehman Brothers, Inc. is assessed NINETEEN THOUSAND NINE HUNDRED TWELVE DOLLARS AND FIFTY CENTS (\$19,912.50).
- 2) Respondent, Merrill Lynch, Pierce, Fenner & Smith is assessed SIX THOUSAND SIX HUNDRED THIRTY SEVEN DOLLARS AND FIFTY CENTS (\$6,637.50).
- 3) Claimant previously paid ONE THOUSAND TWO HUNDRED FIFTY DOLLARS AND ZERO CENTS and is entitled to a refund in that amount.
- 4) Respondent, Astrid M. Berg, was assessed and paid a THOUSAND DOLLARS (\$1,000.00) fee in connection with the postponement of the hearing that was scheduled for November 11, 1993 and November 12, 1993.
- 5) Respondent, Shearson Lehman Brothers, Inc., was assessed and paid a THOUSAND

DOLLARS (\$1,000.00) fee in connection with the postponement of the hearing that was scheduled for February 25, 1993 and February 26, 1993.

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

**ARBITRATION PANEL**

Robert D. Herschman - Public Chairperson  
Robina Fedora Asti - Industry Panelist  
Brian J. Burstin - Public Panelist

Concurring Arbitrator's Signature

 Public Panelist  
Robina Fedora Asti

Executed on:  
~~Date of Decision~~ 5/13/94

Date of Decision: May 16, 1994

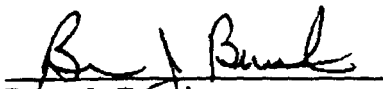
DOLLARS (\$1,000.00) fee in connection with the postponement of the hearing that was scheduled for February 25, 1993 and February 26, 1993.

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

**ARBITRATION PANEL**

Robert D. Herschman - Public Chairperson  
Robina Fedora Asti - Industry Panelist  
Brian J. Burstin - Public Panelist

Concurring Arbitrator's Signature

  
\_\_\_\_\_  
Brian J. Burstin      Public Panelist

Executed on: May 18, 1994

~~Date of Decision:~~ May 18, 1994

Date of Decision: May 16, 1994



STATE OF NEW YORK      s.s.:  
COUNTY OF *New York*

On this *13* day of May, 1994, before me personally appeared **Robina Fedora Asti**, known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledge to me that she executed the same.

*Deborah A. DeJesus*

DEBORAH A. DEJESUS  
Notary Public, State of New York  
No. 02DE5022979  
Qualified in New York County *96*  
Commission Expires January 24, 1996

Page 7  
Award #92-01565

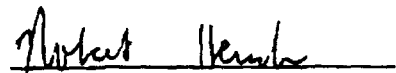
DOLLARS (\$1,000.00) fee in connection with the postponement of the hearing that was scheduled for February 25, 1993 and February 26, 1993.

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

**ARBITRATION PANEL**

Robert D. Herschman	-	Public Chairperson
Robina Fedora Asti	-	Industry Panelist
Brian J. Burstin	-	Public Panelist

Concurring Arbitrator's Signature

  
Robert D. Herschman      Public Panelist

Date of Decision: May 16, 1994