

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Falplat S.A.

92-04235

Name of Respondent

Shearson Lehman Brothers, Inc.

Name of Third-Party Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.
Kidder, Peabody & Co., Incorporated

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on December 18, 1992, Claimant Falplat S.A., who appeared Pro Se, alleged that while they managed their account with Respondent Shearson Lehman Brothers, Inc. they held an investment in Texas Instruments Int. FIN NB bond for an amount of \$50,000.00, maturity March 15, 1991, coupon 11 7/8 with a call option. Claimant further alleged on February 23, 1989 Texas Instruments called the bonds, but Respondent did not take this into account whereby on March 15, 1989, Respondent paid Claimant the interest from March 15, 1988 to March 15, 1989 for a total of \$5,937.50. Claimant contended that on July 12, 1989 they transferred their account from Respondent Shearson Lehman Brothers, Inc. to Kidder, Peabody & Co., Incorporated and according to the stock record takeoff, Respondent included an ACATS transfer of the bonds, whereby Kidder, Peabody & Co., Incorporated maintained the bonds in their records and later transferred them to Merrill Lynch, Pierce, Fenner & Smith, Inc., at which time, on March 15, 1990, Merrill Lynch, Pierce, Fenner & Smith, Inc. paid Claimant the interest. Claimant further contended that on February 11, 1991, Merrill Lynch, Pierce, Fenner & Smith, Inc. took into account that they paid interest on a bond that had been called and charged Claimant's account the sum of \$5,937.50, the amount that was paid out the year before. Claimant asserted that on February 11, 1991 Merrill Lynch, Pierce, Fenner & Smith, Inc. paid the principal of the bond whereby up to date. Claimant has not been paid for the interest from March 15, 1989 to February 22, 1991, thus Respondent Shearson Lehman Brothers, Inc. is liable for the unpaid interest.

Respondent Shearson Lehman Brothers, Inc., by and through their in-house counsel, Thomas E. Hommel, Esq., maintained that on October 6, 1987 Claimant Falplat S.A. opened a Financial Management Account ("FMA") and subsequently on November 10, 1987 Claimant transferred a \$50,000.00 Texas Instruments International Bond with a yield of 11 7/8 due March 15, 1991 into the account with Respondent. Respondent Shearson Lehman Brothers, Inc. further maintained that on March 15, 1991, the bond was called; however, for reasons still unclear, notification of the call was either not received by Respondent or was not properly entered into Respondent's system, whereby on March 15, 1989, which also was a date which called for payment in interest on the bond, Respondent tendered Claimant an interest payment of \$5,937.00 but did not pay the face amount of \$50,000.00. Respondent contended that shortly thereafter, on July 12, 1989 Claimant transferred its account from Respondent Shearson Lehman Brothers, Inc. to Kidder, Peabody & Co., Incorporated and in the process of that transfer, Kidder, Peabody & Co., Incorporated gave to Respondent a positive acknowledgement of receipt of the bond in Claimant's account. Respondent further contended that thereafter, upon information and belief, Claimant transferred its account from Kidder, Peabody & Co., Incorporated to Merrill Lynch, Pierce, Fenner & Smith, Inc. and once again, the bond was transferred as well whereby finally, on February 22, 1991, Merrill Lynch, Pierce, Fenner & Smith, Inc. tendered the bond and paid Claimant the \$50,000.00 face value. Respondent asserted that the fact is they were in possession of the bond for only four months of that time and although Respondent did not tender the bond when it was originally called in March of 1989, neither Kidder, Peabody & Co., Incorporated nor Merrill Lynch, Pierce, Fenner & Smith, Inc. recognized that the bond had been called whereby even if Respondent can be said to have made a mistake with respect to the bond, it cannot be said that Respondent had any reason to believe that it had made a mistake or had any means of correcting that mistake after July 12, 1989, when the account was transferred out of Respondent, and at most, Respondent may fairly be held responsible for interest at the legal rate of nine percent (9%) for a period of four months, or \$1,500.00. Respondent Shearson Lehman Brothers, Inc. further asserted that any liability beyond that sum must be assessed against Kidder, Peabody & Co., Incorporated and Merrill Lynch, Pierce, Fenner & Smith, Inc., who held the bond from July, 1989 until February, 1991. Respondent further maintained that they are willing to contribute its fair share to compensate Claimant for whatever damages it may have sustained due to this unfortunate situation, but Respondent should not be unfairly punished for Kidder, Peabody & Co., Incorporated and Merrill Lynch, Pierce, Fenner & Smith, Inc. failure to acknowledge that the bond has been called once the account had been transferred into their custody.

Respondent Shearson Lehman Brothers, Inc. asserted a Third-Party Claim against Third-Party Respondents Kidder, Peabody & Co., Incorporated and Merrill Lynch, Pierce, Fenner & Smith, Inc. to the extent that Respondent Shearson Lehman Brothers, Inc. is held responsible for damages accruing to Claimant between July 12, 1989 and February 22, 1991, such liability is directly due to the negligence and/or willful acts of Third Party Respondents in failing to advise Claimant that the bond had been called.

Third-Party Respondent Kidder, Peabody & Co., Incorporated, by and through their in-house counsel David Rivera, Esq., maintained that the events giving rise to this arbitration were the results of the negligent conduct of Respondent Shearson Lehman Brothers, Inc. not advising Claimant Falplat S.A. in March, 1989 that their Texas Instruments bonds had been called whereby Third-Party Respondent Kidder, Peabody & Co., Incorporated records indicate that on July 12, 1989, Claimant's account was transferred utilizing the ACAT transfer system and the bonds were subsequently transferred to Third-Party Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. in October, 1989. Third-Party Respondent Kidder, Peabody & Co., Incorporated further maintained that there is no basis set forth either in the Statement of Claim of the Third-Party Claim for holding them liable for interest on the bond for the three month period of time during which it was with them and as acknowledged by the Claimant, Third-Party Respondent Kidder, Peabody & Co., Incorporated was unaware that the bond had been called while it was at Respondent Shearson Lehman Brothers, Inc. and thus, it was Respondent's Shearson Lehman Brothers, Inc. negligence in not tendering the called bonds in March, 1989 that was the actual and proximate cause of Claimant's damages.

Third-Party Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., by and through their in-house counsel Christopher Cavuoti, Esq., maintained that the events giving rise to this arbitration matter were the result solely of the negligent conduct of Respondent Shearson Lehman Brothers, Inc. in not advising Claimant Falplat S.A. that their Texas Instruments bond had been called. Third-Party Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. further maintained that in July, 1989 Claimant's account was transferred to Third-Party Respondent Kidder, Peabody & Co., Incorporated utilizing the ACAT transfer system and in the Statement of Claim, Claimant makes it clear that they were also unaware that the bond had been called whereby in October, 1989, pursuant to an Acquisition Agreement entered into between the Third-Party Respondents, Third-Party Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. agreed to purchase all of the assets in the State of Florida including the right to service accounts based at Third-Party Respondent Kidder, Peabody & Co., Incorporated in Florida, at which time, the transfer of accounts was done on a bulk transfer basis with no physical delivery of any certificates, thus Third-Party Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. could not have reasonably known that Claimant's bond had been called at this time utilizing any reasonable standard of care. Third-Party Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. contended that on February 11, 1991 they properly rescinded the interest payment to Claimant and paid the principal amount on the called bond to Claimant in the amount of \$50,000.00 and from the Statement of Claim and Respondent Shearson Lehman Brothers, Inc.'s Answer, it is clear that Respondent's negligence in not tendering the called bond was the actual and proximate cause of Claimant's damages and therefore they should be held strictly liable for all damages.

RELIEF REQUESTED

Claimant Falplat S.A. requested the sum of \$10,000.00 in actual damages.

Respondent Shearson Lehman Brothers, Inc. requested the claim be denied, or in the alternative held responsible for interest at the legal rate of 9% for a period of four months.

Third-Party Claimant Shearson Lehman Brothers, Inc. requested indemnification of responsibility from July 12, 1989 to February 22, 1991 against Third-Party Respondents Kidder, Peabody & Co., Incorporated and Merrill Lynch, Pierce, Fenner & Smith, Inc.

Third-Party Respondent Kidder, Peabody & Co., Incorporated requested the Third-Party Claim be denied in its entirety.

Third-Party Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. requested the Third-Party Claim be dismissed and they be awarded its reasonable attorney's fees, costs and expenses.

AWARD

Pursuant to Section 13 of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Mary Ann Lanzetta, was selected to review and determine the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on December 1, 1992, by the Respondent Shearson Lehman Brothers, Inc. on June 28, 1993, by Third-Party Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. on October 11, 1993 and by Third-Party Respondent Kidder, Peabody & Co., Incorporated on September 15, 1993.

And, the Arbitrator, having considered the proof of the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

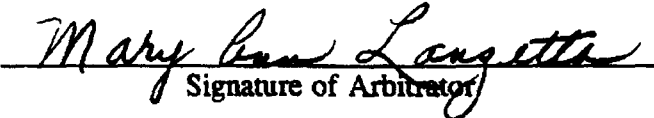
1. Respondent Shearson Lehman Brothers, Inc. is liable and shall pay to the Claimant Falplat S.A. the total sum of \$8,800.00; representing interest at 9% on the principal amount of \$50,000.00 from March 15, 1989 to March 15, 1990 in the amount of \$4,500.00 and interest at 9% on the principal amount of \$50,000.00 from March 15, 1990 to February 22, 1991 in the amount of \$4,300.00.
2. The Third-Party Claim of Shearson Lehman Brothers, Inc. against Third-Party Respondents Kidder, Peabody & Co., Inc. and Merrill Lynch, Pierce, Fenner & Smith, Inc. is dismissed.

3. The parties shall bear their respective costs, including attorney's fees.
4. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Falplat S.A. shall be retained by the NASD, Inc. Respondent Shearson Lehman Brothers, Inc. is liable and shall pay the sum of \$150.00, as reimbursement.

Third-Party Claimant Shearson Lehman Brothers, Inc.'s \$500.00 of the \$575.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. shall be retained. Third-Party Claimant Shearson Lehman Brothers, Inc. shall pay the outstanding sum of \$75.00 to the NASD, Inc.

AFFIRMATION

I, MARY ANN LANZETTA, do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.


Signature of Arbitrator

DATE OF DECISION: NOVEMBER 26, 1993

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STATE OF: *N.Y.*

SS:

COUNTY OF: *Queens*

On this 18 day of November 19 93, before me personally appeared **MARY ANN LANZETTA** to me known and known before me to be the individual described in and who executed the foregoing instrument and she duly acknowledged to me that she executed the same.

Georgetta Monaco

GEORGETTA MONACO
Notary Public, State of New York
No. 41-4828868
Qualified in Queens County
Commission Expires March 30, 1997
12/31/95