

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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In the Matter of the Arbitration Between

**Name of Claimants**

Michael and Barbara Gross

92-01239

**Name of Respondents**

Merrill Lynch, Pierce, Fenner & Smith, Inc.  
Robert McKiernan

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**REPRESENTATION**

For Claimants Michael and Barbara Gross ("Claimants"): Richard D. Orlow, Attorney at Law.

For Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Robert McKiernan ("McKiernan"): Todd A. Zuckerbrod, Esq. of Merrill Lynch.

**CASE INFORMATION**

Statement of Claim filed: April 7, 1992.

Claimant's Submission Agreement signed on: March 17, 1992.

Joint Statement of Answer filed by Respondents Merrill Lynch and McKiernan (collectively referred to as "Respondents") on: June 17, 1992.

Merrill Lynch's Submission Agreement signed on: June 15, 1992.

McKiernan's Submission Agreement signed on: June 3, 1992

**HEARING INFORMATION**

Hearing Date/Sessions: December 15, 1992, two sessions

Hearing Location: NASD Office, Philadelphia, PA

### **CASE SUMMARY**

Claimants alleged that Respondents solicited the Claimants to purchase Americus Tr Dow shares - Scores ("Dow Scores") for purchase in their Individual Retirement Accounts ("IRAs"). Claimants alleged that Respondents advised them that Dow Scores were options that did not expire and were suitable for Claimants IRAs. Claimants alleged that they later found out that the Dow Scores were not non expiring options. Claimants alleged that Respondents made material misrepresentations and failed to disclose that the Dow Scores was a potentially risky investment which was unsuitable for Claimants' IRAs. Claimants alleged that Respondents were aware of the risks associated with this investment. Claimants alleged that Respondents acted in a careless, negligent and fraudulent manner and without regard for the exercise of due care under the circumstances.

Respondents denied all allegations of wrongful conduct asserted by the Claimants. Respondents maintained that Claimants were interested in growth oriented investments for their IRAs that would offer the potential for substantial price appreciation. Respondents maintained that, prior to Claimant Mr. Gross authorizing the purchase of the Dow Scores investment, all associated risks were fully disclosed to him. Respondents maintained that McKiernan explained to Mr. Gross that a "score" gives its holder the right to all price appreciation on an underlying security above a specified price, but none of the dividend income derived from the security. Respondents maintained that Dow Scores were suitable for Claimants. Respondents maintained that on July 23, 1991, McKiernan learned that Dow Scores were due to expire in May, 1992, he called Mr. Gross and gave him the opportunity to cancel the Dow Scores transaction, but Mr. Gross made the decision to hold Dow Scores in his and his wife's IRAs. Respondents maintained that Mr. Gross was a knowledgeable and experienced investor, who made a conscious decision to hold Dow Scores. Respondents maintained that Claimants attempt to hold Respondents as guarantors of their investment decision is without merit.

### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of \$15,666, plus attorney's fees, interest and all costs associated with this arbitration.

Respondent requested that the Arbitration Panel deny Claimants' claim in its entirety and assess all costs against Claimants.

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

1. That Claimants' claim is denied in its entirety.
2. That the parties are to bear their respective costs including attorney's fees.

**FORUM FEES**

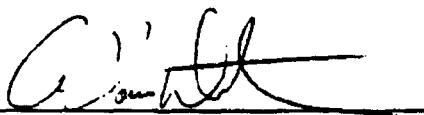
Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.

That the forum fees for the two hearing sessions totalling \$800 are assessed equally. Claimants are assessed forum fees in the amount of \$400 but are entitled to offset this amount with their hearing session deposit of \$400; therefore, no more monies are due from Claimants. Respondents are jointly and severally assessed forum fees in the amount of \$400.

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

Concurring Arbitrator's Signature  
Name

Public/Industry

  
A. Louis Denton, Esq.

1/20/93  
Industry Arbitrator

Date of Decision: January 27, 1993

**OTHER ISSUES CONSIDERED & DECIDED**

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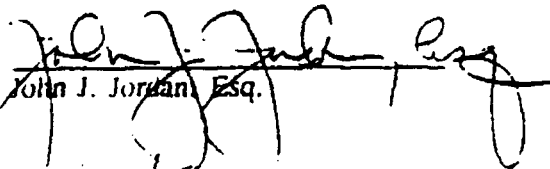
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Concurring Arbitrator's Signature  
Name

Public/Industry

  
John J. Jordan, Esq.  
1/19/93

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Public Arbitrator

Date of Decision: January 27, 1993

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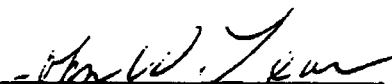
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Concurring Arbitrator's Signature  
Name

Public/Industry

  
John W. Lear

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Public Arbitrator

Date of Decision: January 27, 1993