

**AWARD**  
**NASD Dispute Resolution**

---

*In the Matter of the Arbitration Between*

**Name of Claimants**

David L. Eland and Jo Ann Eland

and

Case Number: 03-02664  
Hearing Site: Milwaukee, Wisconsin

**Name of Respondents**

American Express Financial Advisors and  
Kelly L. Diestler

---

**NATURE OF DISPUTE**

Customer v. Member and Associated Person.

**REPRESENTATION OF PARTIES**

David L. and Jo Ann Eland ("**Claimant**"), was represented by Erwin Cohn Esq., of Cohn & Cohn located in Chicago, Illinois.

American Express Financial Advisors and Kelly L. Diestler ("**Respondents**") were represented by Joseph M. Callow, Esq., of Keating, Muething & Klekamp, L.L.P. located in Cincinnati, Ohio.

**CASE INFORMATION**

The Statement of Claim was filed on or about April 11, 2003. The Submission Agreement of Claimants was signed on or about February 21, 2003.

The Joint Statement of Answer was filed by Respondents American Express and Diestler on July 7, 2003.

The Submission Agreement of Respondent Diestler was signed on June 12, 2003. The Submission Agreement of Respondent American Express was signed on May 14, 2003.

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of contract; violation of section 2310, 2110, 2120, and 3010; violation of NYSE Rule 405(1) and Rule 408 (a) of the NASD Code of Conduct; 15 U.S.C. 77(b), Rule 10-(b) and Rule 10-(b)(5); unsuitable investments; unauthorized trading; common law fraud; constructive fraud; respondent superior; and

breach of fiduciary duty.

All of Claimant's causes of action are in connection with investments in "high risk" funds.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following affirmative defenses; Respondents did not act with the intent to defraud; Claimants alleged damages are not the result of any actions of Respondents'; Claimants received confirmations and written statements reflecting all the transactions in their accounts and did not object to such information; any and all duties owed to Claimants were fully and faithfully preformed; Respondents have no fiduciary duty to Claimants as a matter of law; Claimants have failed to take the necessary and proper steps to mitigate their alleged damages.

### **RELIEF REQUESTED**

Claimant requested an award in the amount of \$2,000,000.00.

Respondents requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and attorneys' fees.

### **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 NASD Dispute Resolution ("NASD").

At the Conclusion of Claimant's case in Chief the Respondents moved for Summary Judgment. Respondents' request was denied by the Panel.

### **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.) Respondents American Express financial Advisors and Kelly Dieter are jointly and severally liable and shall pay to Claimants David L Eland and Jo Ann Eland \$175,000.00 in compensatory damages;
- 2.) That other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and,

- 3.) That any relief not specifically enumerated, including punitive damages and attorney fees, is hereby denied with prejudice.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee = \$ 500.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute. In this matter, the member firm is American Express Financial Advisors.

Member surcharge = \$2,800.00  
Pre-hearing process fee = \$ 750.00  
Hearing process fee = \$5,000.00

#### **Forum Fees and Assessments**

The Arbitration 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 Panel x \$1,200.00	= \$1,200.00
Pre-hearing conference: December 18, 2003	1 session
Two (2) Pre-hearing session with a sole arbitrator	
Pre-hearing conferences: April 22, 2004	1 session
April 30, 2004	1 session
Twelve Hearing sessions x \$1,200.00	\$14,400.00
Hearing Dates: August 30, 2004	2 sessions
August 31, 2004	2 sessions

September 1, 2004	2 sessions
September 2, 2004	2 sessions
March 1, 2005	2 sessions
March 2, 2005	2 sessions

Total Forum Fees = \$16,500.00

The Arbitration Panel has assessed \$8,250.00 of the forum fees Claimants David L. and Jo Ann Eland.

The Arbitration Panel has assessed \$8,250.00 of the forum fees to Respondents American Express Financial Advisors, Inc. and Kelly Diestler jointly and severally.

### Fee Summary

Claimants David L. Eland and Joanne Eland are jointly and severally liable for:

Initial Filing Fee	= \$ 500.00
Forum Fees	= \$ 8,250.00
Total Fees	= \$ 8,750.00
Less payments	= \$ 1,700.00
Balance Due NASD Dispute Resolution	= \$ 7,050.00

Respondent American Express Financial Services is solely liable for:

Member Fees	= \$ 8,550.00
Total Fees	= \$ 8,550.00
Less payments	= \$ 8,550.00
Balance Due NASD Dispute Resolution	= \$ .00

Respondents American Express Financial Services and Kelly Diester are jointly severally liable for:

Forum Fees	= \$ 8,250.00
Total Fees	= \$ 8,250.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 8,250.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Larry Carlson, Esq., Public Arbitrator, Presiding Chair  
Gary L. Grolle, Esq. Public-Public Arbitrator  
Kevin J. Demet, JD Non-Public Arbitrator

**Concurring Arbitrators:**

\_\_\_\_\_  
Larry Carlson, Esq.  
Public Arbitrator, Presiding Chair

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

\_\_\_\_\_  
Gary L. Grolle, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Kevin J. Demet,  
Non-Public Arbitrator

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

3/30/04  
Date of Service (For NASD office use only)

NASD Dispute Resolution  
Arbitration No. 03-02864  
Award Page 5 of 5

NASD Dispute Resolution, Inc.  
**RECEIVED**  
MAR 31 2005

**ARBITRATION PANEL**

Larry Carlson, Esq., Public Arbitrator, Presiding Chair  
Gary L. Grolle, Esq. Public-Public Arbitrator  
Kevin J. Demet, JD Non-Public Arbitrator

**Concurring Arbitrators:**

Larry Carlson, Esq.  
Public Arbitrator, Presiding Chair

Signature Date

  
Gary L. Grolle, Esq.  
Public Arbitrator

  
Signature Date

Kevin J. Demet,  
Non-Public Arbitrator

Signature Date

Date of Service (For NASD office use only)

FROM :

FAX NO. : 7733769690

Mar. 30 2005 10:12AM P2

03/28/2005 16:38 FAX

NASD

007/007

NASD Dispute Resolution  
Arbitration No. 03-02984  
Award Page 5 of 8

**ARBITRATION PANEL**

Larry Carlson, Esq., Public Arbitrator, Presiding Chair  
Gary L. Grolle, Esq. Public-Public Arbitrator  
Kevin J. Demet, JD Non-Public Arbitrator

Concurring Arbitrators:

  
\_\_\_\_\_  
Larry Carlson, Esq.  
Public Arbitrator, Presiding Chair

30 MAR 05  
Signature Date

\_\_\_\_\_  
Gary L. Grolle, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Kevin J. Demet,  
Non-Public Arbitrator

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

\_\_\_\_\_  
Date of Service (For NASD office use only)