

## **Award NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Peter J. Wiese and Laurel J. Rakestraw individually, jointly and as Trustees of the Wiese-Rakestraw Charitable Remainder Unitrust and the Wiese- Rakestraw Trust, and Mark Wiese as trustee of the Wiese-Rakestraw Life Insurance Trust, Claimants v. American Express Financial Advisors, Inc., Steven R. Peabody, and Gary D. Jurden, Respondents

Case Number: 04-05287

Hearing Site: Portland, Oregon

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Nature of the Dispute: Customers v. Member and Associated Persons

### **REPRESENTATION OF PARTIES**

For Claimants:

Jeffrey S. Salisbury, Esq.  
Attorney at Law  
Eugene, Oregon

For Respondents:

Sam Edgerton, Esq.  
Elizabeth Lowery, Esq.  
Law Offices of Edgerton &  
Weaver  
Hermosa Beach, California

### **CASE INFORMATION**

Statement of Claim filed: July 20, 2004

Claimants Peter J. Wiese and Laurel J. Rakestraw individually, jointly and as Trustees of the Wiese-Rakestraw Charitable Remainder Unitrust and the Wiese-Rakestraw Trust's, Joint Uniform Submission Agreement signed: June 30, 2004

Claimant Mark Wiese as Trustee of the Wiese Rakestraw Life Insurance Trust's Uniform Submission Agreement signed: June 29, 2004

Joint Statement of Answer filed by Respondents: September 15, 2004

Respondent American Express Financial Advisors, Inc.'s Uniform Submission Agreement signed: August 24, 2004

Respondent Gary D. Jurden's Uniform Submission Agreement signed:  
August 30, 2004

Respondent Steven R. Peabody's Uniform Submission Agreement signed:  
September 8, 2004

### **CASE SUMMARY**

Claimants alleged negligence, violation NASD Suitability Rule and NYSE "Know Your Customer" Rule, violation of Oregon "blue sky" statutes at ORS 59.119 etc, breach of fiduciary duty and negligent misrepresentation and intentional fraud and deceit. Claimants' allegations involved the sale of UPS stock and reinvestment of the proceeds in unspecified securities.

Respondents denied the allegations of wrongdoing set forth in Claimants' Statement of Claim.

### **RELIEF REQUESTED**

Claimants requested \$600,000.00 in compensatory damages, unspecified punitive damages, pre- and post-judgment interest and costs, including attorney's fees.

Respondents requested dismissal Claimants' Statement of Claim in its entirety.

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

On or about August 1, 2005, Respondent American Express Advisors, Inc. changed its name to Ameriprise Financial Services, Inc.

On or about May 19, 2006, during the evidentiary hearing, after the close of testimony, Respondent, Gary D. Jurden, moved the Panel for an Order dismissing Claimants' claims against him. The Panel took the motion to dismiss under advisement. On or about May 31, 2006, after due deliberation in an executive session, the Panel denied the motion.

On or about August 28, 2006, Respondents moved the Panel for an Order dismissing Claimants' claims on the ground that Claimants' claims were barred by the statute of limitations. On or about September 13, 2006, Claimant filed an opposition to Respondents' Motion to Dismiss. On October 6, 2006, a telephonic post-hearing conference was held, attended by the Parties and the Panel. After due deliberation in an executive session, the Panel denied the motion.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

### **FINDINGS AND CONCLUSIONS**

The Panel is not convinced by a preponderance of the evidence that Claimants had discovered the facts on which their claims are based prior to July 20, 2002. Mere knowledge that their investments were not risk-free, that they were losing money, and that the AXP funds were rated poorly by Morningstar is not enough to put Claimants on inquiry notice and trigger the running of the two-year statute of limitations.

Claimants prevail on their claims for negligence, negligent misrepresentation, breach of fiduciary duty, and violations of Oregon's securities laws. The Panel finds that Respondents' investment recommendations were unsuitable for these unsophisticated investors who were primarily income investors looking for safety.

The determination to award damages to the Claimants is based upon a comparison of the actual performance of Claimants' investments to widely accepted benchmarks. The Panel specifically rejects Claimants' model portfolio theory of damages.

### **AWARD**

After considering the pleadings, testimony, and evidence presented at the hearing, and the post-hearing submissions, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Respondents are jointly and severally liable to and shall pay Claimants the sum of \$167,000.00 in compensatory damages.
- 2) Respondents are jointly and severally liable to and shall pay Claimants the sum of \$78,000.00 in attorney's fees, pursuant to ORS 59.115.
- 3) Except as noted above, the parties shall bear their respective costs, including attorney's fees.
- 4) All other relief including punitive damages requested and not expressly granted is denied.

## **FEES**

Pursuant to the Code, the following fees are assessed:

### **Filing Fees**

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

Initial claim filing fee	= \$ 375.00
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### **Member Fees**

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm American Express Advisors, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 2,250.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 4,000.00
<b>Total Member Fees</b>	<b>= \$ 7,000.00</b>

### **Adjournment Fees**

The following adjournment fees are assessed:

September 13-16, 2006, adjournment requested by Respondents	= \$1,200.00
October 3, 2006, adjournment requested by Respondents	= \$1,500.00

The Panel assessed the Postponement fees jointly and severally to Respondents

### **Three-Day Cancellation Fees**

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

October 3, 2006, adjournment requested by Respondents	= \$ 300.00
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The Panel assessed \$300.00 of the three day cancellation fee jointly and severally to Respondents

### **Forum Fees and Assessments**

The Panel assessed forum fees for each session conducted or each decision rendered on a discovery-related motion on the papers. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators that last four (4) hours or less. Fees associated with these proceedings are:

(1) Pre-hearing conference session with a single arbitrator @ \$ 450.00/session			
Pre-hearing conference:	April 20, 2006	1 session	\$ 450.00
(2) Pre-hearing conference sessions with the Panel @ \$1,200.00/session = \$ 2,400.00			
Pre-hearing conferences:	November 9, 2004	1 session	
	September 29, 2005	1 session	
(13) Hearing sessions @ \$1,200.00/session			= \$15,600.00
Hearings:	May 16, 2006	2 sessions	
	May 17, 2006	2 sessions	
	May 18, 2006	2 sessions	
	May 19, 2006	2 sessions	
	August 31, 2006	2 sessions	
	September 1, 2006	2 sessions	
	October 6, 2006	1 session	
<b>Total Forum Fees</b>			<b>= \$18,450.00</b>

The Panel assessed \$18,450.00 of the forum fees jointly and severally to Respondents.

### **Administrative Costs**

Administrative costs are expenses incurred because a party requested additional services beyond the normal administrative services. These additional services include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, security, and sundry other requests.

Respondents requested copies of 15 tapes @ \$15.00 per tape:	= \$ 225.00
Claimants requested copies of 15 tapes @ \$15.00 per tape:	= \$ 225.00

### Fee Summary

1. Claimants are charged with the following fees and costs:

Initial Filing Fee	= \$ 375.00
Administrative Costs	= \$ 225.00
Total Fees	= \$ 600.00
Less payments	= \$(1,830.00)
<b>Refund Due Claimants</b>	<b>= \$(1,230.00)</b>

2. Respondent American Express Advisors, Inc. is charged with the following fees and costs:

Member Fees	= \$ 7,000.00
Less payments	= \$(7,000.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 0.00</b>

3. Respondents American Express Advisors, Inc. Steven R. Peabody and Gary D. Jurden are charged jointly and severally with the following fees and costs:

Forum Fees	= \$18,450.00
Administrative Costs	= \$ 225.00
Three Day Cancellation Fee	= \$ 300.00
Postponement Fees	= \$ 2,700.00
Total Fees	= \$21,675.00
Less payments made by American Express	= \$( 255.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$21,420.00</b>

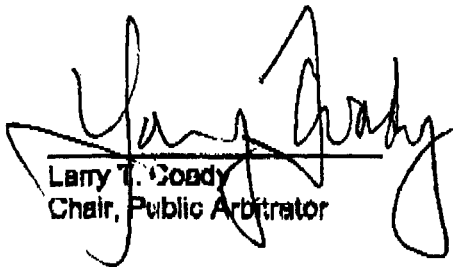
All balances are payable to NASD Dispute Resolution and are due upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Larry T. Coady  
James John Jurinski, JD  
John A. Goffrier

- Public Arbitrator, Presiding Chair
- Public Arbitrator
- Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
Larry T. Coady  
Chair, Public Arbitrator

10/20/06  
Signature Date

James John Jurinski, JD  
Public Arbitrator

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Signature Date

John A. Goffrier  
Non-Public Arbitrator

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Signature Date

October 20, 2006  
Date of Service

**ARBITRATION PANEL**

Larry T. Coady	-	Public Arbitrator, Presiding Chair
James John Jurinski, JD	-	Public Arbitrator
John A. Goffrier	-	Non-Public Arbitrator

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Larry T. Coady  
Chair, Public Arbitrator

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Signature Date

James John Jurinski  
James John Jurinski, JD  
Public Arbitrator

October 20, 2006  
Signature Date

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John A. Goffrier  
Non-Public Arbitrator

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Signature Date

October 20, 2006  
Date of Service



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James John Jurinski, JD	•	Public Arbitrator
John A. Goffrier	•	Non-Public Arbitrator


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James John Jurinski, JD  
Public Arbitrator

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Signature Date

  
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John A. Goffrier  
Non-Public Arbitrator

10/20/06  
Signature Date

10/25/06  
Date of Service