

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Names of the Claimants

Case Number: 01-00246

Dr. Martin Toback, Charlotte Toback,  
Dr. Martin Toback IRA and  
Charlotte Toback IRA

Names of the Respondents

Hearing Site: Boca Raton, Florida

American Express Financial Advisors, Inc.  
and James Kar

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Nature of Dispute: Customer vs. Member and Associated Person.

**REPRESENTATION OF PARTIES**

For Dr. Martin Toback, Charlotte Toback, Dr. Martin Toback IRA and Charlotte Toback IRA, hereinafter collectively referred to as "Claimants": Darren C. Blum, Esq., Blum, Silver & Schwartz, LLP, Plantation, Florida, until his withdrawal of counsel on or about June 8, 2001. Thereafter, Claimants were represented by Alan L. Glaser, Esq., Rochester, New York.

For American Express Financial Advisors, Inc. ("Amex") and James Kar ("Kar"), hereinafter collectively referred to as "Respondents": Robert Wayne Pearce, Esq., Robert Wayne Pearce, P.A., Boca Raton, Florida.

**CASE INFORMATION**

Statement of Claim filed on or about: January 16, 2001.

Claimants signed the Uniform Submission Agreement: February 16, 2001.

Statement of Answer filed by Respondents on or about: April 30, 2001.

Notice of Filing to Correct Typographical Errors on Page 5 of Respondents' Answer and Affirmative Defenses filed by Respondents on or about: October 15, 2001.

Motion to Amend Statement of Claim and for Change of Venue filed by Claimants on or about: September 30, 2002.

Response to Motion to Amend Statement of Claim and for Change of Venue filed by Respondents on or about: October 7, 2002.

Motion for Rehearing on Amending the Statement of Claim filed by Claimants on or about: December 10, 2002.

Affirmation in Support of Motion for Rehearing on Amending the Statement of Claim filed by Claimants on or about December 10, 2002.

Response to Motion for Rehearing on Amending the Statement of Claim filed by Respondents on or about: January 7, 2003.

Amended Statement of Claim filed by Claimants on or about: October 23, 2003.

Motion to Permit Exhibits to Statement of Claim and for Change of Venue filed by Claimants on or about: October 30, 2003.

Response to Motion to Permit Exhibits to Statement of Claim and for Change of Venue filed by Respondents on or about: November 18, 2003.

Reply to Respondents' Response to Motion to Permit Exhibits to Statement of Claim and for Change of Venue filed by Claimants on or about: November 19, 2003.

Answer and Affirmative Defenses to First Amended Statement of Claim filed by Respondents on or about: December 23, 2003.

Respondent Kar signed the Uniform Submission Agreement: May 4, 2001.

Respondent Amex signed the Uniform Submission Agreement: May 10, 2001.

### **CASE SUMMARY**

Claimants asserted the following causes of action: failure to supervise; breach of fiduciary duty; unauthorized trading; and, unsuitability. The causes of action relate to the purchase and sale of shares of the AXP Emerging Market Fund and the AXP International Fund in Claimants' accounts.

Unless specifically admitted in their Answers, Respondents denied the allegations made in the Statement of Claim and Amended Statement of Claim and asserted various defenses.

### **RELIEF REQUESTED**

Claimants requested \$194,899.00 in compensatory damages, lost interest in the amount of \$219,808.00, lost income in the amount of \$82,428.00, punitive damages, costs in the amount of \$1,425.00 and attorney's fees in the amount of \$68,214.00.

Respondents requested that the Panel dismiss all claims, with prejudice. Respondents pled entitlement to attorney's fees as the prevailing parties of the claim under Chapter 517 of the Florida Statutes, but reserved the issue of attorney's fees for determination by a court of competent jurisdiction. Further, Respondents requested costs and any other relief deemed just and proper.

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

On or about October 22, 2002, the Panel issued an order which denied Claimants' Motion to Amend Statement of Claim and for Change of Venue.

On or about March 10, 2003, the Panel issued an order which granted Claimants' Motion for Rehearing on Amending the Statement of Claim, permitted Claimants to file an Amended Statement of Claim excluding without prejudice all exhibits and attachments to the previously proposed Amended Statement of Claim and permitted Claimants to re-introduce the exhibits to the proposed Amended Statement of Claim at the evidentiary hearing in this matter, subject to any relevant objections and the general rules of evidence. In addition, the Panel canceled the evidentiary hearing dates of March 31-April 3, 2003.

On or about November 24, 2003, the Panel issued an order which granted Claimants' Motion to Permit Exhibits to the Statement of Claim as to proposed Exhibit "E" consisting of sixteen (16) pages relating to account opening documents but denied the motion with respect to all other proposed exhibits. In addition, the Panel denied Claimants' Motion to Change Venue.

During the evidentiary hearing on January 8, 2004, after Claimants presented their case, Respondents made an ore tenus motion to dismiss Claimants' claims. Claimants objected to the motion. The Panel granted the motion to dismiss. Thereafter, Respondent Kar verbally requested expungement of this matter from his registration records maintained by the NASD Central Registration Depository ("CRD").

The parties have agreed that the Award in this matter may be executed in counterpart copies.

### **AWARD**

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

All of Claimants' claims are dismissed, with prejudice.

Each party is to bear their own costs, including witness fees and expenses.

The Panel recommends the expungement of all references to the above captioned arbitration from Respondent James Kar's registration records maintained by the NASD CRD, with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent James Kar must obtain confirmation from a court of competent jurisdiction before the NASD CRD will execute the expungement directive.

Any and all claims for relief not specifically addressed herein, including Claimants' requests for punitive damages and attorney's fees, are denied.

### **FEES**

Pursuant to the NASD Code of Arbitration Procedure (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	= \$ 300.00
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#### **Member Fees**

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

Member surcharge	= \$ 1,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 2,500.00

### Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

April 1-4, 2002, adjournment requested by Claimants	= \$ 1,125.00
December 2-4, 2002, adjournment requested by Respondents by the Panel.	= \$ 1,125.00 waived
March 31-April 3, 2003, second adjournment requested by Claimants by the Panel.	= \$ 1,500.00 waived

### Injunctive Relief Fees

No injunctive relief fees were incurred in this matter.

### Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A 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:

Two (2) Pre-hearing sessions with a single arbitrator @ \$450.00	= \$ 900.00
Pre-hearing conferences:	
March 27, 2002	1 session
January 2, 2004	1 session
Five (5) Pre-hearing sessions with the Panel @ \$1,125.00	= \$ 5,625.00
Pre-hearing conferences:	
July 31, 2001	1 session
October 10, 2002	1 session
October 22, 2002	1 session
March 10, 2003	1 session
November 24, 2003	1 session
Five (5) Hearing sessions @ \$1,125.00	= \$ 5,625.00
Hearing Dates:	
January 6, 2004	2 sessions
January 7, 2004	2 sessions
January 8, 2004	1 session

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Total Forum Fees = \$12,150.00

The Panel has assessed \$6,075.00 of the forum fees jointly and severally to Claimants.  
The Panel has assessed \$6,075.00 of the forum fees to Respondent Amex.

### Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but are not limited to: additional

copies of arbitrator awards; copies of audio transcripts; retrieval of documents from archives; interpreters; and, security.

No administrative costs were incurred in this matter.

**FEE SUMMARY**

Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 300.00
Adjournment Fee	= \$ 1,125.00
Forum Fees	= \$ 6,075.00
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Total Fees	= \$ 7,500.00
Less payments	= \$ 2,600.00
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Balance Due NASD Dispute Resolution	= \$ 4,900.00

Respondent Amex is solely liable for:

Member Fees	= \$ 4,600.00
Forum Fees	= \$ 6,075.00
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Total Fees	= \$10,675.00
Less payments	= \$ 4,600.00
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Balance Due NASD Dispute Resolution	= \$ 6,075.00

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

**ARBITRATION PANEL**

Alan B. Goldstein, Esq.	-	Public Arbitrator, Presiding Chair
Martin Weinberg	-	Public Arbitrator
Thomas W. Sinclair	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

/s/

01/10/04

\_\_\_\_\_  
Alan B. Goldstein, Esq.  
Public Arbitrator, Presiding Chair

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

/s/

01/09/04

\_\_\_\_\_  
Martin Weinberg  
Public Arbitrator

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

/s/

01/12/04

\_\_\_\_\_  
Thomas W. Sinclair  
Non-Public Arbitrator

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

01/12/04

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

Concurring Arbitrators' Signatures

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Alan B. Goldstein, Esq.  
Public Arbitrator, Presiding Chair

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Signature Date

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Martin Weinberg  
Public Arbitrator

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

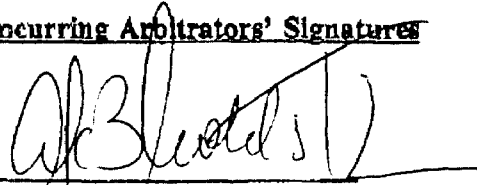
  
\_\_\_\_\_  
Thomas W. Sinclair  
Non-Public Arbitrator

1/12/04  
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Alan B. Goldstein, Esq.  
Public Arbitrator, Presiding Chair

1/10/04

Signature Date

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Martin Weinberg  
Public Arbitrator

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Alan B. Goldstein, Esq.  
Public Arbitrator, Presiding Chair

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Signature Date

*Martin Weinberg*

1/9/04

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Martin Weinberg  
Public Arbitrator

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