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9 UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF ARIZONA

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13 JOHN HARITOS, DAVID AND EMILY) Case No.: No. 02-2255-PHX-PGR
14 AUSTIN, MICHAEL TOOLEY, AND)
15 OMAR SHAHINE, On Behalf of Themselves) SECOND AMENDED CLASS ACTION
and All Others Similarly Situated,) COMPLAINT FOR BREACH OF
16) FIDUCIARY DUTY AND FRAUD UNDER
Plaintiffs,) THE FEDERAL INVESTMENT ADVISERS
17 vs.) ACT OF 1940
18)
AMERICAN EXPRESS)
19 FINANCIAL ADVISORS INC.,) (15 U.S.C. § 80b-1 et seq.)
20 Defendant.)
21)
22)

23 **OVERVIEW**

24 1. This class action seeks to remedy violation of the federal Investment Advisers Act
25 of 1940, 15 U.S.C. § 80b-1 et seq., (the “Advisers Act”) by American Express Financial
26 Advisors Inc. (“AEFA”). It does so on behalf of a class consisting of clients to whom AEFA
27 sold a “Financial Plan” from November 8, 1997 through the present. It excludes AEFA clients
28 who are barred from asserting further claims under the settlement agreement resolving that class
action styled *Benacquisto et al v. American Express Financial Corporation D.Minn.*, Case No.

1 00-1980 DSD/JMM) (Consolidated with State cases 96-018477, 97-004742, and 98-105681) (the
2 “*Benacquisto* Action”).¹

3 2. AEFA holds itself out to the public and is registered with the Securities and
4 Exchange Commission (“SEC”) as a “financial adviser” under the Advisers Act. As such,
5 AEFA is a fiduciary to its clients.

6 3. It is the legal duty of a fiduciary to be scrupulously forthright, honest and candid
7 with its clients; to place the interests of its clients above its own interests; and to supply every
8 client with all information that a reasonable investor might consider relevant. Paying lip service
9 to that fiduciary duty, AEFA portrays itself as a fount of trusted financial advice, communicating
10 to the public, “We consider your needs first” and, “One of American Express' values is 'to place
11 the interests of customers and clients first.”

12 4. AEFA's public pledge of “placing clients first” and discharging its fiduciary
13 duties, however, is an empty sales slogan. As AEFA conceded in a recent internal memo: “Our
14 goal is to *balance* the needs of clients, *advisors/employees and shareholders.*” Consistent with
15 that policy, which illegally subordinates clients' needs, AEFA's nationwide force of some 12,000
16 “advisors” is nothing more than a high-pressure sales operation that seeks to profit at its clients'
17 expense. AEFA does so through the sale of so-called “Financial Plans” whose sole purpose is
18 not to provide objective investment “advice,” but rather to promote the sale of proprietary
19 American Express insurance and other financial products.

20 5. AEFA seeks to cultivate the trust and confidence of prospective clients by
21 offering them a “free initial consultation.” At the “free initial consultation,” an AEFA “advisor,”
22 through high-pressure sales tactics, attempts to sell the potential client a Financial Plan at what
23 appears to be a reasonable price (a typical flat fee of \$500).

24 6. AEFA touts each of its Financial Plans as a “comprehensive and objective
25 financial plan.” They are nothing of the sort. To the contrary, AEFA’s Financial Plans are

26
27 ¹ In the *Benacquisto* Action, American Express paid over \$215 million to settle
28 claims that it engaged in a policy of churning clients’ cash value life insurance policies and
annuities. The *Benacquisto* settlement agreement bars all class members -- who purchased
cash value life insurance or annuities prior to March 1, 2000 -- from asserting any further
claims.

1 simply a sales tool to promote the sale of high-priced and often inappropriate insurance and other
2 financial products. When selling AEFA’s Financial Plans to customers, AEFA’s financial
3 “advisors” fail to disclose the inherent and actual conflicts of interest in such Plans, as well as
4 the biased nature of the “advice” for which clients are paying hundreds of dollars.

5 7. AEFA, through its highly trained “financial advisor” sales force, uses the
6 supposedly “objective” Financial Plans to attempt to induce AEFA’s clients to transfer as much
7 of their assets as possible to AEFA management, and to buy AEFA's high-priced financial
8 products – in particular, its inappropriate and overpriced variable universal life (“VUL”)
9 insurance from sister-company, IDS Life Insurance Company (“IDS”).

10 8. AEFA, a fiduciary, perpetrates this manipulative and deceptive scheme
11 nationwide through a system of uniform training and “canned” sales scripts.

12 **JURISDICTION AND VENUE**

13 9. Federal subject matter jurisdiction exists pursuant to Title 28 U.S.C. § 1331 and
14 Title 15 U.S.C. § 80b-14 (the Advisers Act), which provides in relevant part:

15 The district courts of the United States ... shall have
16 jurisdiction of violations of this subchapter ... and ... of all suits in
17 equity and actions at law brought to enforce any liability or duty
created by, or to enjoin any violation of this subchapter....

18 10. Venue is proper in this district pursuant to Title 28 U.S.C. § 1391(b) and Title 15
19 U.S.C. § 80b-14, which provides in relevant part:

20 Any suit or action to enforce any liability or duty created
21 by, or to enjoin any violation of this subchapter ... may be brought
22 in any such district or in the district wherein the defendant is an
23 inhabitant or transacts business, and process in such cases may be
served in any district of which the defendant is an inhabitant or
transacts business or wherever the defendant may be found.

24 11. Throughout the Class Period, Defendant AEFA has been an inhabitant of and has
25 transacted business in this district, and has perpetrated – in this district and nationwide – the acts
26 giving rise to the violations complained of.

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28

1 **THE PARTIES**

2 12. **Plaintiff John Haritos** was, at all relevant times, a resident of this District. In the
3 summer of 2000, relying on the representations of his American Express Financial “advisor,”
4 Michael Vukonich, that AEFA's financial analysis would be very “personal,” “objective” and
5 “unbiased,” Mr. Haritos thus purchased an AEFA Financial Plan for the sum of \$500.
6 Unbeknownst to Mr. Haritos, however, AEFA’s Financial Plan, delivered in September 2000,
7 was boilerplate, biased and rife with undisclosed conflicts of interest.

8 13. **Plaintiffs David Austin and Emily Austin** were, at all relevant times, husband
9 and wife, residents of Phoenix, Maryland, and prospective or actual clients of AEFA. On
10 November 28, 2000, AEFA – acting by and through its agent, financial “advisor” Brian
11 Gladstone – sold the Austins a Financial Plan by making the representations and omissions
12 detailed below. Gladstone repeatedly told the Austins that AEFA's financial analysis would be
13 very “personal,” “objective” and “unbiased.” Relying on these representations, the Austins
14 purchased an AEFA Financial Plan for the sum of \$550. As provided in greater detail below,
15 however, the Financial Plan was not personalized, objective or unbiased. Instead, the Financial
16 Plan sold to the Austins by Gladstone and AEFA was boilerplate, rife with conflicts of interest,
17 and biased in favor of maximizing AEFA’s and its “advisor’s” revenues and commissions – at
18 the Austins’ expense.

19 13.1. **Plaintiff Michael Tooley** was, at all relevant times, a resident of Richmond,
20 Virginia, and a prospective or actual client of AEFA. In the Winter of 2004, AEFA – acting by
21 and through its agent, financial “advisor” Charles Adams – sold Mr. Tooley an AEFA Financial
22 Plan by making the representations and omissions detailed below. Among those representations,
23 Adams repeatedly told Mr. Tooley that AEFA’s financial analysis would be very “personal,”
24 “objective” and “unbiased.” Relying on those representations, Mr. Tooley purchased an AEFA
25 Financial Plan for the “bargain” price of \$400. The Financial Plan, however, was not
26 personalized in any meaningful sense, objective, or unbiased. Rather, AEFA’s Financial Plan
27 for Mr. Tooley was rife with actual and direct conflict of interest, biased in favor of maximizing
28 AEFA’s profits and its advisor’s sales commissions – all to Mr. Tooley’s detriment.

13.2. **Plaintiff Omar Shahine** was, at all relevant times, a resident of San Francisco,

1 California, and a prospective or actual client of AEFA. On March 12, 2004, AEFA – acting by
2 and through its agent, financial “advisor” Richard B. Pitt – sold Mr. Shahine an AEFA Financial
3 Plan by making the representations and omissions detailed below. Among those representations,
4 Pitts represented to Mr. Shahine that AEFA’s financial plan would be very “personal,”
5 “objective” and “comprehensive.” Relying on those representations, Mr. Shahine purchased an
6 AEFA Financial Plan for the price of \$1100. The Financial Plan, however, was not personalized
7 in any meaningful sense, objective, or comprehensive. Rather, AEFA’s Financial Plan for Mr.
8 Shahine was rife with actual and direct conflict of interest, biased in favor of maximizing
9 AEFA’s profits and its advisor’s sales commissions – all to Mr. Shahine’s detriment.

10 **CLASS ACTION ALLEGATIONS**

11 14. Plaintiffs bring this action as a class action pursuant to F.R.C.P. Rule 23(a),(b)(1)
12 and (b)(3), on behalf of a class of clients of who were sold Financial Plans by AEFA.

13 15. During the Class Period, AEFA, through the use of “canned” scripted sales
14 pitches, has sold hundreds of thousands (if not millions) of Financial Plans. AEFA's sales force
15 of more than 12,000 “advisors” continues to sell such “Plans” – in violation of the Advisers Act.

16 16. The members of the Class are so numerous – at least in the hundreds of
17 thousands – that their joinder is impracticable.

18 17. The disposition of the Class members’ claims in a class action will provide
19 substantial benefits to the parties and the Court.

20 18. The prosecution of separate actions by individual Class members would create a
21 risk of inconsistent and varying adjudications.

22 19. A class action is superior to other available methods for the fair and efficient
23 adjudication of this controversy, as individual members of the Class lack the ability to prosecute
24 individual actions (due to the complexity of the issues and small sum of money involved), and
25 also lack the financial ability to challenge the corporate Goliath that is American Express.

26 20. There is a well-defined community of interest in the questions of law and fact
27 involved in this case. The questions of law and fact common to the members of the Class and
28 that predominate over questions affecting individual Class members include the following:

a. Whether AEFA has breached its fiduciary duty and thereby violated the

1 presentation to a sales manager, who plays the role of a reluctant sales prospect. The manager
2 proffers objections, which are then countered by the “advisor”-in-training.

3 31. To ensure nationwide uniformity of its sales presentations, AEFA has, until
4 recently, required that each and every new “advisor” in the country attend a week-and-a-half
5 training seminar near AEFA headquarters in Minneapolis. Today, AEFA national headquarters
6 distributes written materials, videotapes, DVDs and streaming media available over its Intranet –
7 to reinforce local training.

8 32. The canned scripted pitch of the PMM, which is delivered during the “free initial
9 consultation” to prospective clients, contains numerous representations designed to frighten
10 prospects into taking immediate action. This frightening future, the script-guided “advisor” tells
11 them, can be avoided by buying and implementing an AEFA Financial Plan. AEFA has thus
12 trained its “advisors” to use this “initial free consultation” as a sales tool to induce each prospect
13 to buy a Financial Plan.

14 33. During presentation of the PMM Script to prospects, AEFA “advisors” promise
15 that they will provide objective and unbiased financial analysis, customized for the individual
16 client, and intended solely to promote that client's financial well-being. The advisors stress that
17 they will listen to the client's financial concerns and goals, and that the Financial Plan
18 recommendations will address their concerns to accomplish their goals.

19 34. During presentation of the PMM Script to prospects, AEFA “advisors” also
20 promise – repeatedly and unequivocally – that the delivery of “objective” financial “advice” will
21 continue on a regular basis indefinitely, in the form of telephone “consultations” and in-person
22 meetings – whenever the client “needs” or “chooses” such “advice.” In the words of the PMM:

23 “Once I’ve proposed solutions to meet your goals, you can begin to
24 take action on your goals at that meeting. This is a good time to explain how
25 I’m licensed. In order to provide objective advice, I am licensed by the
26 National Association of Securities Dealers, and I also hold state insurance and
27 securities licenses. What that means to you is I can do what a stockbroker and
28 an insurance agent can do, and we also have a banking division.

1 “Financial planning is an ongoing process. Because changes will
2 occur in your personal situation, as well as in the economy, I’ll review
3 progress in your financial plan twice a year – more often if necessary – to
4 make sure you are still on track to reach your financial goals. What I’ll do as
5 we continue to work together is explain what I offer in terms of client service
6 options. This allows you to choose the relationship that works best for you.”

7
8 35. In truth, these “consultations” and meetings are simply more high-pressure sales
9 opportunities to induce clients to increase their stake in American Express products, which they
10 may have previously resisted.

11 36. The AEFA Financial Plan is formally structured as a “financial analysis” and
12 “financial management proposal” (“FMP”). Clients pay an average fee of approximately \$500
13 for this Financial Plan. The “advisors” present the “financial analysis” in face-to-face meetings
14 with clients as a purported assessment of their financial needs, *e.g.*, education and retirement.
15 Soon thereafter, the “advisor” presents the FMP, which purports to prudently implement the
16 conclusions of the “analysis, and “advises” the client to buy specific financial products.

17 37. Indicative of its view of financial advice as a sales process, AEFA – internally –
18 calls the presentation of the FMP “the close.” Here the “advisor” utilizes the high-pressure sales
19 tactics taught by AEFA to “close” the client to purchase American Express financial products.

20 38. Based on a variety of facts – including American Express's being a well-known
21 financial brand; the seeming expertise of the AEFA “financial advisor;” the promise of
22 professional “unbiased” advice of a fiduciary nature; the charge of approximately \$500 for a
23 comprehensive Financial Plan -- and lifetime of ongoing financial advice; and clients' disclosure
24 of confidential financial information to their trusted “financial advisors” – clients are rendered
25 susceptible to accepting any recommendations that their AEFA financial “advisors” give them.
26 The material facts that AEFA and its financial advisors have actual and direct conflicts of
27 interest in the “financial advice” they provide through the Plans, and that the Financial Plans are
28 neither objective nor unbiased, are never disclosed to prospective clients by AEFA or its
“advisors.”

1 **AEFA COMPENSATION AND RECOGNITION**

2 39. AEFA's "advisors" choice of what to recommend – or “advise” – to clients is
3 steered by a system of compensation that consists of varying sales commissions on different
4 financial products. The size of the advisor's sales commission on any given product is
5 proportionate to AEFA's “Gross Dealer Commission” (“GDC”), which is a measure of the
6 profitability of the sale to AEFA. ***The financial interests of AEFA's advisors/salespeople thus***
7 ***do not match the financial interests of its clients.*** The result is predictable: “Advisors” advise
8 the purchase of products that generate – for themselves – the highest sales commissions, while
9 their clients' financial interests place a distant second. From the top down at AEFA, it is well
10 known to the advisors/salespeople which products are the ones to sell.

11 40. In particular, this reality drives AEFA and the advisor/salespeople to relentlessly
12 push IDS variable universal life (“VUL”) insurance on clients – through the AEFA “Financial
13 Plans.” As a result, American Express boasts, “IDS LIFE IS NO. 1 IN VUL SALES FOR
14 SECOND CONSECUTIVE YEAR,” Press Release, March 28, 2001. (AEFA is IDS's exclusive
15 sales agent). AEFA achieves this “fantastic” result by misrepresenting and concealing a
16 veritable list of misrepresentations and concealments from A to Z regarding the IDS VUL
17 insurance. That A to Z list is attached hereto as Appendix A.

18 41. Rarely, however, is VUL insurance in the best interest of the client (even in
19 theory).² AEFA's recommended IDS VUL insurance – being proprietary and high priced
20 relative to other options, is certainly not “unbiased” – as the “advisors” represent; and it is never
21 the best “objective” choice, far less expensive alternatives being readily available.

22 42. AEFA’s inducing clients to buy IDS VUL insurance has been nothing short of
23 tragic over the past number of years. Failing to inform clients that – even under normal

24
25 ² As *Consumer Reports* succinctly states, “A vigorous septuagenarian who’s the
26 proud father of a pre-schooler may want a cash-value policy [of which VUL is a form] that
27 combines life insurance with an investment product. *** Likewise, tycoons who have run
28 out of other tax shelters or who face complex estate-planning issues might want to give
whole life a look. *** But if you’re an ordinary wage earner who’s in reasonably good
health and whose kids will be on their own by the time you retire, your best bet by far is to
stick with lower-cost term and find more lucrative ways to invest what you save on
premiums.” *Who Needs Whole Life?*” July 1998.

1 circumstances – the vast majority of policyholders allow their policies to lapse within the first
2 ten years, recent market conditions have accelerated that development. As a result, the
3 overwhelming majority of people who purchased IDS VUL insurance through AEFA have seen
4 their policies lapse, as thousands upon thousands of dollars went down the drain. Having put
5 their fortunes into AEFA’s “advice” to buy IDS VUL insurance policies, many people are now
6 without any cash value and no life insurance.

7 43. If, in spite of the financial disincentive to do so, an AEFA “advisor” still wishes to
8 advise a client to purchase appropriate low cost products, such as non-proprietary indexed
9 mutual funds, the “advisor” must obtain special prior approval from management (which has a
10 financial incentive to push only American Express proprietary products), and is either pressured
11 or financially penalized for doing so.

12 44. An “advisor” who consistently recommends term insurance or low-cost indexed
13 mutual funds will be unable to meet AEFA's sales requirements – and will eventually be fired.

14 45. AEFA has also implemented a system of peer recognition, in which AEFA
15 management congratulates and rewards its successful “advisors” during weekly and monthly
16 meetings. AEFA measures such success mainly by calculating “advisors” sales commissions.

17 46. This system of compensation and special recognition creates severe disincentives
18 to financial “advisors” recommending appropriate and beneficial products without regard to
19 sales commission. In particular, the compensation regime also motivates AEFA “advisors” to
20 “advise” clients to buy proprietary (high commission) IDS VUL insurance, mutual funds, and
21 annuities – regardless of the clients' best interests. The conflict of interest is actual and direct.

22 **47. AEFA never discloses its actual and direct conflict of interest to its clients –**
23 **orally or in writing.**

24 48. Instead, by providing its “advisors” such training and financial incentives and
25 disincentives, AEFA knowingly engages in a course of conduct that fosters fundamental
26 conflicts of interest between it and its clients, in order to maximize its revenues – to the
27 detriment of its clients.
28

1 **COMPLIANCE PROCEDURES**

2 49. AEFA's procedures to ensure that its "advisors" comply with fiduciary standards
3 of care is also woefully conflicted as well. The compensation of AEFA's compliance officers is
4 based largely *on the income generated by the very advisors they are supposed to supervise.*

5 **THE FINANCIAL PLAN**

6 50. Prospective clients understandably want prudent and trustworthy advice to
7 improve their financial situations, not theoretical analyses to study. Exploiting this desire,
8 AEFA trains and instructs its financial "advisors": "Create thirst for the FMP and for taking
9 action." AEFA thus sells a Financial Plan, *i.e.*, the "financial analysis" and the "FMP," as one
10 service, and refers to it as such. AEFA charges an average fee of \$500 for the "Financial Plan."

11 51. To any prospective client who objects to the planning fee, in addition to stressing
12 the worth of a lifetime of ongoing financial planning advice, AEFA trains its "advisors" to
13 respond: "Did you know that, on average, it takes 40 to 70 minutes to generate a free financial
14 plan. We [by contrast] spend anywhere from 10 to 30 hours on our plans. In the end, you get
15 what you pay for." In fact, however, it takes an "advisor" – or clerical staff – no more than 40
16 to 70 minutes to input the client-supplied data. AEFA administration then computer-generates –
17 within seconds – a thick boilerplate Financial Plan, which invariably includes recommendations
18 to purchase IDS VUL insurance and other high-priced proprietary products. The "personalized"
19 Financial Plan is then placed in an AEFA *faux* leather binder to impress the client.

20 52. After the "advisor" presents the client with the Financial Plan, the client is then
21 strongly encouraged – over a period of weeks, months and even years – to meet again and again.
22 These meetings – held ostensibly to "update" the client's Financial Plan or "fine tune" the client's
23 investment mix – are simply methods designed and calculated to pressure the client into, once
24 again, "taking action" by purchasing still more American Express financial products. Thus,
25 under the guise of providing on-going financial "advice" to clients, AEFA advisors are able to
26 maximize the amount of client assets and income funneled into American Express financial
27 products and management.

28 53. As AEFA has pointed out in an advisor manual, the sale of AEFA Financial Plans
is critical to the financial well-being – not of the client, but of the AEFA "financial advisor":

1 “Statistics show that clients who purchase financial analyses
2 generate an average of two to three times more total weighted
3 production (TWP)³ [sales commissions relating to AEFA profits]
4 during their first year than clients who don't purchase analyses.”

5 54. Despite AEFA’s emphasis *with* “**Advisors**” on the sale of VUL insurance,
6 annuities and other securities products, AEFA instructs Advisors that they are *not* to discuss *with*
7 *clients* that Advisors depend -- to make a living -- on selling products *other than Financial*
8 *Plans*. Instead, AEFA trains Advisors to discuss with clients in a piecemeal, inadequate and
9 purposely ambiguous fashion (if at all) that AEFA also compensates Advisors by means other
10 than by a portion of the fees paid for Financial Plans. For instance, AEFA has its “advisors”
11 recite to prospective clients: “The fee for my services, which *includes* your analysis, is \$_____”
12 [approximately \$500].” Later, the “advisor” may state: “[I]f you become a client of mine and
13 acquire your financial services through American Express or one of the companies we represent,
14 I am directly compensated by American Express.” The fact of the matter is that “advisor”
15 compensation (aside from the Financial Plan) consists exclusively of sales commissions and fees
16 linked directly to sales and profits of proprietary VUL insurance, annuities and mutual funds.
17 That simple truth is never disclosed by AEFA to clients. Thus, at least during the class period,
18 prospective and actual clients were not told by AEFA or the client’s AEFA “financial advisors,”
19 directly or at all, critical information needed by an investor to make an informed decision about
20 whether to purchase a Financial Plan from AEFA, including but not limited to the following:

- 21 a. American Express Financial Corporation is the parent corporation of both AEFA
22 and IDS Life Insurance Company.
- 23 b. American Express Financial Corporation has a financial interest in products offered
24 by affiliates such as IDS Life.
- 25 c. AEFA Financial Advisors, as agents of IDS Life, will offer only insurance and
26 annuity products of IDS Life.

27
28 ³ Total Weighted Production, “TWP” (pronounced “twip”) was the term that
preceded “GDC,” gross dealer commission.

1 d. AEFA provides compensation to its “Financial Advisors” and their managers
2 designed to promote the sale of the products of American Express Financial Corporation
3 affiliates, such as IDS Life.

4 e. AEFA Financial Advisors receive more for the sale of products such as IDS VUL
5 insurance and annuities, than for other financial products, such as term life insurance and
6 mutual funds.

7 f. These arrangements and compensation structure for AEFA and its Financial
8 Advisors create a conflict of interest.

9 55. Through the foregoing misrepresentations and concealments, advisors are able to
10 lull clients into a deep sense of trust. They are then taught to obtain the client's signature on the
11 Financial Plan contract before the client can even read it. Moreover, even in the unlikely event
12 that clients later read it or the Financial Advisory Services brochure, AEFA hides its wrongdoing
13 in technical legal jargon designed to conceal and obscure the whole truth.

14 56. The “Financial Plan” is thus the “Trojan horse” through which AEFA sells its
15 highest priced and most profitable products – to the detriment of its trusting and unwitting
16 clients.

17 57. The entire AEFA sales process – from initial solicitations of “prospects” through
18 the promise of a lifetime of on-going client service – thus is designed to conceal the facts
19 necessary for clients, including Plaintiffs, to make fully-informed decisions regarding the worth
20 of AEFA's financial “advice.”

21 58. At the time AEFA made – and makes – these misrepresentations and omissions,
22 and at the time Plaintiffs paid for their Financial Plans, they were ignorant of the falsity and
23 incompleteness of AEFA's representations, and believed them to be true and complete.

24 59. By virtue of AEFA's fiduciary relationship to them, Plaintiffs justifiably relied on
25 AEFA's misrepresentations and omissions, and thus purchased AEFA's Financial Plan at a
26 typical price of \$500-\$550. Had clients known the whole truth, they would not have made such
27 purchases.
28

1 67. On or about July 6, 2000, AEFA and Mr. Haritos entered into a written Financial
2 Services Agreement under which AEFA promised to provide Mr. Haritos with a Financial Plan.
3 Mr. Haritos paid AEFA \$500 to receive AEFA's purportedly personalized, objective and
4 unbiased Plan, along with a lifetime of such ongoing financial planning advice. He paid for the
5 Financial Plan through a combination of cash charged to his American Express credit card and
6 American Express card membership points.

7 68. Vukonich delivered the Financial Plan to Mr. Haritos in September 2000 at
8 AEFA's branch office on Alma School Road in Mesa, Arizona. AEFA's Financial Plan for Mr.
9 Haritos recommended that Mr. Haritos purchase from American Express an IDS VUL insurance
10 policy as well as selected American Express recommended mutual funds and annuities.⁴ At no
11 time did Vukonich disclose to Mr. Haritos that he, the "advisor," would receive a sales
12 commission on the sale of product – or that his sales commission was significantly higher if he
13 sold an IDS VUL insurance policy, proprietary American Express mutual funds, or IDS Life
14 annuities to Mr. Haritos as compared to other financial products. Nor did Vukonich even inform
15 Mr. Haritos that IDS Life was a sister-corporation to AEFA, both being subsidiaries of American
16 Express Corporation. Mr. Haritos sets forth the other material misrepresentations regarding the
17 insurance and mutual funds that AEFA tried to or did sell him at Appendix A and B, attached
18 hereto.

19 69. Additionally, in "advising" – and thereby inducing Mr. Haritos – to purchase IDS
20 Annuities, Vukonich and AEFA did not disclose to Haritos many material facts, including but
21 not limited to the following: IDS's fees consume approximately 2% of his annuity holdings each
22 year; it often takes over 10 years before the performance of an IDS recommended annuity can
23 equal the after-tax returns of an alternative investment; term life insurance might be (or was) a

24
25 ⁴ Of the \$1,500 of discretionary dollars that Mr. Haritos could invest each month,
26 AEFA's "personalized, objective and unbiased" advice recommended that this single man
27 devote \$450 to an IDS VUL insurance policy. This advice entailed surrendering his old
28 policy – and suffering surrender charges in the process, as well as generating new
commissions for AEFA and its "advisor." Evidently, the \$215+ million settlement of the
Benacquisto Action (effective on policies sold through 2/29/00) was insufficient to stop
AEFA's practice of churning only a few months thereafter.

1 better, more cost-effective alternative to an IDS Annuity; the insurance component of the IDS
2 Annuity carries appreciable costs; mutual funds and individual stocks can always be passed to
3 heirs after death and incur a lower (capital gains) tax bill than annuities; IDS's surrender charges
4 could be greater than 8% of the annuity's value; and that if Mr. Haritos withdraws funds from
5 the IDS Annuity before age 59 1/2, he will be charged a 10% tax penalty.

6 70. After Mr. Vukonich, through high-pressure sales tactics, strong-armed Mr.
7 Haritos into signing the AEFA Financial Services Agreement, Mr. Haritos never received a copy
8 thereof, nor was he given or shown the AEFA brochure entitled, "American Express Financial
9 Advisory Service." Neither AEFA nor Vukonich ever disclosed to Mr. Haritos – either verbally
10 or in writing – his "advisor's" or AEFA's actual conflicts of interest in "advising" him to
11 purchase American Express proprietary VUL insurance and other financial products, including
12 IDS Annuities.

13 71. Until Mr. Haritos liquidated some of his AEFA-"advised" products – and suffered
14 previously undisclosed penalties – he was not aware that AEFA's "advice" was intrinsically and
15 inherently biased, calculated solely to advance its and its agent's self-interests.

16 72. Had Mr. Haritos known of his "advisor's" and AEFA's actual conflicts of interest
17 in selling their biased analysis and recommendations – all under the guise of personalized
18 objective "advice" – he would never have paid \$500 for his AEFA Financial Plan, nor would he
19 have accepted any of AEFA's financial "advice."

20 73. Pursuant to AEFA's promise of a lifetime of financial advice during Vukonich's
21 presentations, Mr. Haritos has still been receiving AEFA's ongoing financial advice.⁵

22 74. **Plaintiffs David Austin and Emily Austin** were, at all relevant times, husband
23 and wife, residents of Phoenix, Maryland, and prospective or actual clients of AEFA. On or
24 about November 28, 2000, AEFA – acting by and through its agent, financial "advisor" Brian

25
26 ⁵ In addition to the PMM's promise of "ongoing" planning advice (see Para. 33,
27 above), the mission statement found on the opening page of the American Express Financial
28 Advisory Service brochure (May 1, 2000 – April 30, 2001) supports this promise:
*"American Express Financial Advisors' mission is to help clients achieve their financial
objectives – prudently and thoughtfully – through a long-term relationship based on trusted
and knowledgeable advice."* (Emphasis added.)

1 Gladstone – sold the Austins a Financial Plan by making the representations and omissions
2 detailed below. Gladstone repeatedly told the Austins that AEFA’s Financial Plan would be
3 very “personal,” “objective” and “unbiased,” and that its purchase would entitle them to a
4 lifetime of ongoing financial advice. Relying on these representations, the Austins purchased the
5 Financial Plan for the sum of \$550. As provided in greater detail below, however, the Financial
6 Plan was not personalized, objective or unbiased.

7 75. After rendering an “analysis” of their financial situation, Gladstone presented the
8 Austins with a “financial management proposal” (“FMP”) near the beginning of 2001. In that
9 latter part of the Financial Plan, AEFA and Gladstone strongly touted to the Austins various
10 financial products, including an IDS VUL policy. The Austins were not aware – until much
11 later, when they liquidated some of the AEFA “advised” products – that the “advice” furnished
12 to them by AEFA and Gladstone was intrinsically and inherently biased, and rife with conflicts
13 of interest, calculated solely to advance the self-interests of AEFA and its “advisor.”

14 76. Neither AEFA nor Gladstone had informed the Austins of many material facts
15 concerning the IDS VUL insurance, including the fact that IDS Life was a sister company of
16 AEFA, or that their financial “advisor” was receiving a sales commission that was several
17 multiples of what he would receive if he had sold them non-proprietary term insurance and non-
18 proprietary indexed mutual funds.

19 77. Mr. Austin also specifically told Mr. Gladstone that he was not interested in any
20 investments that contained any hidden fees or termination charges. Mr. Gladstone assured him
21 that the IDS VUL insurance policy had NO such hidden costs; only “hidden benefits.” Mr.
22 Gladstone told the Austins that VUL insurance was an excellent tax shelter and could be used as
23 a tax-free income source prior to retirement. The other material misrepresentations and
24 omissions that Mr. Gladstone and AEFA utilized on the Austins to “advise” – and thereby induce
25 – them to purchase the IDS VUL insurance are set forth by the Austins in Appendix A, attached
26 hereto.

27 78. In March 2001, at yet another meeting to discuss the Austins’ Financial Plan, Mr.
28 Gladstone “advised”/induced the Austins to move a Roth IRA from another financial institution
to American Express. Mr. Austin expressed his thought that the IRA was fine where it was and

1 that it did not need to be moved to American Express. Gladstone then explained that by allowing
2 American Express to manage his IRA, the Austins would enjoy benefits of efficiently
3 consolidating their portfolio. Mr. Austin again inquired about maintenance fees associated with
4 IRAs and mutual funds managed by American Express. Gladstone falsely told Mr. Austin that
5 there were NO such fees. But AEFA proceeded to charge the Austins a 1.5% per year
6 management fee (over and above its \$550 Financial Planning fee). Mr. Gladstone did not
7 disclose to the Austins the financial self-interest and actual conflict of interest he had in selling
8 American Express proprietary products. The Austins set forth other material facts that a
9 fiduciary such as American Express should have disclosed or not misrepresented, but failed to do
10 so, in Appendix B, attached hereto.

11 79. At the time this action was filed, the Austins were also, unbeknownst to them,
12 within a 2-year money back guarantee period provided for in the Financial Services Agreement.
13 Pursuant to AEFA's and Gladstone's promise of a lifetime of ongoing financial advice pursuant
14 to the Financial Plan, the Austins have also still been receiving AEFA's ongoing financial
15 "advice."

16 79.1. **Plaintiff Michael Tooley** was at all relevant times herein, 22 years of age, single
17 (never married), and residing at home with his parents.

18 79.2 Toward the end of January 2004, Mr. Tooley entered a Costco store in Richmond,
19 Virginia, on a routine visit. AEFA maintains a booth within the Costco store. An AEFA
20 "Advisor," Charles Adams, attracted Mr. Tooley into the AEFA booth and offered him a free
21 complimentary visit with AEFA -- in which they would discuss Mr. Tooley's financial situation
22 and review several major financial topics to help assure Mr. Tooley's financial future.

23 79.3 As a young man earning money after finishing college, Mr. Tooley wanted to take
24 advantage of AEFA's free complimentary offer because he wanted to "get hold of his finances
25 early on in life." Mr. Adams scheduled a visit by Mr. Tooley to the AEFA office in Richmond
26 for February 5 or 6, 2004.

27 79.4 Upon entering the meeting at the AEFA office, Adams stated to Mr. Tooley,
28 among other things, the important objectives to cover and a "game plan" for their meetings.

1 Among those representations, Adams repeatedly told Mr. Tooley that AEFA’s financial plan
2 would be very “personal,” “objective” and “comprehensive.”

3 79.5 Adams further informed Mr. Tooley he (Adams) was worried -- because Mr.
4 Tooley did not have life insurance and, at his age (22), life insurance was “extremely important.”
5 Adams reviewed with Mr. Tooley a variable universal life (“VUL”) insurance policy and ran
6 several scenarios. His presentation of the VUL Insurance contained virtually all the
7 misrepresentations and concealments detailed in Appendix A, which are incorporated herein by
8 this reference.

9 79.6 Adams informed Mr. Tooley that an AEFA Financial plan cost \$400, which was a
10 one-time fee to ensure that Mr. Adams would be able to regularly “keep in touch” over the
11 course of their relationship together. Mr. Tooley was impressed with both the description of the
12 Plan and the VUL insurance Adams described. Mr. Tooley indicated that he would think about
13 it overnight.

14 79.7 Reassured with the knowledge that a seemingly knowledgeable and trustworthy
15 expert would keep in touch with him on a regular basis and monitor his financial affairs, the next
16 day, Mr. Tooley came in to Mr. Adams’ office at AEFA, and received AEFAs’ sales “close” on
17 the Financial Plan. Following the PMM Script (stage directions are in italics), Mr. Adams
18 performed as follows:

19 I’ll need your approval on our service agreement and a check for
20 \$400 or your American Express card number.

21 * * *

22 What is your social security number?

23 **(FILL OUT CONTRACT AND HAVE THEM SIGN IT.)**

24 What is your birth date?

25 The last thing I need is a check for \$400 or your American Express
26 card number.”

27 79.8 As scripted, Mr. Adams obtained Mr. Tooley’s signature on the Financial
28 Advisory Services Agreement without giving Mr. Tooley any opportunity to read or review it.

1 And Mr. Tooley happily paid the \$400 for his purportedly “personalized,” “objective” and
2 “comprehensive” Financial Plan.

3 79.9 Mr. Adams then *kept* the signature page to the Financial Advisory Services
4 Agreement and the accompanying Financial Advisory Services booklet, and sent Mr. Tooley
5 home without giving him either a copy of his signed Agreement or the Financial Advisory
6 Services Agreement Booklet.

7 79.10 A few days later, on or about February 13, 2004, Mr. Tooley also paid his first
8 premium on an IDS VUL (variable universal life) insurance policy, which Mr. Adams had
9 “advised” him to “invest” in, *i.e.*, a \$150,000.00 life insurance policy with a payment of \$70.00 a
10 month, with \$35.00 thereof going to two proprietary mutual funds offered by American Express.

11 79.11 After receiving Mr. Tooley’s \$400 and premium payments, Mr. Adams never
12 followed-up to consult Mr. Tooley -- or delivered his written “Plan.”

13 79.12 Soon, Mr. Tooley realized he was not getting what he paid for, and suspected that
14 Adams had not disclosed all the important facts at the onset.

15 79.13 Mr. Tooley then decided to research AEFA on the Internet. He soon found a
16 website called “AmexSux.com,” and there read a February 9, 2004 article from the *Wall Street*
17 *Journal*, entitled “*Financial Plans: Selling For In-House Gains?*” which mentions this class
18 action. He followed-up by emailing Mr. Adams, and asking him about the action. Adams
19 responded that he did not know much about it, but not to worry -- it did not affect Mr. Tooley
20 and it was not anything important. Mr. Tooley then followed-up further on the *Wall Street*
21 *Journal* article and postings at the Financial Message Board at AmexSux.com.

22 79.15 Mr. Tooley soon came to believe that his AEFA “Financial Plan” was not
23 “personalized,” “objective” and “comprehensive.” He then initiated contact with Plaintiff’s
24 counsel herein. Mr. Tooley expressed strong interest in joining the suit, and shortly thereafter,
25 agreed to become a lead plaintiff herein.

26 79.16 Had AEFA informed Mr. Tooley that his AEFA “Financial Plan” was rife with
27 undisclosed actual and direct conflicts of interest, he would not have paid \$400 for it.

28 79.17 Had AEFA informed Mr. Tooley that it was not placing his interests above its
own -- in violation of its fiduciary duty, he would not have paid \$400 for the Financial Plan.

1 79.18 Had Mr. Tooley been informed that his AEFA “Financial Plan” was not
2 “personalized,” “objective” or “comprehensive,” he would not have paid \$400 for it.

3 79.19 Had Mr. Tooley been informed that the “Financial Plan” was only a manipulative
4 tool to deceive and fraudulently induce him into buying wholly inappropriate overpriced
5 proprietary IDS VUL insurance, he would never have paid \$400 for the Plan or made IDS VUL
6 insurance payments.

7 79.20 Consequently, Mr. Tooley now seeks rescission of the Financial Advisory
8 Services Agreement and restitution of his Financial Planning fee of \$400.

9 79.21 **Plaintiff Omar Shahine**, 27, attended a free American Express Financial
10 Education Seminar provided to Microsoft employees in the Fall of 2003. He completed a survey
11 and indicated his willingness to be contacted by a financial advisor for a free financial
12 consultation.

13 79.22 On March 12, 2004, Mr. Shahine visited the AEFA office in San Francisco,
14 California. He met there with an Amex financial "advisor" named Richard B. Pitt. "Advisor"
15 Pitt performed the PMM Script, promising Mr. Shahine, among other things, an "objective,"
16 "personalized," and "comprehensive" Financial Plan, along with ongoing regular updates. In
17 reliance on such representations (among others) -- and as planned by the PMM Script, Pitt
18 induced Mr. Shahine to sign the AEFA Financial Advisory Services Agreement. Mr. Shahine
19 also paid the price Pitt quoted for this AEFA "Plan" -- of \$1100 (\$1200 minus a \$100 dollar
20 discount for being a Microsoft employee).

21 79.23 Two months later, on May 10, 2004, Mr. Shahine again met with Pitt, this time to
22 receive his written AEFA Financial Plan. Pitt and the AEFA Plan recommended that Mr.
23 Shahine purchase a \$1 million IDS VUL insurance policy -- to be funded with \$12,000 a year.
24 They also suggested that Mr. Shahine take his existing two whole life insurance policies (for
25 \$500,000) and roll their cash value into the previously recommended IDS VUL insurance policy.

26 79.24 Mr. Shahine did not share Pitt’s and AEFA’s confidence that he could afford to
27 do all that, however. He also wondered why AEFA’s Financial Plan recommended so much
28 insurance -- when he had no dependants, and why so much VUL insurance was being
recommended when he hadn't even maximized the contributions to his 401(k) retirement plan.

1 enforce, *nunc pro tunc*, the two-year “money back guarantee” that AEFA buries on page 6 of its
2 Financial Advisory Service brochure (which clients do not even see), which reads as follows:

3 **“Client Service Policy**

4 American Express Financial Advisors is dedicated to client service, we
5 work hard to ensure your satisfaction with the service you receive and will
6 make every effort to meet or exceed your expectations. If you are
7 dissatisfied for any reason, after receiving the American Express Financial
8 Advisory Service, the management of your local office will work with you
9 to ensure your satisfaction and resolve your concerns. The telephone
10 number of your local offices is on the service agreement provided by your
11 financial advisor. If we are unable to meet your expectations, we will
12 refund the fee you paid for your service with 24 months of delivery to you
13 by your financial advisor. This fee is listed on the service agreement.”

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiffs request that this Court:

- 16 1) Declare this action to be a proper class action;
- 17 2) Award Plaintiffs such relief as is necessary to redress the injuries from AEFA's
18 violations of the Advisers Act, including, but not limited to, the rescission of all client AEFA
19 Financial Advisory Service Agreements and restitution of all monies paid for any AEFA
20 Financial Plan, plus interest at the legal rate;
- 21 3) Award Plaintiffs their costs as allowed by law; and
- 22 4) Award such additional relief as may be just and proper.

23 Respectfully Submitted,

24 LAW OFFICES OF JON E. DRUCKER

25 Dated: July 14, 2004

26 _____
27 Jon E. Drucker
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