

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

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In the Matter of the Arbitration Between:

Vanguard Capital, Inc. (Claimant) v. Jean A. Vitale, Jean A. Vitale IRA (Respondents)

and

Jean A. Vitale and Jean A. Vitale IRA (Claimants) v. Vanguard Capital, Inc.

Case Number: 01-00376 (consolidated w/01-06335) Hearing Site: Boston, Massachusetts

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Nature of the Dispute: (01-00376) Member v. Customers.  
(01-06335) Customers v. Member.

**REPRESENTATION OF PARTIES**

**01-00376**

Claimant Vanguard Capital, Inc. ("Vanguard") hereinafter referred to as "Claimant":  
Jeffrey Kob, Esq., Miller Milove & Kob, San Diego, CA. Previously represented by:  
Brian M. Zaid, Esq., Vanguard Capital, San Diego, CA.

Respondents Jean A. Vitale (Vitale") and Jean A. Vitale IRA ("Vitale IRA") hereinafter  
collectively referred to as "Respondents": Paul B. Kleinman, Esq., Bouchard &  
Kleinman, P.A., Hampton, NH.

**01-06335**

Claimants Jean A. Vitale (Vitale") and Jean A. Vitale IRA ("Vitale IRA") hereinafter  
collectively referred to as "Claimants": Paul B. Kleinman, Esq., Bouchard & Kleinman,  
P.A., Hampton, NH.

Respondent Vanguard Capital, Inc. ("Vanguard") hereinafter referred to as  
"Respondent": Jeffrey Kob, Esq., Miller Milove & Kob, San Diego, CA.

**CASE INFORMATION**

**01-00376**

Statement of Claim filed on or about: January 22, 2001.

Amended Statement of Claim filed on or about: December 14, 2001.

Claimant Vanguard signed the Uniform Submission Agreement: January 22, 2001.



Statement of Answer filed by Respondents Vitale and Vitale IRA on or about:  
September 12, 2001.

Respondents Vitale and Vitale IRA did not sign the Uniform Submission Agreement.

01-06335

Statement of Claim filed on or about: November 14, 2001.

Claimants Vitale and Vitale IRA signed the Uniform Submission Agreement: November 12, 2001.

Statement of Answer filed by Respondent Vanguard on or about: March 22, 2002.

Respondent Vanguard did not sign the Uniform Submission Agreement.

**CASE SUMMARY**

01-00376

Claimant Vanguard asserted the following causes of action: collection; margin calls; and breach of contract. Claimant's claim involved shares of JDS Uniphase and Avici Systems.

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

01-06335

Claimants Vitale and Vitale IRA asserted the following causes of action: breach of fiduciary duty; churning; unsuitability; negligence; breach of contract; unauthorized trading; violation of consumer protection laws; and vicarious liability. Claimants' claim involved common stock.

Unless specifically admitted in its Answer, Respondent Vanguard denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

**RELIEF REQUESTED**

01-00376

Claimant Vanguard requested compensatory damages in the amount of \$35,247.27; costs, including reasonable attorneys' fees; and any additional relief that the Panel deems just and proper.

Respondent Vitale and Vitale IRA requested dismissal of the Statement of Claim, reasonable costs and attorneys' fees; and such other relief that is equitable and just.



01-06335

Claimants Vitale and Vitale IRA requested compensatory damages in the amount of \$29,025.00; punitive damages in the amount of \$250,000.00; treble damages in the amount of \$87,075.00; costs in the amount of \$1,875.00; attorneys' fees in the amount of \$25,000.00; and witness and production fees in the amount of \$10,000.00.

Respondent Vanguard requested that any and all claims against it be dismissed; that Claimant shall take nothing as to it by Claimant's Statement of Claim; and for such other relief as the arbitrators deem just and proper.

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

On or about November 13, 2001, Claimants Vitale and Vitale IRA filed a motion to consolidate this matter with NASD Dispute Resolution ("NASD DR") Arbitration No. 01-06335. On or about December 26, 2001, Vanguard filed an opposition to the motion to consolidate the arbitration cases. The Arbitrator denied the motion to consolidate. On or about January 3, 2002, Vanguard filed a motion to reconsider and joint in Claimants' motion to consolidate. By letter dated January 3, 2002, NASD Dispute Resolution notified the parties that the Arbitrator in Arbitration No. 01-00376 considered the motion for reconsideration and consolidation of these two cases and determined to grant the motions.

In accordance with Rule 10403 of the NASD Code of Arbitration Procedure, the parties requested and adjournment of the hearing dates scheduled for May 29 and 30, 2003, and July 17, 2003, to mediate this matter. NASD DR has inquired of the parties as to the status of this matter at the Panel's request. To date, NASD DR has not received a response and the Panel has determined to dismiss this matter without prejudice for failure to prosecute.

### **AWARD**

After considering the pleadings, and the parties' lack of prosecution, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. The claims of Claimant Vanguard in Arbitration No. 01-00376 are dismissed.
2. The claims of Claimants Vitale and Vitale IRA in Arbitration No. 01-06335 are dismissed.
3. Any and all relief not specifically addressed herein, including punitive and/or treble damages, is denied.

### **FEEES**



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 (01-00376)	= \$1,000.00
Initial claim filing fee (01-06335)	= \$ 300.00

**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. Accordingly, Vanguard Capital, Inc. is a party.

Member surcharge (01-00376)	= \$ 800.00
Pre-hearing process fee (01-00376)	= \$ 600.00
Hearing process fee (01-00376)	= \$1,000.00

**Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

September 20, 2001 adjournment by Respondents Vitale and Vitale IRA	= Waived
May 29-30, 2003, and July 17, 2003, joint adjournment request	= Waived

**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: July 24, 2001 1 session	
January 2, 2002 1 session	
One (1) Pre-hearing session with Panel @ \$1,125.00	= \$1,125.00
Pre-hearing conference: November 1, 2002 1 session	
Total Forum Fees	= \$2,025.00

1. The Panel has assessed \$1,012.50 of the forum fees against Vanguard.
2. The Panel has assessed \$1,012.50 of the forum fees jointly and severally against Vitale and Vitale IRA.

**Fee Summary**

1. Vanguard is solely liable for:  
Initial Filing Fee (01-00376) = \$1,000.00



Member Fees (01-00376)	= \$3,900.00
<u>Forum Fees</u>	<u>= \$1,012.50</u>
Total Fees	= \$5,912.50
<u>Less payments</u>	<u>= \$3,850.00</u>
Balance Due NASD Dispute Resolution	= \$2,062.50

2. Vitale and Vitale IRA are jointly and severally liable for:

Initial Filing Fee (01-06335)	= \$ 300.00
<u>Forum Fees</u>	<u>= \$1,012.50</u>
Total Fees	= \$1,312.50
<u>Less payments</u>	<u>= \$1,875.00</u>
Balance Due NASD Dispute Resolution	= \$ 562.50

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




ARBITRATION PANEL

David Plimpton, Esq.	-	Public Arbitrator, Presiding Chair
Linda Barnes Gadkowski	-	Public Arbitrator
Geraldine B. Cunningham	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument is which is my award.

  
David Plimpton, Esq.  
Public Arbitrator, Presiding Chairperson

JUNE 4, 2004  
Signature Date

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Linda Barnes Gadkowski  
Public Arbitrator

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

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Geraldine B. Cunningham  
Non-Public Arbitrator

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

June 9, 2004  
Date of Service (For NASD Dispute Resolution use only)



ARBITRATION PANEL

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Linda Barnes Gadkowski	-	Public Arbitrator
Geraldine B. Cunningham	-	Non-Public Arbitrator

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\_\_\_\_\_  
David Plimpton, Esq.  
Public Arbitrator, Presiding Chairperson

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Signature Date

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*Linda Barnes Gadkowski*  
Linda Barnes Gadkowski  
Public Arbitrator

\_\_\_\_\_  
*6-4-04*  
Signature Date

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Geraldine B. Cunningham  
Non-Public Arbitrator

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

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David Plimpton, Esq.  
Public Arbitrator, Presiding Chairperson

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

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Linda Barnes Gadkowski  
Public Arbitrator

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

  
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Geraldine B. Cunningham  
Non-Public Arbitrator

6-7-04  
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Signature Date

June 9, 2004

Date of Service (For NASD Dispute Resolution use only)