

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between

Names of Claimants

Kerby E. and Vera T. Calloway

Case No. 99-01983

Names of Respondents

David Michael Vitale  
George Anaya, Jr.  
Baxter, Banks & Smith, Ltd.  
Francis Martin McDermott  
Edward James Muller, Jr.  
John McGowan, III

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**REPRESENTATION OF PARTIES**

For Kerby E. and Vera T. Calloway, hereinafter collectively referred to as "Claimants": Frank W. Virgin, Esq. of the law firm of Slaughter & Virgin, P.C., Atlanta, Georgia.

For David Michael Vitale ("Vitale"): Jeffrey Mark Sherman, Of Counsel, Mouser & Wells, P.A. until his withdrawal as counsel on or about November 4, 1999. Thereafter, Respondent Vitale was represented by Leslie Schwaebe Akins, Esq., San Diego, California.

For Baxter, Banks & Smith, Ltd. ("Baxter Banks"), F. Martin McDermott ("McDermott") and John McGowan, III ("McGowan"): Jeffrey Mark Sherman, Of Counsel, Mouser & Wells, P.A. represented Respondents Baxter Banks and McDermott until his withdrawal as counsel on or about January 14, 2000. Thereafter, Respondents Baxter Banks, McGowan and McDermott were represented by F. Martin McDermott.

For Edward James Muller, Jr. ("Muller"): Allan M. Lerner, P.A., Fort Lauderdale, Florida.

For Respondent George Anaya, Jr. ("Anaya"): Jeffrey Mark Sherman, Of Counsel, Mouser & Wells, P.A. until his withdrawal as counsel on or about November 4, 1999. Thereafter, Respondent Anaya appeared pro se.

**CASE INFORMATION**

Statement of Claim filed on or about: April 28, 1999.

Amendment to Statement of Claim filed on or about: December 3, 1999.

Amendment to Statement of Claim filed on or about: February 8, 2000.  
Claimants signed the Uniform Submission Agreement: April 25, 1999.  
Motion to Dismiss, or, Alternatively For Additional Time to File Respondents Baxter Banks, Vitale and Anaya's Answer filed on or about: July 2, 1999.  
Claimants' Response to Motion to Dismiss, or Alternatively for Additional Time to File Respondents' Answer filed on or about: August 5, 1999.  
Respondent Baxter Banks' Answer to Claimant's Statement of Claim filed on or about: November 8, 1999.  
Statement of Answer filed by Respondent Vitale on or about: November 4, 1999.  
Motion to Dismiss filed by Respondent Anaya on or about: December 2, 1999.  
Claimants' Response to Motion to Dismiss of Respondent Anaya filed on or about: December 9, 1999.  
Motion to Dismiss of Respondent Muller filed on or about: January 22, 2000.  
Supplement to Motion to Dismiss of Respondent Muller filed on or about: February 2, 2000.  
Claimants' Response to Motion to Dismiss of Respondent Muller filed on or about: February 14, 2000.  
Respondents Anaya, Muller, McDermott and McGowan did not file Statements of Answer.  
Respondents did not file executed Uniform Submission Agreements.

### CASE SUMMARY

Claimants asserted the following: Respondents committed fraud and breached their fiduciary duties by selling, without authorization, Claimants' investments in Coca-Cola, AT&T, Home Depot and other similar companies. Respondents used the funds generated by the unauthorized sale of Claimants' stock to make unsuitable purchases of speculative penny stocks whose values either declined significantly or disappeared. On the morning of January 8, 1999, Claimants telephoned Respondents and instructed them not to purchase any additional securities. On the afternoon of January 8, 1999, Respondents used \$52,569.00 of Claimants' funds to purchase additional unsuitable, speculative and highly risky penny stocks. Claimants lost most of these unauthorized investments.

Respondent Vitale denied the allegations made against him in Claimants' Statement of Claim and asserted the following: Claimants were customers of Respondent Anaya during Respondent Anaya's prior employment at Joseph Charles, a brokerage firm located in Florida. While Respondent Vitale worked with Respondent Anaya, he had only minimal contacts with Claimants, and merely processed orders for Claimants' account, as directed by Respondent Anaya.

In July 1998, Respondent Anaya approached Respondent Vitale to leave Joseph Charles and join him at Baxter Banks. After speaking with the branch manger, Respondent Muller, Respondent Vitale agreed. When Respondents Vitale and Anaya moved to Baxter Banks, they opened all accounts under a single representative number at Respondent Muller's instruction. However, Claimants were Respondent Anaya's customers.

Virtually all communications regarding Claimants' account were between Claimants and

Respondent Anaya. Virtually all order tickets for the sales of existing positions, and virtually all order tickets for the purchase and sales of investments at Baxter Banks were done by Respondent Anaya. Respondent Vitale merely filled out a few order tickets from Claimants' account at Respondent Anaya's direction. Respondent Vitale solicited only one investment from Claimants, for Pro Net Link (PLNK).

Respondent Vitale never made an unauthorized trade in Claimants' account. Respondent Vitale never churned Claimants' account nor sold an unregistered security to Claimants. Additionally, Respondent Vitale's activities were supervised by Respondents Baxter Banks and Muller.

Claimants never complained to Respondent Vitale about their account. Claimants never questioned any activity or trade in Claimants' account, or told Respondent Vitale that anything was improper. However, Claimants did close their Baxter Banks account, and told Respondent Vitale they wanted no further activity in their account to occur. Respondent Vitale is not aware that this directive was ever violated.

Respondent Baxter Banks alleged the following: The trades at issue in the Statement of Claim were authorized by Claimants; Respondent Baxter Banks acted in good faith; Claimants were advised of the risks of the securities purchased; the investments were made for the benefit of Claimants and not for generating commissions; and, the annual turnover ratio indicates a lack of excessive trading.

Respondent Anaya asserted that the Statement of Claim fails to allege any material facts that can establish a claim against him and is not an accurate depiction of the events that occurred.

Respondent Muller asserted that while employed at Baxter Banks, he never placed any trades on behalf of Claimants, made any recommendations to Claimants or communicated with Claimants at all. Further, Respondent Muller contended that he did not have any supervisory responsibilities at the firm. In addition, Respondent Muller alleged that the trades at issue occurred after he was no longer associated with Baxter Banks.

#### **RELIEF REQUESTED**

Claimants requested an Award against Respondents as follows:

Trading losses:	\$ 85,865.88;
Excessive commissions:	\$ 22,069.02;
Excessive taxes:	\$ 18,392.00;
Lost opportunity:	\$ 12,150.35;

Pre-judgment interest:

*Woods v. Barnett Bank of Fort Lauderdale*,  
765 F.2d 1004 (11th Cir. 1985); *Wolfe v.*  
*Blythe, Eastman, Dillon & Co.*, 637 F.2d  
77 (2nd Cir. 1980);

Attorneys' fees and costs  
of litigation:

O.C.G.A. Section 10-5-14(a);  
O.C.G.A. Section 13-6-11;  
*Cochnauer, supra*;

Exemplary (punitive damages):

of three times total compensatory  
damages, *Mastrobuono v. Shearson*  
*Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.  
Ct. 1112, 131 L. Ed. 2d 76 (1995); *Bonar*  
*v. Dean Witter Reynolds, Inc.*, 835 F.2d  
1378 (11th Cir. 1988); O.C.G.A. Section  
51-12-5.1; and,

Such other and further  
relief as is just and  
appropriate.

Respondent Vitale requested:

1. That Claimants take nothing by way of the Statement of Claim;
2. That Respondent Vitale be awarded his costs in defending himself against the Statement of Claim; and,
3. For such other and further relief as this tribunal deemed just and proper.

Respondent Baxter Banks requested that Claimants' claims be denied plus an award of its legal fees.

Respondent Anaya requested a dismissal of all claims asserted against him.

Respondent Muller requested a dismissal of all claims asserted against him plus an award of his attorneys' fees.

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

On September 5, 2000, Respondent Anaya informed NASD Dispute Resolution, Inc. staff that he would not attend or otherwise participate in the evidentiary hearing in this matter. In addition, Respondent Baxter Banks did not appear at the evidentiary hearing. Upon review of the file and the representations made by/on behalf of the Claimants, the undersigned arbitrators (the "Panel") determined that Respondents Anaya and Baxter Banks have been properly served with the Statement of Claim and received due notice of the hearing, and that arbitration of the matter would proceed without said Respondents present, in accordance with

the NASD-DR Code of Arbitration Procedure (the "Code").

Respondents did not file with NASD Dispute Resolution, Inc. properly executed submissions to arbitration but are required to submit to arbitration pursuant to the Code and, having appeared, are bound by the determination of the Panel on all issues submitted.

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

On September 5, 2000, Claimants informed the arbitration panel that they had entered into settlement agreements with Respondents Vitale, McDermott and McGowan.

### **AWARD**

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

Respondents Anaya and Baxter Banks are liable, jointly and severally, and shall pay to Claimants the sum of \$91,241.00 plus pre-judgment interest in the sum of \$9669.00. Post-judgment interest shall accrue at the rate of 12% per annum from September 5, 2000 until the date of payment of the Award.

Respondents Anaya and Baxter Banks are liable, jointly and severally, and shall pay to Claimants the sum of \$300,000.00 in punitive damages pursuant to O.C.G.A. Section 51-12-5.1, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) and Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988).

Respondents Anaya and Baxter Banks are liable, jointly and severally, and shall pay to Claimants the sum of \$30,000.00 in attorneys' fees pursuant to O.C.G.A. Section 13-6-11.

Respondents Anaya and Baxter Banks are liable, jointly and severally, and shall pay to Claimants the sum of \$2,000.00 in costs.

Respondents Anaya and Baxter Banks are liable, jointly and severally, and shall pay to Claimants the sum of \$300.00 representing reimbursement of the claim filing fee previously paid by Claimants to NASD Dispute Resolution, Inc.

The panel found fraud in connection with the actions of Respondents Anaya and Baxter Banks.

The panel found in favor of Respondent Muller and all claims against him are dismissed, with prejudice.

All other requests for relief not specifically addressed herein are denied.

### FEES

Pursuant to the Code, the following fees are assessed:

#### Filing Fees

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

Initial claim filing fee = \$300.00

#### Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) 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 requested during these proceedings:

There were no adjournments requested during these proceedings.

#### Forum Fees and Assessments

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Three Pre-hearing sessions with Panel x \$1,125.00 = \$3,375.00

Pre-hearing conferences:	October 29, 1999	1 session
	March 31, 2000	1 session
	August 1, 2000	1 session

Two Hearing sessions x \$1,125.00 = \$2,250.00

Hearing Date: September 5, 2000 2 sessions

Total Forum Fees = \$5,625.00

The Panel has assessed the total forum fees of \$5,625.00 to Respondents Anaya and Baxter Banks, jointly and severally.

#### Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

Respondent Anaya requested additional copies of documents from the file at a cost of \$14.50.

**Fee Summary**

Claimants be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$300.00
Total Fees	= \$300.00
<u>Less payments</u>	<u>= \$300.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$0.00

Respondents Anaya and Baxter Banks be and hereby are jointly and severally liable for:

Forum Fees	= \$5,625.00
Total Fees	= \$5,625.00
<u>Less Payments</u>	<u>= \$0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$5,625.00

Respondent Baxter Banks be and hereby is solely liable for:

Member Fees	= \$4,600.00
Total Fees	= \$4,600.00
<u>Less payments</u>	<u>= \$0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$4,600.00

Respondent Anaya be and hereby is solely liable for:

Administrative Costs	= \$14.50
Total Fees	= \$14.50
<u>Less Payments</u>	<u>= \$0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$14.50

All balances are due and payable to NASD Dispute Resolution, Inc.

**Concurring Arbitrators' Signatures**

\_\_\_\_\_/s/\_\_\_\_\_  
Randolph A. Mayer, Esq.  
Public Arbitrator, Presiding Chair

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

\_\_\_\_\_/s/\_\_\_\_\_  
Joseph N. Miller  
Public Arbitrator

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

\_\_\_\_\_/s/\_\_\_\_\_  
Dan F. Laney, III, Esq.  
Industry Arbitrator

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

October 11, 2000  
Date of Service (For NASD-DR office use only)



Respondent Anaya requested additional copies of documents from the file at a cost of \$14.50.

Fee Summary

Claimants be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$300.00
Total Fees	= \$300.00
<u>Less payments</u>	<u>= \$300.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$0.00

Respondents Anaya and Baxter Banks be and hereby are jointly and severally liable for:

Forum Fees	= \$5,625.00
Total Fees	= \$5,625.00
<u>Less Payments</u>	<u>= \$0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$5,625.00

Respondent Baxter Banks be and hereby is solely liable for:


Member Fees	= \$4,600.00
Total Fees	= \$4,600.00
<u>Less payments</u>	<u>= \$0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$4,600.00

Respondent Anaya be and hereby is solely liable for:

Administrative Costs	= \$14.50
Total Fees	= \$14.50
<u>Less Payments</u>	<u>= \$0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$14.50

All balances are due and payable to NASD Dispute Resolution, Inc.

Concurring Arbitrators' Signatures

  
\_\_\_\_\_  
Randolph A. Mayer, Esq.  
Public Arbitrator, Presiding Chair

September 29, 2000  
Signature Date

\_\_\_\_\_  
Joseph N. Miller  
Public Arbitrator

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

Respondent Anaya requested additional copies of documents from the file at a cost of \$14.50.

**Fee Summary**

Claimants be and hereby are jointly and severally liable for:

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Administrative Costs	= \$14.50
Total Fees	= \$14.50
<u>Less Payments</u>	<u>= \$0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$14.50

All balances are due and payable to NASD Dispute Resolution, Inc.

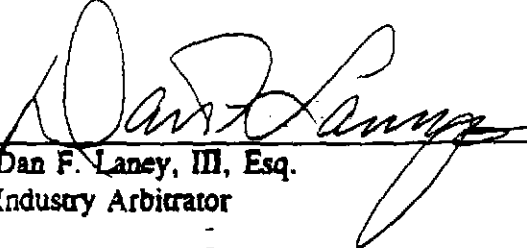
**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Randolph A. Mayer, Esq.  
Public Arbitrator, Presiding Chair

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

  
\_\_\_\_\_  
Joseph N. Miller  
Public Arbitrator

10/5/00  
\_\_\_\_\_  
Signature Date

  
Dan F. Laney, III, Esq.  
Industry Arbitrator

9/29/00  
Signature Date

Date of Service (For NASD-DR office use only)