

NATIONAL FUTURES ASSOCIATION
BEFORE THE
BUSINESS CONDUCT COMMITTEE

FILED

AUG 30 2006

In the Matter of:)
)
MERCER CAPITAL MANAGEMENT)
(NFA ID #346322),)
)
MERCER CAPITAL, INC.)
(NFA ID #301960),)
)
ROBERT L. FLICKINGER, II)
(NFA ID #284210),)
)
BENJAMIN KERPE)
(NFA ID #325466),)
)
CHARLES M. MONTGOMERY)
(NFA ID #336444),)
)
and)
)
ARTHUR VIERA)
(NFA ID #340309),)
)
Respondents.)

**NATIONAL FUTURES ASSOCIATION
LEGAL DOCKETING**

NFA Case No. 06-BCC-023

COMPLAINT

Having reviewed the investigative report submitted by the Compliance Department of National Futures Association ("NFA"), and having reason to believe that NFA Compliance Rules and Financial Requirements ("NFA Requirements") are being, have been, or are about to be violated and that the matter should be adjudicated, NFA's Business Conduct Committee ("Committee") issues this Complaint against Mercer Capital Management ("MCM"), Mercer Capital Inc. ("MCI"), Robert L. Flickinger, II ("Flickinger"), Benjamin Kerpe ("Kerpe"), Charles M. Montgomery ("Montgomery") and Arthur Viera ("Viera").

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ALLEGATIONS

JURISDICTION

1. At all times relevant to this Complaint, MCM was registered as an introducing broker ("IB") Member of NFA. As such, MCM was and is required to comply with NFA Requirements and is subject to disciplinary proceedings for violations thereof.
2. At all times relevant to this Complaint, MCI was registered as an IB Member of NFA. As such, MCI was and is required to comply with NFA Requirements and is subject to disciplinary proceedings for violations thereof.
3. At all times relevant to this Complaint, Flickinger was a listed principal of MCM and MCI. In addition, Flickinger was registered as an associated person ("AP") of MCM and MCI and as an NFA Associate in accordance with NFA Bylaw 301(b) at all times relevant to this Complaint. MCM and MCI are liable for violations of NFA Requirements committed by Flickinger during the course of his activities on their behalf.
4. At all times relevant to this Complaint, Kerpe, Montgomery and Viera were registered as APs of MCI and as NFA Associates in accordance with NFA Bylaw 301(b). As such, they were and are required to comply with NFA Requirements and are subject to disciplinary proceedings for violations thereof. MCI is liable for violations of NFA Requirements committed by them in the course of their activities on behalf of MCI.

BACKGROUND

5. MCM has been an NFA Member IB since August 4, 2004. Its main office is in Boca Raton, Florida and it also operated a branch office in Portland, Oregon. Flickinger is MCM's president. On October 18, 2005, MCM became subject to enhanced supervisory procedures under an Interpretive Notice issued by NFA's Board of Directors which, among other things, requires Members that draw a substantial part of their sales force from firms that have been barred from the industry for dishonest sales practices ("Disciplined Firms") to tape record all conversations with customers and prospective customers. MCM's petition to NFA's Telemarketing Procedures Waiver Committee ("Waiver Committee") to waive the firm's obligation was denied and MCM was, therefore, required to adopt the procedures by February 18, 2006.
6. MCM is a successor to MCI, which was an NFA Member IB from June 2000 until September 2004 – shortly after MCM became registered. MCI was also a commodity trading advisor and a notice registered broker dealer. Flickinger was the president of MCI. In 2003, the Committee issued a Complaint alleging that MCI made deceptive solicitations and allowed unregistered individuals to act as APs, and that MCI and Flickinger failed to supervise. MCI agreed to a settlement which required the firm to submit promotional material to NFA for a year and to tape record for three months. MCI and Flickinger also agreed to pay a \$10,000 fine. (NFA Case No 03-BCC-006).
7. MCM and MCI both charged customers a commission of \$95 per option and \$105 per round turn on futures. During 2003 and 2004 the companies earned

combined commission income of more than \$836,000. MCI's customers lost almost \$269,000 overall in 2003 and customers of MCI and MCM lost almost \$534,000 in the aggregate during 2004.

8. NFA visited MCM's main office in Boca Raton in November 2004 to perform an audit. When NFA arrived, only Flickinger and a secretary were present and Flickinger told NFA that the rest of the firm's APs worked in MCM's Portland branch. NFA, therefore, undertook an examination of MCM's Portland branch. Information developed during NFA's examination of MCM demonstrates that the firm failed to maintain certain required books and records and failed to give telegraphic notice of its failure to maintain books and records. MCM also failed to implement an adequate anti-money laundering ("AML") program.
9. Due to the fact that Flickinger had only recently closed MCI and created MCM, moving some of MCI's accounts to the new firm, NFA also reviewed sales practices at MCI in conjunction with its audit since the majority of customer solicitations had taken place under MCI's auspices. Information gathered from customers who had traded through MCI during 2003 and 2004 indicates that APs from that firm, including Flickinger himself, used deceptive and high-pressure tactics during solicitations. Overall, the evidence also indicates that both MCM and MCI, as well as Flickinger, failed in their obligation to supervise their futures-related activities.

APPLICABLE RULES

10. NFA Compliance Rule 2-2(a) provides that no Member or Associate shall cheat, defraud or deceive, or attempt to cheat, defraud or deceive, any commodity futures customer.

11. NFA Compliance Rule 2-9(a) provides that each Member shall diligently supervise its employees and agents in the conduct of their commodity futures activities for or on behalf of the Member. Each Associate who has supervisory duties shall diligently exercise such duties in the conduct of that Associate's commodity futures activities on behalf of the Member.
12. NFA Compliance Rule 2-9(c), in pertinent part, requires IB Members to develop and implement a written AML program approved in writing by senior management reasonably designed to achieve and monitor the Member's compliance with the applicable requirements of the Bank Secrecy Act and the implementing regulations promulgated thereunder by the Department of the Treasury and, as applicable, the Commodity Futures Trading Commission ("CFTC").
13. NFA Compliance Rule 2-10 provides that each Member shall maintain adequate books and records necessary and appropriate to conduct its business including, without limitation, the records required to be kept under CFTC Regulations 1.18 and 1.32 through 1.37 for the period required under CFTC Regulation 1.31.
14. CFTC Regulation 1.18, in pertinent part, requires registrants to keep current records and documentation of each transaction affecting its asset, liability, income, expense and capital accounts. In addition, each registrant must make formal monthly computations of its adjusted net capital ("ANC") and its minimum financial requirements.
15. NFA Compliance Rule 2-29(a)(1) provides that no Member or Associate shall make any communication with the public which operates as a fraud or deceit.

16. NFA Compliance Rule 2-29(a)(2) provides that no Member or Associate shall make any communication with the public which employs or is part of a high-pressure approach.
17. NFA Financial Requirements Section 5 provides, in pertinent part, that any Member that is required to file notice under CFTC Regulations 1.10 and 1.12 is required to file such notice with NFA.
18. CFTC Regulation 1.12, in pertinent part, requires registrants that fail to keep current books and records as required under CFTC Regulation 1.18 to give telegraphic notice to NFA of that failure on the day on which such failure occurs.

COUNT I

VIOLATION OF NFA COMPLIANCE RULES 2-2(a) AND 2-29(a)(1) AND (a)(2): MAKING DECEPTIVE, MISLEADING AND HIGH-PRESSURE SALES SOLICITATIONS.

19. The allegations set forth in paragraphs 1 through 10, 15 and 16 are realleged as paragraph 19.
20. Flickinger made misleading and deceptive statements during solicitations on behalf of MCI to Robert Humphrey ("Humphrey") in early 2004. For example, his solicitations to Humphrey included the following misleading statements, representations and claims:
 - Flickinger assured Humphrey that he could make enough money to buy a boat or whatever he spent extra cash on;
 - Flickinger told Humphrey that commodities were hot and that bad weather and shortages would drive the price of corn higher; and
 - Flickinger assured Humphrey that, at most, he would only lose half of his investment if things went poorly and told Humphrey that he would put in stops that would limit losses to 50%.

21. The statements set forth in paragraph 20 above, as well as Flickinger's overall solicitation to Humphrey, constituted cheating, fraud or deception or an attempt to cheat, defraud or deceive, in that they contained patent fabrications and gave a distorted and misleading impression of the profit potential and risk of loss associated with options and made it appear that large profits were easily attainable trading options through MCI. In addition, Flickinger failed to inform Humphrey that a substantial majority of MCI's customers lost money overall trading with MCI.
22. Montgomery made misleading and deceptive statements during solicitations on behalf of MCI to Dorothy Russell ("Russell") in late 2003 and early 2004. For example, his solicitations to Russell included the following misleading statements, representations and claims:
- Montgomery told Russell that she could make money in the options market and stressed that even a small move in a commodity could result in a considerable profit and Montgomery told Russell that he knew when to make a move;
 - Montgomery told Russell that he thought that he could double her money in four months; and
 - Montgomery blunted the effectiveness of discussions of the risk of loss by telling Russell how a move of a few cents could result in a large profit. Montgomery suggested that Russell invest \$10,000 and told her that after he had made money on the account, he could return her original investment and she could invest her profits so she would have nothing at risk. Montgomery also downplayed risk by telling Russell that even if her first \$3,000 investment was lost, she still had the other \$7,000 available to make it up.
23. The statements set forth in paragraph 22 above, as well as Montgomery's overall solicitation to Russell, constituted cheating, fraud or deception or an attempt to

cheat, defraud or deceive, in that they contained patent fabrications and gave a distorted and misleading impression of the profit potential and risk of loss associated with options and made it appear that large profits were easily attainable trading options through MCI. In addition, Montgomery failed to inform Russell that a substantial majority of MCI's customers lost money overall trading with MCI.

24. Kerpe and Flickinger made misleading and deceptive statements during solicitations on behalf of MCI to Saurabh Shah ("Shah") in late spring of 2003.

For example, their solicitations to Shah included the following misleading statements, representations and claims:

- Kerpe told Shah that he had fifteen years of experience in the industry when, in fact, he had been an AP for less than a year at the time of the solicitation;
- Kerpe initially encouraged Shah to invest in options on the Canadian dollar ("CAD") based on his expectations of the results of an upcoming meeting of the Federal Reserve Board. Kerpe told Shah that the potential interest rate change would work to Shah's favor, as the U.S. dollar ("USD") would be weak and the CAD would be strong. Kerpe told Shah that profits of 100-200% in just two to three weeks were possible and that a \$5,000 investment would be worth approximately \$50,000 in just six months;
- Kerpe later encouraged Shah to invest in T-bond and USD options and told him that he could expect a 500% rate of return. He also suggested investing in unleaded gas options because, he said, summer was coming and people were traveling more; and
- Flickinger took over Shah's account in November of 2003, after Shah had lost money investing with Kerpe. Flickinger assured Shah that his other customers were making money – some as much as 200%. Flickinger also told Shah that he could rebuild the value of his account in six months and triple it after that. Flickinger suggested a variety of trades to Shah, including heating oil options – which he said would increase in value due to the upcoming winter.

25. The statements set forth in paragraph 24 above, as well as Kerpe's and Flickinger's overall solicitations to Shah, constituted cheating, fraud or deception or an attempt to cheat, defraud or deceive, in that they contained patent fabrications and gave a distorted and misleading impression of the profit potential and risk of loss associated with options and made it appear that large profits were easily attainable trading options through MCI. In addition, Kerpe and Flickinger failed to inform Shah that a substantial majority of MCI's customers lost money overall trading with MCI.
26. Viera made misleading and deceptive statements during solicitations on behalf of MCI to David Trey ("Trey") in 2004. For example, his solicitations to Trey included the following misleading statements, representations and claims:
- Viera claimed that his customers received a lot of "intrinsic value" for the fees they paid and that MCI had very favorable results in the markets in which it specialized;
 - Viera told Trey that bean meal had a "100% upside potential short-term at September trading" and that economic growth in China would drive prices for bean meal futures; and
 - Viera also told Trey that his money would be handled "as if on eggshells."
27. The statements set forth in paragraph 26 above, as well as Viera's overall solicitations to Trey, constituted cheating, fraud or deception or an attempt to cheat, defraud or deceive, in that they contained patent fabrications and gave a distorted and misleading impression of the profit potential and risk of loss associated with options and made it appear that large profits were easily attainable trading options through MCI. In addition, Viera failed to inform Trey

that a substantial majority of MCI's customers lost money overall trading with MCI.

28. Viera employed a high-pressure approach in his solicitation of Trey in that he told Trey that large gains were to be had if he invested during a small window of opportunity and that Trey "should not hesitate." In addition, Viera called Trey more than fifteen times over three weeks and complained to Trey that he had "pussy-footed around" with sending money to invest through MCI.
29. Viera made misleading and deceptive statements during solicitations on behalf of MCI to John Rice ("Rice") in the spring of 2004. For example, his solicitations to Rice included the following misleading statements, representations and claims:
 - Viera told Rice that he could make anywhere from \$3,000 to \$15,000 on certain markets through MCI;
 - Viera also told Rice that he would protect his investment and that he would *buy contracts in a way that limited losses*. Viera told Rice that he would protect him against the risk of investing by buying puts and calls and that this strategy would protect Rice against losing all of his money; and
 - Viera told Rice that soybean meal goes up in the summer before crops come in and that oil goes down during the summer's late traveling season before school starts back.
30. The statements set forth in paragraph 29 above, as well as Viera's overall solicitations to Rice, constituted cheating, fraud or deception or an attempt to cheat, defraud or deceive, in that they contained patent fabrications and gave a distorted and misleading impression of the profit potential and risk of loss associated with options and made it appear that large profits were easily attainable trading options through MCI. In addition, Viera failed to inform Rice

that a substantial majority of MCI's customers lost money overall trading with MCI.

31. Viera employed a high-pressure approach in his solicitation of Rice in that he emphasized the urgency of investing to Rice with statements to the effect that the time was right and that Rice had to invest now because they had already missed moves.
32. By reason of the foregoing acts and omissions, MCI, Flickinger, Kerpe, Montgomery and Viera are charged with violations of NFA Compliance Rules 2-2(a) and 2-29(a)(1). In addition, MCI and Viera are charged with violations of NFA Compliance Rule 2-29(a)(2).

COUNT II

VIOLATION OF NFA COMPLIANCE RULE 2-10 AND NFA FINANCIAL REQUIREMENTS SECTION 5: FAILURE TO MAINTAIN REQUIRED BOOKS AND RECORDS AND FAILURE TO FILE REQUIRED TELEGRAPHIC NOTICE.

33. The allegations contained in paragraphs 1, 2, 5, 6, 8, 13, 14, 17 and 18 are realleged as paragraph 33.
34. MCM failed to prepare its ANC computation for the month ended July 31, 2005. Furthermore, MCM failed to ensure that current books and records were maintained. Specifically, MCM failed to maintain a general ledger or similar records that showed each transaction affecting the firm's assets, liabilities, income, expense and capital accounts.
35. MCM failed to give timely telegraphic notice to NFA of its failure to maintain current books and records.
36. By reason of the foregoing acts and omissions, MCM is charged with violations of NFA Compliance Rule 2-10 and NFA Financial Requirements Section 5.

COUNT III

VIOLATION OF NFA COMPLIANCE RULE 2-9(c): FAILURE TO INITIATE AN ADEQUATE AML PROGRAM.

37. The allegations contained in paragraphs 1, 2, 5, 6, 8 and 12 are realleged as paragraph 37.
38. MCM failed to develop and implement an effective AML program. For example:
- Its AML program was not approved in writing by senior management;
 - Its Customer Identification Program did not adequately address the accepted methods to verify the identity of new customers or the methods to be used in circumstances where the firm could not verify the identity of a customer through documents;
 - Its AML program failed to define the circumstances that would require non-individual account holders to provide information about an account controller or what situations triggered the filing of a Suspicious Activity Report;
 - Its AML program failed to identify the procedures governing the collection and retention of identification data and notification of customers about why the firm requests verification of identification;
 - Its AML program lacked adequate training for employees on how to identify suspicious accounts and what to do if the evidence indicated a problem; and
 - Its AML program did not designate the specific supervisory personnel who were responsible for reporting suspicious activity.
39. In addition, MCM failed to have procedures to identify and make appropriate notification regarding customers on the Office of Foreign Asset Control's list or on any list of known or suspected terrorists designated by the Treasury Department and it did not have procedures to monitor activity in high risk accounts.
40. By reason of the foregoing acts and omissions, MCM is charged with violations of NFA Compliance Rule 2-9(c).

COUNT IV

VIOLATION OF NFA COMPLIANCE RULE 2-9(a): FAILING TO DILIGENTLY SUPERVISE EMPLOYEES AND AGENTS IN THE CONDUCT OF THEIR COMMODITY FUTURES ACTIVITIES.

41. The allegations contained in paragraphs 1 through 9 and 11 are realleged as paragraph 41.
42. MCI and MCM were responsible for the diligent supervision of their respective employees and agents at all times relevant this Complaint. In addition, Flickinger was responsible for the diligent supervision of MCI's and MCM's employees and agents at all times relevant this Complaint.
43. The diligent supervision of employees and agents requires, in part, the diligent supervision of telephone sales solicitations made by a Member's APs to detect and/or prevent the use of deceptive and misleading sales tactics.
44. The allegations set forth in paragraphs 20 through 31 are realleged as paragraph 44.
45. MCI and Flickinger failed to adequately supervise the sales practices of MCI's sales force and failed to detect and/or prevent the misleading sales solicitations alleged in paragraph 44 above.
46. Compliance with NFA Compliance Rule 2-9(a) requires, in part, that Members and their supervisory personnel initiate and execute appropriate procedures to maintain current books and records and make appropriate notice of a failure to maintain records.
47. The allegations contained in paragraphs 34 and 35 are realleged as paragraph 47.

48. MCM and Flickinger failed to initiate and execute appropriate procedures to maintain current books and records and make appropriate notice of a failure to maintain records.
49. By reason of the foregoing acts and omissions, MCI, MCM and Flickinger are charged with violations of NFA Compliance Rule 2-9(a).

PROCEDURAL REQUIREMENTS

ANSWER

You must file a written Answer to the Complaint with NFA within thirty (30) days of the date of the Complaint. The Answer shall respond to each allegation in the Complaint by admitting, denying or averring that you lack sufficient knowledge or information to admit or deny the allegation. An averment of insufficient knowledge or information may only be made after a diligent effort has been made to ascertain the relevant facts and shall be deemed to be a denial of the pertinent allegation.

NFA staff is authorized to grant such reasonable extensions of time in which an Answer may be filed as it deems appropriate. The place for filing an Answer shall be:

National Futures Association
200 West Madison Street
Suite 1600
Chicago, Illinois 60606-3447
Attn: Legal Department-Docketing

Failure to file an Answer as provided above shall be deemed an admission of the facts and legal conclusions contained in the Complaint. Failure to respond to any allegation shall be deemed an admission of that allegation. Failure to file an Answer as provided above shall be deemed a waiver of hearing.

POTENTIAL PENALTIES, DISQUALIFICATION AND INELIGIBILITY

At the conclusion of the proceedings conducted as a result of or in connection with the issuance of this Complaint, NFA may impose one or more of the following penalties:

- (a) expulsion or suspension for a specified period from NFA membership;
- (b) bar or suspension for a specified period from association with an NFA Member;
- (c) censure or reprimand;
- (d) a monetary fine not to exceed \$250,000 for each violation found; and
- (e) order to cease and desist or any other fitting penalty or remedial action not inconsistent with these penalties.

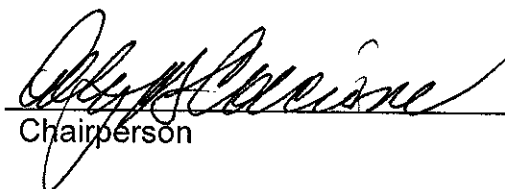
The allegations in this Complaint may constitute a statutory disqualification from registration under Section 8a(3)(M) of the Commodity Exchange Act.

Respondents in this matter who apply for registration in any new capacity, including as an AP with a new sponsor, may be denied registration based on the pendency of this proceeding.

Pursuant to the provisions of CFTC Regulation 1.63, penalties imposed in connection with this Complaint may temporarily or permanently render Respondents who are individuals ineligible to serve on disciplinary committees, arbitration panels and governing boards of a self-regulatory organization, as that term is defined in CFTC Regulation 1.63.

NATIONAL FUTURES ASSOCIATION BUSINESS CONDUCT COMMITTEE

Dated: 08/30/06

By: 
Chairperson

AFFIDAVIT OF SERVICE

I, Nancy Miskovich-Paschen, on oath state that on August 30, 2006, I served copies of the attached Complaint, by placing such copies in the United States mail, first-class delivery, and by overnight mail, in envelopes addressed as follows:

Mercer Capital Management
1200 N. Federal Hwy.
#315
Boca Raton, FL 33432
Attn: Robert Flickinger

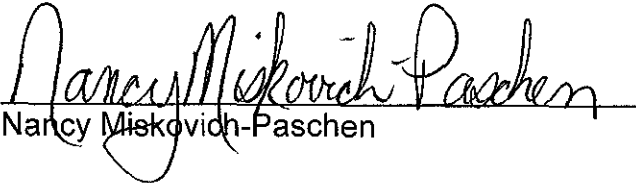
Mercer Capital, Inc.
121 SW Morrison
Suite 825
Portland, OR 97204
Attn: Robert Flickinger, President

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Benjamin Kerpe
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Sheboygan, WI 53081

Charles M. Montgomery
1963 SW Camelot Ct.
Portland, OR 97225

Arthur Viera
9514 SW Commons Ct.
Beaverton, OR 97005


Nancy Miskovich-Paschen

Subscribed and sworn to before me
on this 30th day of August 2006.


Notary Public

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