

NATIONAL FUTURES ASSOCIATION
BEFORE THE
HEARING PANEL

FILED

JUL 30 2007

In the Matter of:)
)
BENJAMIN KERPE)
(NFA ID #325466),)
)
CHARLES M. MONTGOMERY)
(NFA ID #336444),)
)
and)
)
ARTHUR VIERA)
(NFA ID #334309),)
)
Respondents.)

NATIONAL FUTURES ASSOCIATION
LEGAL DOCKETING

NFA Case No. 06-BCC-023

DECISION

On April 24, 2007, a designated Panel of the Hearing Committee held a hearing to consider the charges against Benjamin Kerpe (Kerpe), Charles M. Montgomery (Montgomery) and Arthur Viera (Viera). The Panel issues the following Decision under National Futures Association (NFA) Compliance Rule 3-10.

I

PROCEDURAL BACKGROUND

On August 30, 2006, NFA's Business Conduct Committee issued a four count Complaint against Mercer Capital Management (MCM), Mercer Capital, Inc. (Mercer), Robert L. Flickinger, II (Flickinger), Benjamin Kerpe, Charles M. Montgomery and Arthur Viera. MCM, Mercer and Flickinger settled the charges against them prior to the hearing.

Count I of the Complaint charged that Kerpe, Montgomery and Viera violated NFA Compliance Rules 2-2(a) and 2-29(a) by engaging in deceptive and misleading sales solicitations. In addition, Count I of the Complaint charged Viera with violating NFA Compliance Rule 2-29(a)(2) by engaging in high pressure sales solicitations.

Kerpe, Viera and Montgomery each filed an Answer denying all material allegations in the Complaint.

At the start of the hearing, NFA requested that the allegations against Viera related to a solicitation of David Trey (Trey) in paragraphs 26-28 of the Complaint be dismissed because Trey was not available to testify. The Panel granted that request and dismissed those allegations with prejudice.

II

EVIDENCE PRESENTED AT THE HEARING

NFA presented the testimony of four witnesses and introduced several documents into evidence. Kerpe and Viera each testified on their own behalf and entered several documents into evidence. A brief summary of the evidence follows.

Lisa Marlow

Lisa Marlow (Marlow) testified that she is a manager in NFA's Compliance Department. Marlow stated that part of her responsibility is to supervise NFA staff that conduct audits of NFA Members.

Marlow stated that NFA audited Mercer and MCM in late 2004. Marlow explained that Mercer closed in August 2004 and Mercer's president, Robert Flickinger started MCM at that time.

Marlow testified that Kerpe was an AP of Mercer from November 2002 through September 2004 and an AP of MCM from August 2004 through October 2004. Kerpe is currently an AP and principal of QCM, an NFA Member introducing broker.

Marlow also testified that Viera was an AP of Mercer from February 2004 through August 2004 and an AP of MCM from August 2004 through May 2005. Viera has not been registered since that time.

In addition, Marlow testified that Montgomery was an AP of Mercer from February 2004 through August 2004 and an AP of MCM from August 2004 through January 2006.

According to Marlow, NFA analyzed the overall performance of Mercer's customers in 2003 using the 1099 forms issued to them. Marlow stated that this analysis revealed that Mercer had 169 customers in 2003 and overall these customers lost \$268,700. Marlow stated that 122, or 72 percent, of Mercer's customer lost money in 2003. Marlow also stated that during 2003 Mercer collected \$371,500 in gross commissions.

Marlow also testified that NFA analyzed the performance in certain Mercer customer accounts, including accounts belonging to Saurabh Shah (Shah), Dorothy Russell (Russell) and John Rice (Rice). Shah's account traded from June 2003 through July 2004. During that time, he deposited \$7,900 and he lost \$4,700. Russell's account was open from May 2004 through July 2004. During that time she deposited \$10,000 and she lost \$9,700. Rice's account traded from May 2004 through July 2004. Rice deposited \$5,000 and he lost \$4,900.

John Rice

Rice testified that he is a locomotive electrician from Corbin, Kentucky. Rice stated that his investment experience includes stock trading and a one-time investment in silver options in the late 1980s or early 1990s.

Rice stated that in April 2004, Viera called him and spoke to him about buying futures on soy crush and oil. Viera told him that he had already made a lot of money in soy crush, with some people making \$3,000, \$5,000, \$10,000 and \$15,000. Viera also told him that now was the time to get in because there were a lot of factors that were going to push the price up, including some disease in Africa and the fact that it was going to be a dry year. According to Rice, Viera told him he could make anywhere from \$3,000 to \$15,000.

Rice testified that Viera also spoke to him about investing in oil. Viera told him that as the driving season ended and the school season started, oil would go down because the demand for it lessens.

Rice stated that he agreed to open an account after speaking to Viera three to five times. Rice testified that he told Viera that he had lost money trading silver and he was not receptive to opening another account. According to Rice, Viera told him that he would trade to limit Rice's losses by buying puts and calls. Rice stated that Viera told him that if they lost one way, they would gain the other way. Rice opened an account with \$5,000 and lost almost the entire amount. Rice also stated that nobody from Mercer ever told him that the majority of customers at Mercer lost money.

On cross examination, Rice agreed he was aware that he could lose everything trading options.

Under examination by the Panel, Rice stated that he had never heard of “soy crush” prior to speaking with Viera. He also didn’t know anything about spread trades.

Arthur Viera

Viera testified that he only worked in the futures industry for a short period of time. Viera stated that he has extensive securities training and was Series 7 registered prior to working at Mercer.

Viera testified that he spoke to Rice several times and then he didn’t hear from him for a few weeks. Rice then contacted him and asked what he needed to do to get started trading options. Viera also testified that Rice signed all the account opening documents involving risk and that he told Rice to read through the documents.

Viera stated that he followed a trading strategy with Rice to protect, to a small extent, Rice’s investment if the market moved the wrong way. The strategy was not to completely reduce or eliminate risk.

Viera testified that he never discloses information about other accounts to a customer. Viera stated that he would never have said that clients were making a lot of money on a trade.

Saurabh Shah

Shah testified that he owns a convenience store in Florida. Shah stated he has owned the store for about six months, and prior to that he lived in New Jersey. Shah stated that before investing with Mercer his investment experience consisted of stock trading based on advice from friends.

Shah stated that Kerpe called him one afternoon. Kerpe told him that he

worked for Mercer and had 15 years' experience. He assured Shah that he was good at making money with not too much risk. Shah testified that he told Kerpe that he knew nothing about futures and options trading and that Kerpe told him not to worry about it. Kerpe told him if Shah made money, Kerpe would generally make money.

According to Shah, Kerpe told him he needed to invest immediately because there was a big interest-rate change coming up, and as a result there was a possibility of making good money by investing in Canadian dollars. Kerpe told him there were only two days before the meeting so he would send the account papers to Shah by overnight mail. Shah stated that he received the papers in the morning and about four hours later Kerpe sent someone to pick them up.

Shah also testified that he opened an account with Kerpe after their first telephone conversation. During that call, Kerpe talked about a 200 to 300 percent profit. Shah also stated that Kerpe did not say much about risk until after Shah started losing money. At that point, Kerpe told him there was a possibility of losing all the money.

Shah also stated that after two or three days he received a call from Flickinger, who told him that Kerpe was out of town. Flickinger also told Shah that he had been looking at Shah's position and he thought it was risky. Flickinger told him that he might lose all his money unless he invested more money to buy insurance positions. Shah asked Flickinger to have Kerpe call Shah and let him know whether it was okay to trade with Flickinger. When Kerpe called him, Kerpe told Shah that Flickinger was his supervisor.

Shah testified that the next time Kerpe contacted him, Kerpe told him that

he had made a mistake but he would take care of the positions and make sure that the money grew.

According to Shah, sometime around September, he and Kerpe also discussed the unleaded gas market. Kerpe told him that the price of gas would be going down because summer was almost over and there was excess inventory internationally. Kerpe convinced him to purchase gas positions.

Shah also testified that in December, he and Kerpe had a disagreement, and Flickinger took over his account. On cross examination, Shah stated that Flickinger took over his account in January 2004 and he closed the account in June 2004.

Shah also stated that Kerpe never told him that the majority of Mercer customer's lost money overall. Rather, whenever Kerpe suggested a new position, he told Shah that all his customers were making money.

On cross-examination, Shah acknowledged that he signed a risk disclosure statement and an options risk disclosure statement. Shah also stated on cross-examination that Flickinger had also made him promises about profits. Shah maintained, however, that he was not confusing the two because Kerpe always spoke in terms of percentages and Flickinger always made promises in terms of two, three or four times the investment.

Benjamin Kerpe

Kerpe testified that he is 28 years old and a Series 3 licensed commodities broker. Kerpe also stated that he has an economics degree from the University of Wisconsin at Milwaukee.

Kerpe stated that Mercer was his first job after graduating from college.

According to Kerpe, he was employed at Mercer from November 2002 through August 2004. Kerpe testified that he started his own company after he left Mercer.

Kerpe testified that he first spoke to Shah in mid-spring 2003. He and Shah had ten to fifteen conversations before Shah agreed to invest. Most of their conversations were 30 to 45 minutes, and they discussed social, political and economic events that could have caused market fluctuations. Kerpe also testified that Shah opened his account in June 2003. Before he was allowed to trade, he went through Mercer's initial compliance process, which included information on the inherent risks of futures and options. The initial compliance process also included information about seasonal factors being already calculated into the market and about commissions.

Kerpe denied that he ever told Shah that he had 15 years experience, because that would have made him nine years old when he started in the industry. Kerpe stated that he told him that he had a BA in economics and that he was a junior broker. Under examination from the Panel, Kerpe stated that he didn't know what a junior broker was.

Kerpe testified that the first trade he recommended to Shah was a bull call spread on Canadian dollars. Kerpe stated that he discussed the fact that this trade had limited profit potential and that the total risk was the cost of purchasing the spread, plus commissions. Kerpe stated that there was a three point wide spread on maximum profitability.

Kerpe also denied that he ever told Shah that it was possible to make profits of 100 to 200 percent in just two to three weeks from the Canadian dollar trade. Kerpe stated he never discussed percentage rates when discussing the profitability of

options because Mercer's clearing firm told him never to discuss percentages

Kerpe testified that when he recommended a trade at Mercer he would discuss the research with the client over the telephone. If the customer liked the idea, he would then discuss different strategies. Once the customer agreed to a trade, he would transfer the customer over to the confirmation desk where the office manager would tape record the customer's authorization. The customer would then be transferred to Flickinger, who called in the trade. Under examination by the Panel, Kerpe stated that when he referred to research he was talking about information he gathered from different sources, such as the media, web or newsletters and compiled to make his own educated guesses.

Kerpe also testified that he never discussed unleaded gas options with Shah, and he denied telling Shah that it was a good time to invest in unleaded gas options because summer was coming and people would be traveling more. Kerpe stated that the unleaded gas trades were done by Flickinger.

According to Kerpe, Flickinger also serviced Shah's account. Kerpe stated that he didn't get any commissions for trades made by Flickinger.

Kerpe testified that he does not know how many of Mercer's customers lost money because he did not have access to the equity runs. Kerpe stated, however, that of the 20 to 30 accounts he had at Mercer, approximately 70% of those lost money.

Dorothy J. Russell

Russell testified that she is a retired circuit court judge from Orange County, Florida. Russell stated that Montgomery began calling her in the fall of 2003. According to Russell, she does not know how Montgomery got her name.

Russell stated that she had between 15 and 25 calls with Montgomery before she agreed to open an account. During those calls, Montgomery talked to her about investing in options. Montgomery told her that if the commodity went up a few cents, she could make thousands of dollars. Russell acknowledged that Montgomery probably mentioned that the commodity price could go down, but the focus of his conversation was how easy it would be to make money. For example, Montgomery told her that within a few months she could double her money and then he would return her principal and she could trade with the profits. Montgomery gave her many reasons why the markets would go up, including that the trade deficit and service index were up, terrorist threats and an Iraqi refinery had been hit.

Russell also acknowledged that she signed paperwork that included information on risk. As a result, she was aware that there was a risk, but Montgomery's focus was on how much she could make.

Russell also testified that nobody at Mercer, including Montgomery, ever told her that a substantial majority of Mercer's customers lost money overall. According to Russell, if she had heard that, she would not have invested with Montgomery.

III

DISCUSSION

The Complaint charges Kerpe, Viera and Montgomery with engaging in deceptive and misleading sales solicitations in violation of NFA Compliance Rules 2-2(a) and 2-29(a)(1). As discussed more fully below, the Panel finds that all three individuals committed the violations alleged. The Complaint also charged Viera with engaging a high pressure sales solicitation in violation of NFA Compliance Rule 2-

29(a)(2). The Panel, however, did not find evidence that Viera's solicitation to Rice constituted a high pressure sales solicitation. Therefore, the portion of Count I alleging high pressure sales is dismissed with prejudice.

1. **Charles Montgomery**

NFA's case against Montgomery was based entirely on Russell's testimony.

In particular, Russell testified that Montgomery began calling her in the fall of 2003.

During those conversations, Montgomery told her the following:

- If the commodity option went up a few cents, Russell could make thousands of dollars.
- Russell could double her money within a few months and then Montgomery would return her principal and she could trade with profits.
- The option markets would go up because of the trade deficit, terrorist threats and an Iraqi refinery that had been hit.

Russell also testified that she was aware that there was risk but that

Montgomery focused on how easy it was to make money and on how much money she could make.

Although Montgomery was properly served with notice of the hearing, he did not appear at the hearing and did not provide any rebuttal to Russell's testimony. He did file an answer denying that he misled Russell.

The Panel found Russell to be a very credible witness. She was straightforward and factual with her testimony and did not attempt to conceal the fact that she was aware that there was risk. Russell was adamant, however, that Montgomery's focus was on profits.

The Panel understands why Russell felt that Montgomery's solicitation was focused on making money and did not give her an adequate understanding of the