NATIONAL FUTURES ASSOCIATION
BEFORE THE
BUSINESS CONDUCT COMMITTEE

In the Matter of:	)	
	)	
MERCER CAPITAL MANAGEMENT (NFA ID #346322),	)	
	)	
MERCER CAPITAL, INC. (NFA ID #301960),	)	NFA Case No. 06-BCC-023
	)	
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.	)	

ANSWER OF RESPONDENTS MERCER CAPITAL MANAGEMENT, MERCER CAPITAL, INC., AND ROBERT L. FLICKINGER, II

Respondents Mercer Capital Management ("MCM"), Mercer Capital, Inc. ("MCI"), and Robert L. Flickinger, II ("Flickinger") (collectively, "Respondents") hereby submit this response to the allegations of the Complaint issued by the Business Conduct Committee ("BCC") of the National Futures Association ("NFA") in the above-captioned matter. Respondents deny all allegations of the Complaint unless specifically admitted herein. Respondents also request an oral hearing.

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BACKGROUND

From June 7, 2000 through September 4, 2004, MCI was registered with NFA as an Introducing Broker ("IB"). On August 4, 2004, MCM became registered with NFA as an IB. At all times relevant to the Complaint, Flickinger was the president of MCI and MCM. Respondents Benjamin Kerpe ("Kerpe"), Charles M. Montgomery ("Montgomery"), and Arthur Viera ("Viera") were registered as Associated Persons ("APs") of MCI and MCM.

Flickinger became registered as an AP in 1997. Throughout his nine-year tenure as an AP, Flickinger has had only one formal customer complaint filed against him for allegedly failing to execute a trade.[1] Kerpe became registered as an AP in 2003. Upon information and belief, Kerpe has never had a formal customer complaint filed against him. Montgomery became registered as an AP in 2003. Upon information and belief, Montgomery has had only one formal customer complaint filed against him. Viera became registered as an AP in 2004. Upon information and belief, Viera has never had a formal customer complaint filed against him.

As IBs, MCI and MCM provided services to individuals who were interested in purchasing and selling exchange-traded commodity options. MCI and MCM endeavored to conduct their business activities in accordance with industry rules, including the rules promulgated by the NFA. The APs of MCI and MCM solicited individuals who displayed an interest in the commodities markets to inquire whether they were interested in trading commodity options. Only investors who were suitable were eligible to open accounts to trade the commodities markets with MCI and MCM. MCI and MCM undertook measures to ensure that all prospects completely understood the nature of and risks associated with trading

[1] In that case, the arbitrator (who decided the case on a summary proceeding) awarded the claimant $1,000 on an $8,000 claim. The award was to be paid jointly and severally between Flickinger and Montgomery, who was also a respondent in the case.

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commodity options, and that all sales solicitations were in full compliance with NFA's rules. To that end, the APs of MCI and MCM were required to provide all prospects with a detailed explanation of the mechanics of and risks associated with trading commodity options as part of their initial sales presentation. In addition, MCI and MCM provided all prospects with literature that explained the mechanics of and risks associated with trading commodity options. Prior to opening their account with MCI and MCM, customers were required to execute multiple risk disclosure documents, thereby acknowledging that they read and understood those documents. All prospective customers of MCI and MCM were also required to participate in a tape-recorded compliance interview to confirm that they fully understood the investment and its associated risks prior to placing their initial trade.

All customers of MCI and MCM had non-discretionary accounts. This meant that the customers, not the brokers, controlled the trading activity in their accounts. Indeed, customers of MCI and MCM understood that they were free to accept, reject, or modify the trade recommendations provided by their brokers. No trade could be placed in the account of a customer of MCI or MCM until the customer confirmed the trade during a tape-recorded conversation with MCI and MCM personnel. All customers of MCI and MCM received trade confirmations and monthly account statements from the futures commission merchants through which MCI and MCM customers cleared their trades. The trade confirmations summarized the trades, and the monthly account statements set forth the trading activity conducted during the month, the status of the open positions, and the value of the account. Brokers of MCI and MCM also remained in contact with their customers to apprise them of the performance of their accounts. For these reasons, as well as those set forth below, Respondents deny the allegations of the Complaint.

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RESPONSE TO COUNT I

Count I of the Complaint contains allegations by five (5) former customers of MCI and MCM who were contacted by NFA staff as part of NFA's audit of these firms. Like 90% of the people who invest in commodity options, these five former customers of MCI lost money through trading the commodities markets.

NFA alleges that Respondents failed to inform customers that a substantial majority of the customers of MCI and MCM lost money overall trading with these firms. However, Respondents are unaware of any NFA rule that requires such disclosure. For these reasons, and those set forth below, Respondents deny all allegations contained in Count I of the Complaint (unless specifically admitted herein).

I. Robert Humphrey

NFA alleges that Flickinger made misleading and deceptive statements during solicitations on behalf of MCI to customer Robert Humphrey ("Humphrey") in early 2004. Specifically, NFA alleges that Flickinger: (a) assured Humphrey that he could make enough money to buy a boat or whatever he spent extra cash on; (b) told Humphrey that commodities were hot and that bad weather and shortages would drive the price of corn higher; and (c) 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%. These allegations are belied by the facts.

On or about March 25, 2004, Humphrey opened an account with MCI to trade commodity options after discussing the mechanics of and risks associated with trading commodity options with his broker. On his account application, Humphrey disclosed that he was a psychologist whose annual income was between $50,000 to $75,000 and net worth was

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between $100,000 and $500,000. See Humphrey's Account-Opening Documents, attached as Exhibit A hereto, at 2. Humphrey also disclosed that his speculative capital was $20,000. Id. Humphrey further disclosed that he had prior experience investing in securities. Id.

In connection with opening his account with MCI, Humphrey executed documents that explained the mechanics of trading commodity options and the risks associated therewith. Id. at 3 and 8-13. Specifically, the Customer's Agreement contained a risk disclosure which informed Humphrey that trading in commodities is highly speculative and suitable only for persons who can assume the risk of loss of their entire investment. Id. at 3. In addition, the Options Disclosure Statement contained a comprehensive, detailed explanation of trading commodity options and the risks associated therewith. Id. at 8-13. Humphrey executed all account documents, acknowledging that he read them and understood the mechanics of and risks inherent in trading commodity options. Id.

During the time that Humphrey maintained an account with MCI, Flickinger believed that most commodities were in a bullish market. While Flickinger may have expressed this good-faith belief to Humphrey, he never told Humphrey that he could make enough money to buy a boat or that commodities were "hot" and bad weather and shortages would drive the price of corn higher.

In addition, Flickinger never assured Humphrey that he would only lose half of his investment if things went poorly, nor did he tell Humphrey that stops would limit his losses to 50%. Indeed, in connection with opening his account with MCI, Humphrey executed documents which unequivocally stated that his entire investment, not half, would be at risk if the commodity markets did not move in his favor. Specifically, the Options Disclosure Statement stated:

A PERSON SHOULD NOT PURCHASE ANY COMMODITY OPTION UNLESS HE IS ABLE TO SUSTAIN A TOTAL LOSS

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> OF THE PREMIUM AND TRANSACTION COSTS OF PURCHASING THE OPTION . . . THE PURCHASER OF A PUT OR CALL IS SUBJECT TO THE RISK OF LOSING THE ENTIRE PURCHASE PRICE OF THE OPTION – THAT IS T HE PREMIUM PAID FOR THE OPTION PLUS ALL TRANSACTION COSTS.

Id. at 8 (emphasis added). In addition, Humphrey executed a document entitled "Options Only Account," pursuant to which he acknowledged that his risk was limited to the total cost of the option and that he could lose that entire amount. See Exhibit A.

Flickinger further explained to Humphrey that a stop loss order was merely an attempt to limit his losses to a certain amount in the event that the commodity markets moved against him, and that it was still possible for him to lose his entire investment.

II. Dorothy Russell

NFA alleges that Montgomery made misleading and deceptive statements during solicitations on behalf of MCI to customer Dorothy Russell ("Russell") in late 2003 and early 2004. Specifically, NFA alleges that Montgomery: (a) 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 that he knew when to make a move; (b) told Russell that he thought he could double her money in four months; (c) blunted the effectiveness of discussions of risk of loss by telling Russell how a move of a few cents could result in a large profit; (d) 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; and (e) 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. Respondents deny these allegations.

On or about February 3, 2004, Russell opened an account with MCI to trade commodity options after discussing the mechanics of and risks associated with trading commodity options

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with here broker. On her account application, Russell disclosed that she was a retired circuit court judge whose annual income was between $75,000 to $100,000 and net worth was over $1 million. See Russell's Account-Opening Documents, attached as Exhibit B hereto, at 2. Russell also disclosed that her speculative capital was $10,000. Id. Russell further disclosed that she had a law degree and prior investment experience with securities. Id.

In connection with opening her account with MCI, Russell executed documents that explained the mechanics of trading commodity options and the risks associated therewith. Id. at 3 and 8-13. Specifically, the Customer's Agreement contained a risk disclosure which informed Russell that trading in commodities is highly speculative and suitable only for persons who can assume the risk of loss of their entire investment. Id. at 3. In addition, the Options Disclosure Statement contained a comprehensive, detailed explanation of trading commodity options and the risks associated therewith. Id. at 8-13. Russell executed all account documents, acknowledging that she read them and understood the mechanics of and risks inherent in trading commodity options. Id. Thus, even if Montgomery made the statements attributed to him in the Complaint, Russell could not have reasonably relied upon them when deciding whether to trade the commodities markets through MCI.

III. Saurabh Shah

NFA alleges that Kerpe and Flickinger made misleading and deceptive statements during solicitations on behalf of MCI to customer Saurabh Shah ("Shah") in late spring of 2003. Specifically, NFA alleges that: (a) Kerpe told Shah that he had 15 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; (b) 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; (c) Kerpe

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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; (d) 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; (e) Kerpe later encouraged Shah to invest in T-Bond and USD options and told him that he could expect a 500% rate of return; (f) Kerpe also suggested investing in unleaded gas options because, he said, summer was coming and people were traveling more; (g) Flickinger took over Shah's account in November of 2003 after Shah had lost money investing with Kerpe; (h) Flickinger assured Shah that his other customers were making money – some as much as 200%; (i) Flickinger also told Shah that he could rebuild the value of his account in six months and triple it after that; and (j) Flickinger suggested a variety of trades to Shah, including heating oil options – which he said would increase in value due to the upcoming winter. Respondents deny these allegations.

As a preliminary matter, Flickinger never acted as Shah's broker, nor did he provide Shah with any trading advice or recommendations. Rather, at all times, Kerpe was the broker who serviced Shah's account.

On or about October 24, 2003, Shah opened an account with MCI to trade commodity options after discussing the mechanics of and risks associated with trading commodity options with his broker. On his account application, Shah disclosed that he was the owner of a perfumery company whose annual income was between $25,000 and $50,000 and net worth was less than $50,000. See Shah's Account-Opening Documents, attached as Exhibit C hereto, at 2. Shah also disclosed that his speculative capital was $30,000. Id. Shah further disclosed that he had previously traded commodities and securities, and that he had an account with MCI and Ameritrade. Id.

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In connection with opening his account with MCI, Shah executed documents that explained the mechanics of trading commodity options and the risks associated therewith. Id. at 3 and 8-13. Specifically, the Customer's Agreement contained a risk disclosure which informed Shah that trading in commodities is highly speculative and suitable only for persons who can assume the risk of loss of their entire investment. Id. at 3. In addition, the Options Disclosure Statement contained a comprehensive, detailed explanation of trading commodity options and the risks associated therewith. Id. at 8-13. Shah executed all account documents, acknowledging that he read them and understood the mechanics of and risks inherent in trading commodity options. Id. Thus, even if Kerpe made the statements attributed to him in the Complaint (which Respondents vehemently deny), Shah could not have reasonably relied upon them when deciding whether to trade the commodities markets through MCI.

IV. David Trey

NFA alleges that Viera made misleading and deceptive statements during solicitations on behalf of MCI to customer David Trey ("Trey") in 2004. Specifically, NFA alleges that Viera: (a) 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; (b) 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 (c) told Trey that his money would be handled "as if on eggshells."

NFA also alleges that 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." NFA further alleges that Viera called Trey more

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than 15 times over three weeks and complained to Trey that he had "pussy-footed around" with sending money to invest through MCI. These allegations are false.

On or about June 15, 2004, Trey opened an account with MCI to trade commodity options after discussing the mechanics of and risks associated therewith with his broker. On his account application, Trey disclosed that he was a self-employed (retired) cabinet maker whose annual income was between $50,000 to $75,000 and net worth was over $1 million. See Trey's Account-Opening Documents, attached as Exhibit D hereto, at 2. Trey also disclosed that his speculative capital was $25,000. Id. Trey further disclosed that he had previously traded commodities and securities, and that his prior investment experience included 30 years of trading securities with Scottrade and one year of trading commodities with Lynn Waldock. Id.

In connection with opening his account with MCI, Trey executed documents that explained the mechanics of trading commodity options and the risks associated therewith. Id. at 3 and 8-13. Specifically, the Customer's Agreement contained a risk disclosure which informed Trey that trading in commodities is highly speculative and suitable only for persons who can assume the risk of loss of their entire investment. Id. at 3. In addition, the Options Disclosure Statement contained a comprehensive, detailed explanation of trading commodity options and the risks associated therewith. Id. at 8-13. Trey executed all account documents, acknowledging that he read them and understood the mechanics of and risks inherent in trading commodity options. Id. Thus, even if Viera made the statements attributed to him in the Complaint (which Viera vehemently denies in his Answer to the Complaint), Trey could not have reasonably relied upon them when deciding whether to trade the commodities markets through MCI.

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V. John Rice

NFA alleges that Viera made misleading and deceptive statements during solicitations on behalf of MCI to customer John Rice ("Rice") in the spring of 2004. Specifically, NFA alleges that Viera told Rice that: (a) he could make anywhere from $3,000 to $15,000 on certain markets through MCI; (b) he would protect his investment and that he would buy contracts in a way that limited losses; (c) 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 (d) 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.

NFA also alleges that 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. Respondents deny these allegations.

On or about May 21, 2004, Rice opened an account with MCI to trade commodity options after discussing the mechanics of and risks associated therewith with his broker. On his account application, Rice disclosed that he was a locomotive electrician whose annual income was between $50,000 to $75,000 and net worth was between $100,000 to $500,000. See Rice's Account-Opening Documents, attached as Exhibit E hereto, at 2. Rice also represented that his speculative capital was $5,000. Id. Rice further disclosed that his prior investment experience included trading commodities and securities. Id.

In connection with opening his account with MCI, Rice executed documents that explained the mechanics of trading commodity options and the risks associated therewith. Id. at 3 and 8-13. Specifically, the Customer's Agreement contained a risk disclosure which informed

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Rice that trading in commodities is highly speculative and suitable only for persons who can assume the risk of loss of their entire investment. Id. at 3. In addition, the Options Disclosure Statement contained a comprehensive, detailed explanation of trading commodity options and the risks associated therewith. Id. at 8-13. Rice executed all account documents, acknowledging that he read them and understood the mechanics of and risks inherent in trading commodity options. Id. Thus, even if Viera made the statements attributed to him in the Complaint (which Viera vehemently denies in his Answer to the Complaint), Rice could not have reasonably relied upon them when deciding whether to trade the commodities markets through MCI.

RESPONSE TO COUNT II

NFA alleges that MCM failed to prepare its ANC computation for the month ended July 31, 2005 and failed to ensure that current books and records were maintained. Specifically, NFA alleges that 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. NFA also alleges that MCM failed to give timely telegraphic notice to NFA of its failure to maintain current books and records.

MCM retained Portland Bookkeeping, Inc. to prepare its monthly computations. Although MCM did keep all required books and records, MCM's books and records were not readily available at the time of NFA's audit of the firm. However, MCM subsequently provided NFA with its books and records shortly after NFA had requested them. Thus, the deficiencies alleged by NFA in the Complaint no longer exist.

RESPONSE TO COUNT III

NFA alleges that MCM failed to develop and implement an effective anti-money laundering ("AML") program because: (a) its AML program was not approved in writing by

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senior management; (b) 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; (c) 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; (d) 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; (e) 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 (f) its AML program did not designate the specific supervisory personnel who were responsible for reporting suspicious activity. NFA also alleges that 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 did not have procedures to monitor activity in high risk accounts.

At the time of NFA's audit, MCM was utilizing an initial AML program created by Flickinger. When it became apparent that MCM's AML program was deficient, MCM adopted the AML program of the futures commission merchant through which MCM customers' trades were cleared. Thereafter, MCM completed a comprehensive review of its AML program and corrected all deficiencies alleged by NFA in the Complaint.

RESPONSE TO COUNT IV

NFA alleges that 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 the Complaint. NFA also alleges that MCM and Flickinger failed to initiate and execute

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appropriate procedures to maintain current books and records and make appropriate notice of a failure to maintain records. Respondents deny these allegations.

MCI and Flickinger had adequate supervisory procedures in place to detect and/or prevent misleading sales solicitations. Among those procedures, supervisory personnel of MCI monitored the sales presentations of MCI's brokers on a random basis to ensure that those solicitations were in compliance with NFA's rules. In addition, MCI retained an independent compliance consultant to assist MCI with training its APs on conducting proper sales presentations when speaking with customers and prospects of the firm.

Moreover, MCI undertook measures to ensure that its prospects completely understood the nature of and risks associated with trading commodity options. To that end, MCI provided its prospects with literature explaining the mechanics of and risks associated with trading commodity options. MCI also required its prospects to participate in a tape-recorded compliance interview with a representative of MCI to confirm that they fully understood the risks associated with investing in commodity options prior to placing their initial trade. Tellingly, of the hundreds of customer accounts serviced by MCI during the four-and-a-half years that it was an IB, only two complaints filed against MCI (both of which were settled).

Lastly, MCM and Flickinger had appropriate procedures in place to maintain current books and records for the firm. As stated above, Portland Bookkeeping, Inc. prepared the monthly computations of MCM. MCM kept all required books and records, but those materials were not readily available at the time of NFA's audit of the firm. MCM, however, subsequently produced its books and records to NFA shortly after NFA had requested them. Thus, any deficiencies alleged by NFA in the Complaint have been addressed and cured.

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Respectfully submitted:

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By: _____ (for)
Francisco O. Sanchez

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused to be served via overnight mail the original and five (5) copies of the foregoing document upon the Legal Docketing Department of National Futures Association, 200 W. Madison Street, Suite 1600, Chicago, IL 60606 and a true and correct copy of the foregoing document upon Philip M. Raleigh, Esq., National Futures Association, 200 W. Madison Street, Suite 1600, Chicago, IL 60606; Benjamin Kerpe, 5021 Evergreen Drive, Sheboygan, WI 53081; Charles M. Montgomery, 1963 SW Camelot Ct., Portland, OR 97225; and Arthur Viera, 9514 SW Commons Ct., Beaverton, OR 97005 on this 30th day of October, 2006.

_____ (for)
Francisco O. Sanchez

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