

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 04-22549-CIV-SEITZ/MCALILEY**

**COMMODITY FUTURES TRADING
COMMISSION,**

Plaintiff,

v.

**BRICKELL KEY FINANCIAL, LLC,
EDUARDO BARALE,
MICHAEL MESA, and
MALINI NERSIAN,**

Defendants.

**CONSENT ORDER OF PERMANENT INJUNCTION AND
OTHER EQUITABLE RELIEF AGAINST DEFENDANT MICHAEL MESA**

I. BACKGROUND

Plaintiff Commodity Futures Trading Commission ("Commission" or "CFTC") filed its Complaint against Brickell Key Financial, LLC ("BKF"), Eduardo Barale, Michael Mesa ("Mesa") and Malini Nersian (collectively "Defendants"), in the above-captioned action on October 8, 2004, seeking injunctive and other equitable relief for violations of Sections 4b(a)(2)(i) and (iii) and 4c(b) of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. §§ 6b(a)(2)(i) and (iii) (2002), and Commission Regulation 33.10 promulgated thereunder, 17 C.F.R. §§ 33.10 (2006).

II. CONSENT AND AGREEMENT

To effect settlement of the matters alleged in the Complaint as to Defendant Mesa without a trial on the merits or any further judicial proceedings, Defendant Mesa:

1. Consents to the entry of this Consent Order of Permanent Injunction and Other Equitable Relief ("Consent Order");

2. Affirms that he has read and agreed to this Consent Order voluntarily, and that no threat or promise has been made by the Commission or any member, officer, agent or representative thereof, or by any other person, to induce consent to this Consent Order, other than as set forth specifically herein;

3. Acknowledges service of the Summons and Complaint;

4. Admits that this Court has jurisdiction over him and the subject matter of this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002);

5. Admits that venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002);

6. Waives:

a. All claims which may be available under the Equal Access to Justice Act, 5 U.S.C. § 504 (2002) and 28 U.S.C. § 2412 (2002) to seek costs, fees, and other expenses relating to, or arising from, this action;

b. Any claim of double jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any relief; and

c. All rights of appeal from this Consent Order;

7. Consents to the continued jurisdiction of this Court in order to implement and carry out the terms of all orders and decrees that may be entered herein, to assure compliance with the Consent Order and for all other purposes related to this action;

8. Agrees that neither he nor any of his agents, servants, employees, contractors or attorneys shall take any action or make any public statement denying, directly or indirectly, any allegation in the Complaint or contained in this Consent Order or creating, or tending to create, the impression that the Complaint or this Consent Order is without a factual basis; provided, however, that nothing in this provision shall affect Mesa's (a) testimonial obligations; or (b) right to take legal positions in other proceedings to which the Commission is not a party. Mesa shall take all necessary steps to ensure that all of his agents, servants, employees, contractors and attorneys understand and comply with this agreement;

9. By consenting to the entry of this Consent Order, Mesa neither admits nor denies the allegations of the Complaint or the Findings of Fact and Conclusions of Law contained in this Consent Order, except as to jurisdiction and venue, which he admits. Mesa consents to the entry of this Consent Order solely for the purpose of settling this case;

10. Solely with respect to any bankruptcy proceeding relating to Mesa or any proceeding to enforce this Consent Order, Mesa agrees that the allegations of the Complaint and the findings in this Consent Order shall be taken as true and correct and be given preclusive effect, without further proof. Furthermore, Mesa agrees to provide immediate notice to this Court and the Commission by certified mail of any bankruptcy proceeding filed by, on behalf of, or against him, individually or collectively; and

11. Mesa voluntarily undertakes never to apply for registration or to claim exemption from registration with the Commission in any capacity, and not to engage in any capacity requiring such registration or exemption from registration, except as provide for in Commission Regulation §4.14(a)(9), 17 C.F.R. §4.14(a)(9), and not to act as a principal, agent, officer or employee of any person registered, exempted from registration or required to be registered with

the Commission, unless such exemption is pursuant to Commission Regulation §4.14(a)(9), 17 C.F.R. § 4.14(a)(9)(2006).

III. FINDINGS AND CONCLUSIONS

The Court, being fully advised in the premises, finds that there is good cause for the entry of this Consent Order and that there is no just reason for delay. The Court therefore directs, without a trial on the merits or any further judicial proceedings or presentation of evidence, the entry of findings of fact, conclusions of law, and a permanent injunction and ancillary equitable relief pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002), as set forth herein.

A. Findings of Fact

1. From at least November 2002 through at least May 2003, Mesa was registered with the Commission as an associated person of and worked at BKF, a registered introducing broker, in Miami, Florida, soliciting members of the general public to open accounts to trade futures contracts and options on futures contracts through BKF.
2. Mesa misrepresented the risks and rewards of trading futures and options through BKF. In telephone calls, Mesa engaged in fraudulent sales solicitations by misrepresenting and/or failing to disclose material facts concerning, among other things: (i) the profit potential of futures and options; (ii) the risk involved in trading futures and options; and (iii) the poor performance record of BKF customers trading futures and options.
3. Mesa represented that BKF customers could reap substantial profits in the commodity futures markets by trading upon publicly known information about certain world events that purportedly would influence the price of futures contracts. For example, Mesa told customers events such as the crisis in the Middle East would cause an increase in the price of oil and virtually guaranteed them a profit. In fact, because efficient markets quickly factor publicly

known information into the price of contracts, one can not normally earn substantial profits based upon such publicly known information. Therefore, Mesa's statements were false or misleading.

4. Mesa also told customers that they could expect to make large returns on their investments quickly. These statements were false because the vast majority of BKF customers lost money trading through BKF and, overall, BKF customers lost over \$1.5 million. Further, Mesa failed to disclose the fact that an overwhelming majority of BKF customers sustained losses trading through BKF.

5. Mesa knew or recklessly disregarded the fact that the vast majority of BKF customers sustained losses trading through the firm. Given the firm's losing trading record, Mesa knew or recklessly disregarded the fact that customers' earning enormous profits on futures and options was highly unlikely. He also knew or recklessly disregarded the fact that publicly known information would not lead to substantial profits as few, if any, of his customers had profited from this type of well-known information.

6. Mesa's statements described in paragraphs 3 and 4 were material, and Mesa's customers relied upon the misrepresentations and omissions made by him in making a decision to trade futures and options through BKF. Mesa knew that such statements were false or misleading or made them in reckless disregard for the truth.

7. Mesa routinely failed to disclose adequately the risk of loss inherent in trading futures and options in his customer solicitations. Among other things, Mesa fraudulently led customers and potential customers to believe that risk of loss was, or could be limited, and his disclosures of risk, to the extent made, were vitiated by the unbalanced sales presentations described in paragraphs 3 and 4, which falsely conveyed that trading futures and options with

BKF was highly profitable and virtually risk free. Mesa's failure to adequately disclose the risk of loss was either intentional or reckless.

B. Conclusions of Law

1. This Court has jurisdiction over the subject matter of this action and all parties hereto pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, which authorizes the Commission to seek injunctive relief against any person whenever it shall appear that such person has engaged, is engaging or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation or order thereunder.

2. Venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, in that Mesa is found in, inhabit, or transact business in this district, and the acts and practices in violation of the Act have occurred, are occurring, or are about to occur within this district, among other places.

3. This Court has personal jurisdiction over Mesa, who acknowledges service of the Complaint and Summons and consents to the Court's jurisdiction over him.

4. By the conduct described in Section III.A above, Mesa cheated and defrauded or attempted to cheat or defraud other persons, and willfully deceived or attempted to deceive other persons, in violation of Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii), by intentionally or recklessly making material misrepresentations or misleading statements to his customers in or in connection with commodity futures transactions and by intentionally or recklessly omitting material information that a reasonable person would consider important in making the decision to invest with BKF.

5. By the conduct described in Section III.A above, Mesa cheated or defrauded, or attempted to cheat or defraud other persons, and willfully deceived or attempted to deceive

other persons, in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and Regulation 33.10(a) and (c), 17 C.F.R. § 33.10(a) and (c), by intentionally or recklessly making material misrepresentations or misleading statements to his customers in or in connection with commodity option transactions and by intentionally or recklessly omitting material information that a reasonable person would consider important in making the decision to invest with BKF.

IV. ORDER OF PERMANENT INJUNCTION

NOW THEREFORE, IT IS ORDERED THAT:

1. Mesa is permanently restrained, enjoined and prohibited from directly or indirectly:
 - a. Cheating or defrauding, or attempting to cheat or defraud, other persons or willfully deceiving or attempting to deceive by any means whatsoever other persons in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity futures transaction or in regard to any act of agency performed with respect to any order or contract, in violation of Sections 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i) and (iii);
 - b. Confirming the execution of any transaction involving any option or cheating or defrauding, or attempting to cheat or defraud, other persons or willfully deceiving or attempting to deceive by any means whatsoever other persons in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any options transaction or in regard to any act of agency performed with respect to any order or contract, in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b), and Regulation 33.10 (a) and (c), 17 C.F.R. § 33.10(a) and (c).

2. Mesa is permanently restrained, enjoined and prohibited from engaging, directly or indirectly, in any activity related to trading in any commodity, as that term is defined in Section 1a(4) of the Act, 7 U.S.C. § 1a(4) ("commodity interest"), including, but not limited to, the following:

- a. Soliciting, receiving, or accepting any funds from any person in connection with the purchase or sale of any commodity interest;
- b. Controlling or directing the trading of any commodity interest account for or on behalf of any person or entity, directly or indirectly, whether by power of attorney or otherwise;
- c. Trading on or subject to the rules of any registered entity, as that term is defined in § 1a(29) of the Act, 7 U.S.C. § 1a(29)(2002); and
- d. Engaging in any business activities related to commodity interest trading.

3. Mesa is ordered to comply with the terms of his voluntary undertaking not to apply for registration or to claim exemption from registration with the Commission in any capacity, and not to engage in any capacity requiring such registration or exemption from registration, except as provided for in Commission Regulation §4.14(a)(9), 17 C.F.R. §4.14(a)(9), and not to act as a principal, agent, officer or employee of any person registered, exempted from registration or required to be registered with the Commission, unless such exemption is pursuant to Commission Regulation §4.14(a)(9), 17 C.F.R. § 4.14(a)(9)(2006), as set forth in Section II.5 above.

4. The injunctive and other provisions of this Consent Order shall be binding on Mesa, upon any person insofar as he or she is acting in the capacity of officer, agent, servant, employee or attorney of Mesa, and upon any person who receives actual notice of this Consent Order by personal service or otherwise insofar as he or she is acting in active concert or participation with Mesa.

V. RESTITUTION, CIVIL MONETARY PENALTY, AND ANCILLARY RELIEF

NOW THEREFORE, IT IS FURTHER ORDERED THAT:

Mesa shall comply fully with the following terms, conditions and obligations relating to the payment of restitution and the payment of a civil monetary penalty.

A. RESTITUTION

1. **IT IS HEREBY ORDERED THAT** Mesa shall make restitution in the amount of \$25,000, plus post-judgment interest. Restitution shall be paid within ten days of entry of this Consent Order. Post-judgment interest shall accrue beginning on the date of entry of this Consent Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Consent Order pursuant to 28 U.S.C. § 1961.

2. Further, the amount payable for restitution set forth above shall not limit the ability of any BKF customer from proving that a greater amount is owed from Mesa or any other person or entity, and nothing herein shall be construed in any way to limit or abridge the rights of any investor that exist under state or common law.

3. To effect payment by Mesa and distribution of restitution, the Court appoints Daniel Driscoll, Executive Vice-President of the National Futures Association ("NFA") or his successor, as Monitor ("Monitor"). The Monitor shall collect restitution payments from Mesa, and make distributions as set forth below. Because the Monitor is not being specially compensated for these services, and these services are outside the normal duties of the Monitor, he shall not be liable for any action or inaction arising from his appointment as Monitor, other than actions involving fraud.

4. Mesa shall make restitution payments under this Consent Order in the name "Michael Mesa – BKF Restitution Fund" and shall send such restitution payments by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier check, or bank

money order, to Daniel Driscoll, Monitor, National Futures Association, 200 W. Madison Street #1600, Chicago, Illinois 60606-3447 under cover letter that identifies himself and the name and docket number of the proceeding. Mesa shall simultaneously transmit copies of the cover letter and the form of payment to (a) the Director, Division of Enforcement, U.S. Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581, and (b) the Chief, Office of Cooperative Enforcement, at the same address.

5. The Monitor shall oversee Mesa's restitution obligation, and shall have discretion to determine the manner for distribution of funds in an equitable fashion to BKF customers, as appropriate, or may defer distribution until such time as it deems appropriate. The Commission shall cooperate with the Monitor as appropriate to provide such information as the NFA deems necessary and appropriate to identify BKF/Mesa customers to whom the Monitor, in his sole discretion, may determine to include in any plan for distribution of any Restitution payments.

6. All payments by Mesa pursuant to this Consent Order shall first be applied to satisfaction of his restitution obligation. After satisfaction of his restitution obligation, payments by Mesa pursuant to this Consent Order shall be applied to satisfy the civil monetary penalty described below.

B. CIVIL MONETARY PENALTY

1. Mesa is liable for and shall pay to the Commission a civil monetary penalty in the amount of \$120,000.00, plus post-judgment interest, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1. The civil monetary penalty shall be paid within ten days of entry of this Consent Order. Post-judgment interest shall accrue beginning on the date of entry of this Consent Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Consent Order pursuant to 28 U.S.C. § 1961.

2. All payments by Mesa shall first be applied to his restitution obligation under this Consent Order until the restitution obligation has been paid in full. Upon full payment of his restitution obligation, all payments by Mesa will be applied to his civil monetary penalty obligation under this Consent Order.

3. Mesa shall pay such civil monetary penalty by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order made payable to the Commission and sent to the address below:

Commodity Futures Trading Commission
Division of Enforcement
Attn: Marie Bateman-AMZ-300,
DOT/FZZ/MMAC
6500 S. Macarthur Blvd.
Oklahoma City, OK 73169
Telephone: (405) 954-6569

If the payment is to be made by electronic funds transfer, Mesa shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Mesa shall accompany the payment of his penalty with a cover letter that identifies the paying defendant and the name and docket number of this proceeding. Mesa shall simultaneously transmit copies of the cover letter and the form of payment to (a) the Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21st Street, NW, Washington, D.C. 20581, and (b) to the Chief, Office of Cooperative Enforcement, at the same address.

C. PARTIAL PAYMENTS

Any acceptance by the Commission and/or Monitor of partial payment of Mesa's restitution obligation and/or civil monetary penalty shall not be deemed a waiver of the

respective requirement to make further payments pursuant to this Consent Order, or a waiver of the Commission's and/or Monitor's right to seek to compel payment of any remaining balance.

D. EQUITABLE RELIEF PROVISIONS

The equitable relief provisions of this Consent Order shall be binding upon Mesa and any person who is acting in the capacity of officer, agent, employee, servant or attorney of Mesa, and any person acting in active concert or participation with Mesa who receives actual notice of this Consent Order by personal service or otherwise.

VI. MISCELLANEOUS PROVISIONS

1. **ENTIRE AGREEMENT, AMENDMENTS AND SEVERABILITY.** This Consent Order incorporates all of the terms and conditions of the settlement among the parties. Nothing shall serve to amend or modify this Consent Order in any respect whatsoever, unless: (1) reduced to writing, (2) signed by all parties, and (3) approved by order of the Court. If any provision of this Order or the application of any provision or circumstance is held invalid, the remainder of this Order shall not be affected by the holding.

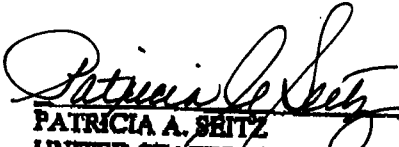
2. **COUNTERPARTS.** This Consent Order may be executed by the parties in counterparts and by facsimile.

3. **WAIVER.** The failure of any party hereto to require performance of any provision hereof shall in no manner affect the right of such party at a later time to enforce the same or any other provision of this Consent Order. No waiver in one or more instances of the breach of any provision contained in this Consent Order shall be deemed to be or construed as a further or continuing waiver of such breach or waiver of the breach of any other provision of this Consent Order.

4. **JURISDICTION.** This Court shall retain jurisdiction of this cause in order to implement and carry out the terms of all orders and decrees that may be entered herein, to assure compliance with this Order and for all other purposes related to this action.


There being no just reason for delay, the Clerk of the Court is hereby directed to enter this Consent Order of Permanent Injunction and Other Equitable Relief.

DONE and ORDERED in chambers in Miami, Florida this 17th day of September, 2007.


PATRICIA A. SELTZ
UNITED STATES DISTRICT JUDGE

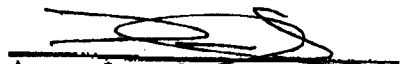
Consented to and approved for entry by:

DEFENDANT


Michael Mesa

Date: 7/27/07

and


Approved as to form
Francisco O. Sanchez, Esq. on behalf of
Defendant Michael Mesa
Homer & Bonner, P.A.
The Four Seasons Tower
1441 Brickell Avenue Suite 1200
Miami, Florida 33131

Date: 8/20/07

PLAINTIFF

Mark Bretscher

Date: 9/12/07

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