

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

MICHAEL H. VARNER,

CFTC Docket No. SD 02-02

Respondent.

Appearances:

On behalf of Michael H. Varner:

Douglas E. Arend, Esq.
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Chicago, Illinois

On behalf of the Division of Enforcement:

Charles J. Sgro, Esq.
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Division of Enforcement
Commodity Futures Trading Commission
525 Washington Blvd.
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Before: George H. Painter, Administrative Law Judge

SUMMARY DISPOSITION

I. Procedural History

On or about November 19, 2001, the Commodity Futures Trading Commission ("Commission") brought a statutory disqualification ("SD") action against Michael H. Varner ("Varner") for violation of the Commission's June 4, 1999 Order ("June 1999

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Order”), *In re Michael Varner*, Comm. Fut. L. Rep. (CCH) par 27, 543 (CFTC Jan. 27, 1999). In the June 1999 Order, the Commission issued a Settlement Order accepting Varner’s Offer of Settlement of the 1999 SD action, *In re Varner*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,673 (CFTC June 4, 1999).

The June 1999 Order placed certain restrictions on Varner’s registration and trading activities for two years beginning on June 4, 1999. On May 31, 2001 the Commission filed an administrative complaint, Docket No. 01-08, which it amended on June 1, 2001, charging Varner with violation of the Commission’s June 1999 Order. Respondent Varner’s FB registration was suspended for six months commencing on May 31, 2001, on the grounds that he violated the June 1999 Settlement Order. The administrative complaint was assigned to the docket of the Honorable Bruce C. Levine. Thereafter, Varner filed a petition with the Commission to dismiss Docket No. 01-08. On or about June 15, 2001 Judge Levine stayed the case pending resolution of Respondent Varner’s interlocutory appeal. For purposes of this proceeding it is deemed that Varner’s interlocutory appeal has been denied *sub silentio*.

In the instant proceeding, on December 31, 2001, Varner filed a *Motion to Consolidate, Vacate Suspension and Stay Proceedings Pending Appeal*. On January 3, 2002, this court denied the motion. Since Varner had not filed an Answer, the Division of Enforcement (“DOE”), on or about January 10, 2001, filed a *Motion to Enter Findings and Conclusions and for a Default Order*. On or about January 22, 2002, Varner filed a *Response in Opposition to the Division’s Motion for Default and Varner’s Motion for Leave to File His Answer Instanter*. On or about January 23, 2002, the request for an entry of judgment in default was denied. On January 24, 2002, the court accepted the late

Answer. On February 26, 2001, the DOE filed a *Motion for Summary Disposition*. On March 15, 2002, Varner filed a *Motion for Entry of an Order Striking Division of Enforcement's Motion for Summary Disposition* ("Motion to Strike"). On March 18, 2002, this Motion to Strike was denied.

II. Findings of Fact

The Findings of Fact set out below incorporate in large measure the facts set forth in the Division's Statement of Material Facts and they are fully supported by the evidentiary record.

1. Varner resides at 355 Goodwyn Street, Memphis, TN 38111. (Admission in Varner's Answer at 1.)
2. Varner has been a registered FB on the New York Cotton Exchange ("NYCE") since July 8, 1987. Varner's FB Registration has been suspended since May 31, 2001. (Commission records; Admission in Varner's Answer at 1.)
3. The Commission's June 1999 Order placed restrictions on Varner's registration for two years beginning on June 4, 1999. The June 1999 Order prohibited Varner from: (1) directly or indirectly trading on behalf of customers; (2) clearing his trades through a futures commission merchant ("FCM") other than the FCM specified in the Commission's June 1999 Order; and (3) acting as a principal, partner, officer, or branch office manager of an entity registered or required to be registered with the Commission. *In re Varner*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,673 (CFTC June 4, 1999). Peng Dec. ¶3, Exhibit A), (Admission in Varner's Answer at 2.)

4. Varner violated the June 1999 Order by trading directly or indirectly on behalf of customers. During the period of his restricted registration, Varner made trading decisions and placed orders on behalf of Delta Capital Fund (“Delta Capital”), a commodity trading company. Delta Capital is a limited partnership in which Lester Smith, a customer of Varner Brokerage, owns a 50% interest, Varner owns a 25% interest and Varner’s family members, Bryan Varner, H. Rogers Varner and Mary Helen Varner, together own the remaining 25% interest. (Admission in Varner’s Answer at 2-3.)
5. In the June 1999 Order, Varner agreed to clear all his customer trades through MGF Clearing Corp., an FCM. “MGF” Clearing Corp.” is a misprint and should read “MBF” Clearing Corp. *In re Varner*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,673 (CFTC June 4, 1999). (Peng Dec. ¶3, Exhibit A), (Admission in Varner’s Answer at 3.) Varner cleared his trades for Delta Capital through Refco, Inc. and not through MBF as required by the Commission’s June Order. (Admission in Varner’s Answer at 3.)
6. The June 1999 Order states that “Varner shall not directly or indirectly act as principal, partner, officer, or branch office manager of any entity registered or required to be registered with the Commission.” *In re Varner*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,673 (CFTC June 4, 1999). (Peng Dec. ¶3, Exhibit A.) In violation of the June 1999 Order, Varner was the sole proprietor and acted as President of Hunter Trading, a registered commodity trading advisor (“CTA”), from May 7, 1992 until October 2000. (Admission in Varner’s Answer at 4.) Hunter Trading had been registered as a CTA from May

1997 to October 18, 2000 and had trading authority over Delta Capital from 1997 to at least August 2000. (Peng Dec. ¶8, Exhibit F, Peng. Dec. ¶9, Exhibit G.)

7. On or about September 19, 2000, Varner completed and filed a CFTC Form 40 *Statement of Reporting Trader* in which he named Hunter Trading as the “reporting trader” and referred to himself as its “President.” (Peng. Dec. ¶¶10-11, Exhibits H and I.)

III. Discussion

Rule 10.91(e) of the Regulations provides as follows:

If the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, depositions, and matters of official notice show that (1) there is no genuine issue as to any material fact, (2) there is no necessity that further facts be developed in the record, and (3) [the moving] party is entitled to a decision as a matter of law.

There is no genuine issue as to any material fact and no necessity that further facts be developed. First, the Commission’s June 1999 Order required that Varner not trade “directly or indirectly on behalf of customers.” Section 1.3(y) of the Regulations provides that “an owner or holder of such proprietary account shall otherwise be deemed to be a customer.” Even if Delta Capital’s account can be characterized as proprietary, it is deemed to be a customer account since each owner or holder is a customer under Section 1.3(k) of the Regulations. Varner violated the Commission’s June 1999 Order by trading for customers through Delta Capital’s account.

Second, the Commission's June 1999 Order placed a restriction requiring Varner's trades to be cleared through MBF. Since he owned a percentage of Delta Capital, all of his trades, by plain meaning alone, include trades for Delta Capital. Irrespective of the role of the other partners in the trading activity of Delta Capital, any trade in which Varner had an interest should have been cleared through MBF. Varner did not clear the trades he made for Delta Capital through MBF, but through Refco, Inc., in contravention of the Commission's June 1999 Order.

Third, Varner acted as a principal and an officer of a registered entity in violation of the Commission's June 1999 Order. Varner admitted that he was the sole proprietor and President of Hunter Trading, but he asserts that he did not act as a principal or officer because Hunter trading was not operational in any manner during the time period of Varner's suspension. NFA records show that Hunter Trading was registered as a CTA from May 7, 1992 to October 18, 2002. This court agrees with the Division's assertion that Hunter Trading was in fact operational at the relevant times. On or about September 19, 2000, Varner completed and filed with the Commission a CFTC Form *40 Statement of Reporting Trader* in which Varner identified Hunter Trading as the "reporting trader" and identified himself as the "President." (Peng Dec. ¶¶10-11, Exhibit H and I.) Also, on or about June 2, 1999 Varner's brother sent a fax to the National Futures Association stating that Varner's title had "changed from President to principal of Hunter Trading." (Peng Dec. ¶12, Exhibit J.) These documents clearly demonstrate that from about June 1999 to October 2000, Varner acted as a principal and an officer of Hunter Trading in violation of the Commission's June 1999 Order.

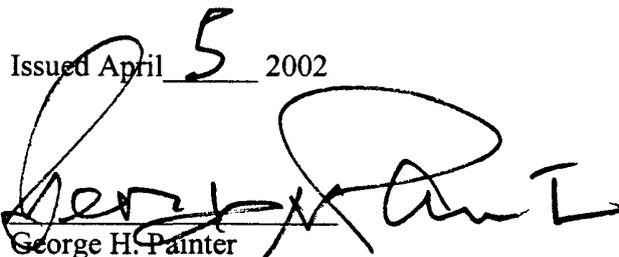
The undisputed facts of record establish conclusively that Respondent Varner has repeatedly violated the terms of the Commission's June 1999 Order, and there is no evidence of mitigation or rehabilitation. This court agrees with the Division's assertion on page 10 of its March 28, 2002 Reply Brief that "...the Commission afforded Varner a chance to regain his full registration if he complied with the terms of the Commission's June 4, 1999 Order. Varner has squandered the opportunity accorded him by the Commission." The facts set forth above constitute other good cause to revoke Respondent Varner's floor broker registration. The Division of Enforcement is entitled to a decision as a matter of law.

ORDER

The Division of Enforcement's Motion for Summary Disposition is GRANTED. Pursuant to Sections 8a(3)(M) and 8a(4) of the Commodity Exchange Act, Respondent Varner's floor broker registration shall be revoked the date this order becomes final.

So ordered.

Issued April 5 2002


George H. Painter
Administrative Law Judge

Dhaval Patel
Law Student Extern