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Shonda Warner,

Complainant,

v.

ADM Investor Services, Inc.,
Varner Brokerage, Inc., and Henry
Rogers Varner, Jr.,

Respondents.

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CFTC Docket No. 20-R020
Served electronically

**INITIAL DECISION & ORDER
GRANTING RESPONDENTS'
MOTION FOR SUMMARY DISPOSITION**

Before: Kavita Kumar Puri, Administrative Judge
Commodity Futures Trading Commission
Washington, D.C.

Appearances: Kate O'Hara Gasper, Esq.,
Michael J. Abrams, Esq.
Lathrop GPM LLP
Kansas City, MO
For Complainant

Martin Doyle, Esq.
Daryl M. Schumacher, Esq.
Kopecky Schumacher Rosenburg, LLC
Chicago, IL
For Respondent

Complainant, Shonda Warner, filed her Complaint on May 11, 2020, electing a formal proceeding and claiming \$159,950 plus interest in damages. She alleges Respondents, ADM Investor Services, Inc. (ADMIS), Varner Brokerage, Inc. (Varner Brokerage), and Henry Rogers Varner, Jr. (Varner, Jr.), breached their fiduciary

duty and violated Illinois law by purportedly failing to roll over certain futures contracts after she instructed them to do so.

On July 22, 2020, Respondents filed their Answer and Affirmative Defenses. This case was forwarded to my docket on September 10, 2020 and discovery commenced shortly thereafter. The parties filed numerous documents throughout the proceedings, including but not limited to: (1) a spreadsheet of relevant text messages between Warner and Respondent Varner, Jr.; (2) biographical information regarding Warner; (3) a complete set of Warner's ADMIS monthly account statements from December 2019 through March 2020; (4) a selection of Warner's ADMIS monthly account statements for July 2016 through December 2019; (5) account opening documents (including risk disclosures, and wire transfer instructions); and (6) emails between Warner and the Varner Respondents, some of which included Warner's counsel.

On June 18, 2021, Respondents filed a Motion for Summary Disposition arguing that Warner cannot hold ADMIS, a futures commission merchant (FCM), vicariously liable for the acts of Varner Brokerage, which served as an independent introducing broker (IB). They further argued that Warner failed to establish any violation of the Commodity Exchange Act (CEA) or its regulations. Warner filed her Opposition on July 12, 2021, stating that Respondents breached their fiduciary duty and violated CFTC regulation 17 C.F.R. § 33.9(c), but conceded that ADMIS could not be held liable for the Varner Respondents' actions. Respondents filed a Reply on

August 2, 2021. The Motion has been fully briefed and this case is now ready for disposition.

After reviewing the parties' evidence and carefully considering the record, I am granting Respondents' Motion for Summary Disposition, and dismissing the Complaint.

I. Summary of Parties and Relevant Procedural History

A. The Parties

Complainant Shonda Warner (Warner) is a resident of Kansas City, Missouri, and has 25 to 30 years of futures trading experience. Ans. & Aff. Def. at 2 (July 22, 2020). Warner has held senior roles at financial institutions in derivatives trading. For example, she served as an Executive Director at Goldman Sachs for its equity derivatives and proprietary trading desks in London. *Id.*; *see also* Ans. Ex. 1 (“Chess AG Full Harvest Partners Company Bio on Shonda Warner—founder of the company”) (Warner Bio). Warner had been registered with the NFA as an Associated Person (AP) and Principal for various firms for 11 years. *See* NFA Basic Research at www.nfa.futures.org/BasicNet/basicprofile.aspx?nfaid=aiF1v1J1hQc%3D.

She opened a self-directed trading account with Respondent Varner Brokerage, Inc., in September 2015. *Id.*; Complaint at 1 (May 11, 2020). She closed her account on or about March 10, 2020, with a closing balance of \$521,515.93. WARNER0056-58.

Respondent ADMIS is an FCM registered with the NFA. *See* NFA Basic Research at www.nfa.futures.org/BasicNet/basic-profile.aspx?nfaid=uc3xQkxe240%3D. ADMIS held Warner's trading account during the relevant time. Ans. & Aff. Def. at 2 (Jul. 22, 2020).

Respondent Varner Brokerage is an IB registered with the NFA. *See* NFA Basic Research at www.nfa.futures.org/BasicMet/basic-profile.aspx?nfaid=mPYUjSbpprQ%3D. Warner opened her self-directed trading account with Varner Brokerage in September 2015. Ans. & Aff. Def. at 2 (Jul. 22, 2020).

Respondent Varner, Jr. is an Associated Person (AP) and Principal of Varner Brokerage, Inc, as well as its President. *See* NFA Basic at www.nfa.futures.org/BasicMet/basic-profile.aspx?nfaid=kY4rCF3SrRQ%3D.

B. Relevant Procedural History

On August 12, 2020, Warner filed her reparations Complaint requesting a Formal Proceeding against Respondents. Respondents filed their Answer and Affirmative Defenses on July 22, 2020, and this case was forwarded to my docket on September 10, 2020.

The parties participated in the discovery process and submitted numerous documents. *See supra* at 2. A discovery conference was held on January 7, 2021 to resolve the parties' outstanding issues, and discovery closed on January 19, 2021.

On June 18, 2021, Respondents filed a Motion for Summary Disposition (the Motion) requesting that this case be dismissed for Warner's failure to establish any violations of the CEA. Additionally, Respondents argued that an FCM cannot be

held vicariously liable for the actions of an IB. Warner filed her Opposition to the Motion on July 12, 2021, stating that Respondents breached their fiduciary duty and violated CFTC regulation 17 C.F.R. § 33.9(c) when they failed to roll over Warner's 20 S&P 500 E-mini contracts after she instructed them to do so. To be clear, Warner has never during the course of this proceeding pled fraud or any violation of either the CEA or its regulations other than Regulation 33.9(c). Respondents filed a Reply on August 2, 2021.

On June 23, 2021, I issued an Order staying all deadlines in this case but for those pertaining to Respondents' Motion.

II. Factual Findings

Warner is an experienced trader with 25 to 30 years of prior futures trading experience and has held senior roles with well-established FCMs like Cargill—where she began her trading career trading grains and engaging in financial instrument arbitrage; and Goldman Sachs—where she was an executive director of its London equity derivatives and proprietary trading desk. Ans. & Aff. Def. at 2; Warner Bio. Warner had been registered with the NFA as an AP and Principal for various firms for a period of time totaling 11 years. *See supra* at 3.

On or about September 2015, Warner opened a self-directed trading account with Varner Brokerage, and completed and signed the ADMIS Customer Account Application and Customer Agreement. Ans. & Aff. Def. at 2 (Jul. 22, 2020); Greg A. Hostetler Verified Statement ¶ 3 & Exs. 1 & 2 (Jun. 18, 2021) (Hostetler Verified Statement). The Varner Respondents did not have discretion to trade her account.

Ans. & Aff. Def. at 2 (Jul. 22, 2020); Hostetler Verified Statement ¶ 5; Henry Rogers Varner, Jr. Verified Statement ¶ 5 (Jun. 18, 2021).

Warner chose to receive and did receive, her daily and monthly statements for the account via email. Compl. at 1; Ans. & Aff. Def. at 3. ADMIS emailed Warner account statements regularly, including each business day during the relevant time, from December 23, 2019 through February 26, 2020. ADMIS emailed these statements regardless of whether there was any activity in the account. Ans. & Aff. Def. at 3. During the relevant time, Warner received fifty (50) daily confirmation statements and two monthly statements. *Id.* Warner admits she did not review her account statements regularly because she “[was] a busy individual” who “did not routinely log-in to her account to confirm that [Varner, Jr.] had done his job.” Compl. at 1.

Warner has not raised any issues with how her account was traded until November 2019. On November 25, 2019, Warner bought 20 short E-mini S&P 500 contracts (E-mini contracts) at \$3127.75. Compl. at 1; WARNER0052-53. These contracts would expire by 8:30 am CST on December 23, 2019 if the positions were not rolled. Compl. at 1. The positions were not rolled and the 20 E-mini contracts expired. Compl. at 1.

After placing the E-mini contracts on November 25, 2019, Warner did not review her account statements until on or about February 26, 2020. Upon review, she discovered the E-mini contracts had not been rolled over and had expired instead. Compl. Ex. A; ADMIS WARNER 347-363.

Warner states that she instructed Varner, Jr. to always roll her futures unless specifically instructed otherwise. Compl. However, most of the CME E-Mini S&P 500 contracts Warner placed were not rolled before expiration. Ans. & Aff. Def. at 2. Of the 18 instances Warner placed E-mini trades, 14 were not rolled before expiration. *Id.* Of the four that were rolled, Warner delivered specific instructions to Varner, Jr. to do so. *Id.*; *see also* Complainant's Supplemental Response to Respondents' Interrogatories (Compl. Supp. Response). Warner does not dispute that she specifically asked Varner, Jr. to roll these four contracts. *See* Compl. Supp. Response. In fact, Warner admits she "cannot recall specific dates and trades where Mr. Varner rolled her positions pursuant to her default instructions, as opposed to rolling the positions after some discussion regarding the same." *Id.*

Despite this history of **not** rolling these E-Mini contracts unless specifically instructed to do so, Warner found Varner, Jr.'s failure to roll the November 2019 E-mini contracts upsetting. On February 19, 2020, Warner texted Varner, Jr. "Hey Rogers... I got a tex[t] thing in the mail from ADM saying I lost \$590,00 last year. I know it was a tough year, but that seems like a lot! Can you check it, and send a list of trades?" *See* Exhibit A (attached as exhibit to Compl.); Complainant's Discovery Responses (Excel Spreadsheet). Varner, Jr. responded on February 21, 2020, "[t]hat figure is correct and I will send monthly statements on Mon to confirm. SP has moved below 2 support points today, next support 3303, then the doors come off at 3213." *Id.* On February 26, 2020, after reviewing the account statements, Warner

texted “Uh Rogers, did you stop me out or did futures expire and you forgot to roll me?” and “I don’t look often, but checked tonight feeling rather good, only to find no position!” *Id.* ADMIS WARNER 348). The next day—February 27, 2020, Varner, Jr. replied, “Yep I forgot.” *Id.* ADMIS WARNER 348.

That day, on February 27, 2020, Warner and Varner, Jr. texted multiple times about the failure to roll the E-Mini contracts:

Warner: “Are you going to put 85 points times 20 into my account. How could you forget? We were texting?”; “This is likely continue ... can you sell 20 again please”; “Hello? Rogers please”

Varner, Jr.: “Ok”; “Fill 3067.25”

Warner: “Ok. Now, do you have some culpability in not rolling? Don’t you get a report? I know it’s happened before and I let it slide, but this is that rather serious I’m sorry to ask, but dang can’t believe you then didn’t notice either ...”

Varner, Jr.: “I did notice, it was right at Christmas but was very glad to be flat margin would have been awful I will install software notification to remind me confirm expirations”

Warner: “But Rogers, just last week you told me to stay short!?!?!”; “I asked you if I should cover and you said no!”

Varner, Jr.: “Right, a brain slip, my fault I did have some customers short and sent that message”;

Warner: “So what are you going to do about it?”

Varner, Jr.: “Let me think, for now I’m watching 3030 old high as support, if that gives way next is 2730”

Warner: “Rogers, I just checked my text and you have advised me on staying in a position I apparently didn’t have a number of times over the last several months?”

Varner, Jr.: “All on me”; “I have maybe 12 ac[counts] that trade SP and Russ and often send same message. I’m truly sorry and will adjust business practice as I know you don’t keep up with things [d]ay to day.”; “Such as: SP testing long term support now at 3000”

Warner: “It’s not sending the same message Rogers... it’s replying to questions I ask directly with answers that imply a trade. It’s not unsolicited messages”

“Rogers, I’m really sorry to be a pill but I think you owe me the money this time. Not only did you forget to roll, you forgot to tell me you didn’t roll, and then you responded to queries about my position by answering questions implying that I had the position I thought I had. You typically roll my positions for me, it’s one of the reasons I pay a broker.”

“I want to be peaceful and not ugly, but I would like to know what you’re going to do about this?”

Varner, Jr.: “I will cut my commission out, only charge ADM part, work it off”

Warner: “No Rogers, that’s not enough”

Varner Jr.: “Let’s discuss over phone soon”

Warner: “I’d like to keep this in writing, thank you” “The difference is \$132,000”

Id.; ADMIS WARNER 347-363.

III. Analysis and Legal Discussion

Under Commission Rule 12.310(e), summary disposition is appropriate when each of three conditions has been met: (1) there is no genuine issue of material fact; (2) there is no need for further factual development; and (3) the moving party is entitled to a decision as a matter of law. *Elliot v. Jay De Bradley et al.*, CFTC No. 11-R004, 2012 WL 6087468 at *6 (CFTC Dec. 5, 2012); *Levi-Zeligman v. Merrill Lynch Futures, Inc.*, CFTC No. 92-R125, 1994 WL 506234 at *6 (CFTC Sept. 15, 1994). The purpose of summary disposition “is to avoid the empty ritual of an oral hearing,” *Elliot*, 2012 WL 6087468 at *6 (internal citation omitted), and at this stage:

[T]he judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. All reasonable doubts about the facts should be resolved in favor of the non-moving party. If reasonable minds could differ on any inferences arising from undisputed facts, summary judgment should be denied.

Id.

After carefully reviewing the parties' submissions, I have determined that any additional discovery, written testimony, and any oral testimony, is unlikely to aid Warner in her claim, because Warner does not allege any applicable violation of the CEA or its regulations. Therefore any additional factual development is unwarranted, and the Motion is granted as to all Respondents.

A. The Parties Concede ADMIS Should Be Dismissed From This Proceeding

In their briefs, both parties conceded that ADMIS could not be held liable for the potential misconduct of third party IB, Varner Brokerage. Complainant's Opp. To Resp. Motions for Summ. Disp. at 1 (May 26, 2021); Resp. Reply Mem. at 1 (Aug 2, 2021). Because both parties agree that there is no legal basis to keep ADMIS in this proceeding, all allegations against ADMIS are dismissed.

B. Warner Does Not Allege Any Violations Of The CEA By Respondents

There is a factual question about whether Varner, Jr. knew he was supposed to roll Warner's E-mini contracts on December 23, 2019. This fact issue cannot be resolved on this paper record. On the one hand, Warner's account was non-discretionary, and the only time Varner, Jr. ever did roll her E-mini contracts was at Warner's express direction. This suggests Varner, Jr. bears no responsibility for failing to roll forward her E-mini contracts in December 2019. On the other hand,

Varner, Jr. admitted to culpability for something regarding her E-mini contracts. It is not clear whether he “forgot” to roll her contracts forward, or whether he “forgot” she was out of the contracts and then failed to advise her appropriately.

But this factual question is irrelevant because Warner states no claims arising under the CEA or its regulations. And in order to bring a reparations complaint, a customer must allege a violation of the CEA or its regulations. *See* 17 U.S.C. § 18(a)(1) (“[a]ny person complaining of any violation of any provision of this chapter, or any rule, regulation order issued pursuant to this chapter, may . . . apply to the Commission for an order awarding [damages.]”); 17 C.F.R § 12.13(a) (complaint must state “a violation of any provision of the [CEA] or a rule, regulation or order of the Commission”).

Warner alleges that the Varner Respondents violated CFTC regulation 33.9(c), 17 C.F.R. §33.9(c). *See* Complainant’s Opposition to Respondents’ Motion for Summary Disposition at 2-3. However that regulation is specifically for violations related to commodity option transactions, and the E-mini contracts at issue here are futures contracts.¹ It is therefore not applicable to the facts at hand.

Although on this factual record Warner may have a cognizable claim for either breach of contract or breach of fiduciary duty, neither of those claims can be litigated in this forum without a concomitant violation of the CEA or its regulations.

¹ 17 C.F.R. §33.9(c) reads in relevant part “It shall be unlawful for any person. . . [u]pon acceptance of an order for a commodity option transaction, to fail unreasonably to secure prompt execution of such order or upon rejection of an order to fail to notify the person whose order has been rejected of such rejection[.]”

Emily v. Gleichmann, CFTC Dkt. No. 14-R007, 2020 WL 3248253 at *3 (Jun. 9, 2020) (barring breaches of fiduciary duty claims); *Wills v. First Financial Corp. of America*, [1984–86 Transfer Binder] Comm.Fut.L.Rep. (CCH) ¶ 22,605 at 30,596–30,597 (CFTC May 31, 1985) (a mere breach of an agreement, absent some showing of fraudulent intent on the part of the breaching party, does not constitute a violation of the CEA); *see also Tysdal v. Jack Carl/312 Futures, Inc.*, CFTC Dkt. No. 88-R225, 1992 WL 45534 at *3 (Feb. 27, 1992) (breach of an oral agreement, without any allegation of fraud, is not sufficient to establish a violation of the CEA).

Fraud would certainly be a violation of the CEA and its regulations, but Warner, as represented by counsel, has made no allegations of fraud against any of the Respondents. In the absence of a fraud claim, Warner argues that breaches of fiduciary duty are actionable under the CEA. She makes this argument despite my directive during a status conference held before the filing of these pleadings to consider the implications of *Emily v. Gleichmann, supra*, in which the Commission held that breaches of fiduciary duty alone are not actionable in reparations. Jan. 7, 2021 Tr. at 16-18.

Warner cites *McBlaine v. Jack Carl Assocs., Inc.*, 705 F. Supp. 1340 (N.D. Ill. 1989) to support this proposition that breaches of fiduciary duty are actionable under the CEA. But that was an enforcement case, not a reparations case. More importantly, *McBlaine* held that fiduciary duty breaches are violations of the CEA when they involve “reckless or intentional” conduct—in other words, when they rise to the level of fraud, which Warner specifically did not allege.

Warner also argues there are claims under Illinois law. This forum is plainly not empowered to adjudicate those state law claims without some related violation of the CEA or its regulations.

Warner finally argues that if I fail to adjudicate issues such as the breach of fiduciary duty and violations arising under Illinois law, I will be foreclosing relief to Warner because of forum selection gamesmanship. But Warner brought her claim in this forum, as represented by counsel, so it is difficult to credit the assertion that Respondents have engaged or will engage in gamesmanship. Even if the record did suggest that Respondents were engaging in forum selection gaming, this forum is not one of general jurisdiction. Rather, by statute its jurisdiction is wholly circumscribed by the CEA. This forum is not authorized to look to Illinois law or general breaches of fiduciary duty where there is no violation of the CEA or its regulations.

Accordingly, Warner's Complaint against Varner, Jr. and Varner Brokerage is DISMISSED for failure to state a claim under the CEA or its regulations.

Conclusion

For the reasons discussed above, Respondents Motion For Summary Disposition is **GRANTED**, and Warner's reparations Complaint against all Respondents is **DISMISSED**.

Dated: October 17, 2022

/s/ Kavita Kumar Puri
Kavita Kumar Puri
Administrative Judge