UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

VICTORIA TEREKHINA

v.

CAPITAL MARKET SERVICES, LLC
d/b/a CMS FOREX

CFTC Docket No. 07-R017

OPINION AND ORDER

Complainant Victoria Terekhina ("Terekhina") appeals from an Administrative Law Judge's ("ALJ") summary disposition of her reparations complaint against respondent Capital Market Services, LLC d/b/a CMS Forex ("CMS Forex") for failure to state a cause of action. For the reasons explained below, we affirm the dismissal of the complaint.

FACTS

Terekhina filed a *pro se* reparations complaint against CMS Forex, an online foreign currency broker, in which she alleges that a software malfunction in CMS Forex's trading platform, VT Trader, closed positions that she intended to keep open, resulting in losses. She alleges that the system worked as expected when she closed a single position, but that when she attempted to close multiple positions, one after another, the wrong trades were closed. Terekhina opened a trading account with CMS Forex in August 2006 and made two deposits totaling $35,000 in September. Within two weeks, her account balance reached $66,488.92. However, by November 2006, she had lost all of her money. Terekhina contacted CMS Forex several times while her account was open to report problems with the trading system, but did not receive a response that she deemed satisfactory. She seeks $35,000 in out-of-pocket losses as well as lost profits. *See generally* Complaint and April 14, 2007 Amendment to Complaint.

CMS Forex asserts that the VT Trader system requires a user to execute a series of confirmations and checks in order to close a position and that Terekhina alone controlled the closure of a given trade. Answer and Motion to Dismiss at 5, 6-7. CMS Forex contends also that Terekhina failed to plead both her claim for improper trade execution and her claim for lost profits with specificity. *Id.* at 8, 9. The Office of Proceedings denied the motion to dismiss and assigned the case to an ALJ, whereupon discovery commenced.[1]

During discovery, Terekhina requested CMS Forex to produce: (1) the source code[2] for the programs used in the version of the VT Trader system that operated during September 2006 and certain specifications pertaining to the program; and (2) a list of all CMS Forex customers whose accounts were under a margin call at any time during 2006 and information regarding those customers' trades. CMS Forex objected and filed a motion for a protective order, which the ALJ granted in full, denying Terekhina any access to the data.[3] Subsequently the parties filed motions for summary disposition.

On September 19, two days before the deadline for filing prehearing memoranda, the ALJ granted CMS Forex's motion for summary disposition and dismissed the complaint with prejudice. The parties' prehearing memoranda reached the Commission several days later. Though the memoranda reached the Commission following the ALJ's decision, we consider them for the purposes of this appeal.[4]

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[1] Terekhina subsequently recalculated her damages and increased her lost profits claim from $232,870 to $4.1 million. July 14, 2007 Addition to Claim Amount Calculations.

[2] The source code is a list of instructions written in a standard programming language to construct a computer program.

[3] Terekhina styled her pleading a "Motion for Summary Judgment," but it is in essence her opposition to CMS Forex's Motion for Summary Disposition.

[4] CMS Forex's supplemental brief moved to strike Terekhina's prehearing memorandum in its entirety. We decline to do so, inasmuch as the corrective measures described herein avoided any prejudice suffered by CMS Forex on

INITIAL DECISION

The ALJ dismissed Terekhina claims with prejudice. *Terekhina v. Capital Market Servs., LLC*, [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,709 (CFTC Sept. 19, 2007). He ruled that CMS Forex provided substantial evidence that the VT Trader platform required "four distinct actions by the customer to close out a position" and that Terekhina "does not assert that her trades were closed without her compulsory participation." *Id.* at 61,273. He found that Terekhina persisted in her allegations that the VT Trader platform was flawed, but failed to oppose CMS Forex's motion for summary disposition by setting forth material facts as to which she contends a genuine issue exists regarding how trades were closed. *Id.* Terekhina filed and perfected a timely appeal which incorporated by reference her prehearing memorandum and the exhibits to the memorandum.

DISCUSSION

Terekhina contends that a software malfunction in the VT Trader system offset positions for which she did not enter orders to close. She asserts that the reason she did not dispute performing VT Trader's multi-step confirmation process to close trades is that the problems she experienced occurred after the process was finalized. App. Br. at 3. She argues that email messages she received from CMS Forex personnel, among other evidence, suggest that there

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account of Terekhina's procedural errors. See Commission Rule 12.1, 17 C.F.R. § 12.1 (providing that the Reparations Rules "shall be construed liberally so as to secure the just, speedy, and inexpensive determination of the issues presented with full protection of the rights of all parties"). "The failure of one party to serve a document upon another party, particularly when the erring party is without counsel, is precisely the kind of technical and inadvertent violation to which the Commission was referring to when it adopted the rules." *Spurgeon v. Rosenthal & Co.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,906 at 23,682 n.9 (CFTC Sept. 26, 1979). The Commission directed the Proceedings Clerk to provide CMS Forex with any documents that Terekhina failed to serve and afforded CMS Forex an opportunity to file a supplemental brief based on the complete record. Order Pursuant to Delegated Authority (Jan. 29, 2008). In addition, Rule 12.405, 17 C.F.R. § 12.405, permits the Commission to receive new evidence where (1) the additional evidence is material, and (2) there were reasonable grounds for failing to adduce such evidence before the ALJ. *McGough v. Bradford*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,265 at 50,600 (CFTC Sept. 28, 2000). Terekhina's submission clearly satisfies the second prong. However, as described herein, her complaint fails to state a cause of action cognizable in this forum. Accordingly, while the submission may be material to her claims, it is not material to claims that this Commission has jurisdiction over.

were operating problems with the VT Trader platform. *Id.* at 3-4. She contends that the evidence she submitted, before and after the ALJ dismissed the case, demonstrates the existence of genuine issues of material facts. *Id.* at 1, 4-5. Finally, she argues that the denial of her discovery requests deprived her of additional evidence she needs to meet her burden of proof. *Id.* at 4-5.

Taken together, however, Terekhina's submissions amount to a contention that CMS Forex was negligent in the operation of the VT Trader system. Nowhere does she allege that CMS Forex acted intentionally or recklessly to cause her losses. Allegations of mere negligence, however, are not actionable in reparations:

> To recover in reparations . . . a complainant must establish scienter; injurious action by the wrongdoer is not enough. The Commission has no authority to award reparations to a wronged party unless the wrongdoer intended the offending act, or was reckless in allowing it to happen. The forum does not reach negligent conduct ....

Dunmire v. Hoffman, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30, 201 at 57,826 (CFTC Mar. 2, 2006) (internal citation omitted).

Because we have no jurisdiction over claims of negligence a, dismissal of Terekhina's complaint was proper.[5]

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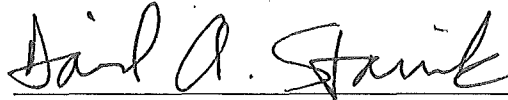
[5] In addition, because the Commission does not have jurisdiction over this kind of claim, Terekhina's discovery requests are moot. The information she sought, source code and customer lists, are relevant to her negligence claim. Accordingly, even if Terekhina were entitled to the information she requested in discovery, the denial of her request would amount at most to harmless error.

CONCLUSION

Based on the foregoing, we affirm the ALJ's order of summary disposition.

IT IS SO ORDERED.[6]

By the Commission (Chairman GENSLER and Commissioners CHILTON, SOMMERS and O'MALIA) (Commissioner DUNN not participating).

David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: November 23, 2010

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[6] Under Sections 6(c) and 14(e) of the Commodity Exchange Act (7 U.S.C. §§ 9 and 18(e) (2006)), a party may appeal a reparation order of the Commission to the United States Court of Appeals for only the circuit in which a hearing was held; if no hearing is held, the appeal may be filed in any circuit in which the appellee is located. The statute also states that such an appeal must be filed within 15 days after notice of the order, and that any appeal is not effective unless, within 30 days of the date of the Commission order, the appealing party files with the clerk of the court a bond equal to double the amount of the reparation award.