

No. 1-11-3135

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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DONNA MARLENE DONLAN, Personal Representative of the Estate of TIMOTHY DONLAN, Deceased.	)	Appeal from the
	)	Circuit Court
	)	of Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
THE LINN GROUP, INC.,	)	No. 08 L 3046
	)	
Defendant-Appellee	)	
	)	
(MF Global, Inc.,	)	Honorable
	)	Lee Preston,
Defendant).	)	Judge Presiding.

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JUSTICE REYES delivered the judgment of the court.  
Justices HALL and GORDON concurred in the judgment.

**ORDER**

- ¶ 1 Held: The circuit court of Cook County erred in dismissing plaintiff's complaint alleging defendant commodities brokers breached their fiduciary duty to a decedent customer and violated the Consumer Fraud and Deceptive Business Practices Act.
- ¶ 2 Plaintiff Donna Marlene Donlan, personal representative of the estate of Timothy Donlan, deceased, appeals an order of the circuit court of Cook County dismissing her third amended

complaint against defendant The Linn Group, Inc. (Linn).<sup>1</sup> The third amended complaint alleges Linn breached its fiduciary duty to the decedent and violated the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2004)) by taking *de facto* control of decedent's commodity futures trading account and "churning" it to Linn's benefit. For the following reasons, we reverse and remand the case to the circuit court for further proceedings.

¶ 3

### BACKGROUND

¶ 4 Plaintiff initially filed suit against defendants on March 19, 2008. Plaintiff's third amended complaint (complaint), electronically filed on August 10, 2010, alleges the following facts: Decedent was a Florida resident who transferred funds into commodity trading accounts with defendants in Chicago, Illinois. Linn is a nonclearing futures commission merchant and introduced customer accounts to MF Global, a clearing futures commission merchant that accepted introductions from Linn.

¶ 5 On December 27, 2005, decedent suffered a stroke from which he never fully recovered. Plaintiff attached affidavits from medical professionals to the pleading. Dr. James E. McDonnell, a Florida physician who treated decedent before and after the stroke, opined decedent had a cerebrovascular disease which impaired his mental judgment. According to Dr. McDonnell, decedent's condition deteriorated over time. Decedent was allegedly unable to read

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<sup>1</sup> Defendant MF Global, Inc. (MF Global) is not a party to this appeal. Plaintiff's brief asserts this defendant is currently in bankruptcy proceedings.

or fill in blanks on documents. Dr. Paul M. Dodd, another Florida physician, examined decedent on February 2, 2006, and concluded decedent suffered from dementia, including short term memory loss and confusion.

¶ 6 The complaint alleges decedent had several conversations in early February 2006 with defendants' employee, Jeff Pearl, before defendants opened a trading account for decedent. Plaintiff attached an affidavit from Robert Moore, the father of decedent's grandson, to the pleading. In his affidavit, Moore stated he cared for decedent five days per week from the time decedent returned from the hospital after the stroke until decedent's death in December 2006. Moore stated he would dial the telephone for decedent, who would frequently mistake the television remote control for a telephone. A few days prior to February 4, 2006, decedent asked Moore to telephone Pearl. Moore stated he dialed the number and put the call on the speakerphone because decedent could not hold a telephone to his ear. According to Moore, Pearl told decedent if he wanted to make a lot of money, he had to act right away. Moore characterized Pearl as loudly speaking to decedent in this conversation "like a parent speaks to a disobedient child." Moore asserted decedent would not have allowed anyone to speak to him in that manner before suffering a stroke. After the first telephone call with Pearl, Moore left the room. Upon his return, decedent called him "Lance," the name of decedent's son, who lived in California and did not physically resemble Moore. The complaint also alleges Pearl had to repeatedly explain trades and strategies to decedent.

¶ 7 The complaint further alleges plaintiff had a telephone conversation with Pearl shortly after defendants opened decedent's trading account. In this conversation, plaintiff allegedly

informed Pearl that decedent was not in his right mind, due to his stroke. Plaintiff also advised Pearl decedent was suffering from a severe vision problem, was often unaware of his surroundings and unable to make business decisions. Pearl allegedly ignored this information.

¶ 8 From March through July 2006, decedent made a series of wire transfers to defendants, in the aggregate amount of \$1,301,000. This amount allegedly constituted almost all of decedent's life savings. From May through August 2006, defendants bought large, "out of the money" options on natural gas for decedent's account. Defendants charged decedent \$110,126 over the course of three months of trading. Decedent lost \$1,046,516 in these transactions. As a result of these losses, plaintiff allegedly lost decedent's marital home through foreclosure, as well as the equity in most of the estate's other property.

¶ 9 The complaint alleges defendants gained control and discretion over the trading decisions on decedent's account, due to defendant's dementia and other mental disabilities. After gaining control over decedent's funds, defendants allegedly used their discretion to implement an extremely complex and risky investment plan, calling for the spreading of an extremely high number of "out of the money" natural gas options in hopes of a market turn which would increase the value of the options over a relatively short period of time. The plan was allegedly inappropriate for a person in decedent's physical, mental and financial condition. In addition, the plan allegedly generated high commission payments to defendants. Furthermore, defendants allegedly misrepresented and failed to adequately explain either the true risks of this plan or the high rate of commissions to decedent.

¶ 10 Count I of the complaint alleges defendants breached their fiduciary duty to decedent. The fiduciary relationship allegedly arose due to the disparity between decedent and defendants in factors including age, health, mental condition, education and business experience. Defendants allegedly held and managed decedent's funds for his benefit, but breached their fiduciary duty by engaging in the aforementioned trades, misrepresentations, and failures to explain the risks and commissions to decedent. Count II alleges defendants' actions also violated the Consumer Fraud Act.

¶ 11 On October 20, 2010, defendants filed a motion to dismiss the complaint pursuant to sections 2-619(a)(5) and (9) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5),(9) (West 2010)). In the motion, defendants argued plaintiff's claim was barred by a one-year limitations period contained in the customer agreement decedent electronically executed to establish his trading account. Defendants also argued plaintiff's claims necessarily failed because all of the trades made for decedent's account were solely the product of decedent's express, specific direction, without any recommendations or representations from defendants that could constitute fraud or a breach of fiduciary duty.

¶ 12 Defendants supported their motion with copies of decedent's customer agreement, containing the one-year limitations period, and customer account application. Decedent's customer account application indicated decedent had 20 years of futures investment experience and 10 years of options investment experience. The application also indicated decedent had \$2 million in annual income and \$50 million in net worth, of which \$8 million was cash.

¶ 13 Defendants also supported their motion with affidavits, including one executed by Pearl. In his affidavit, Pearl stated he was an account executive and broker for Linn. According to Pearl, decedent opened his trading account on March 7, 2006, with Linn as the broker and MF Global as the clearing firm. Pearl also stated the account was nondiscretionary, meaning no other person controlled the account and decedent personally undertook all trading strategies and decisions. Pearl added that decedent did not select an option in his customer account application indicating some other person would control the account. Moreover, Pearl stated decedent did not execute a power of attorney form required to establish a discretionary account.

¶ 14 Pearl further stated decedent directed him to place orders for various natural gas options on futures from May through August 2006. According to Pearl, decedent had previously employed similar trading strategies for natural gas options while trading with a different broker and clearing firm, the records of which decedent provided to Pearl on April 17, 2006. Pearl asserted decedent spoke knowledgeably and clearly about each trade and the circumstances motivating him to make the trade when instructing Pearl to place orders.

¶ 15 In addition, Pearl stated that at no point during his dealing with decedent, which involved telephone conversations between March 1, 2006, and August 31, 2006, did anyone contact him or otherwise inform him of decedent's alleged mental incompetence. Pearl claimed he did not know and had no reason to know decedent was incapable of opening an account or making the trades he executed. In a supplemental affidavit attached to the motion to dismiss, Pearl stated he had only one substantive conversation with plaintiff, which occurred during the summer of 2006. According to Pearl, during a conversation he was having with decedent, plaintiff took the

telephone and expressed her excitement about a weather report predicting hurricanes, because decedent's trading strategy was based on hurricanes disrupting natural gas production in the Gulf of Mexico.

¶ 16 On February 18, 2011, following argument and briefing on the matter, the circuit court entered an order granting defendants' motion to dismiss the complaint. The circuit court rejected defendants' argument regarding the limitations period in decedent's customer agreement, finding there was an issue of material fact regarding decedent's mental capacity to enter into the agreement. The circuit court, however, ruled plaintiff's claims of breach of fiduciary duty and violation of the Consumer Fraud Act should be dismissed because the undisputed facts showed defendants never gained *de facto* control over decedent's account. The trial court found the undisputed facts showed the trades made on decedent's account were based on decedent's requests, not defendants' recommendations. The circuit court also found plaintiff did not allege any facts demonstrating defendants learned of decedent's alleged mental incapacity and advised him to make risky trades. The court further found plaintiff failed to allege any trades were made without decedent's approval or that defendants provided decedent false or misleading information. The circuit court concluded defendants' only duty was to properly carry out decedent's trades because decedent had a nondiscretionary account.

¶ 17 Plaintiff filed a motion to reconsider. Plaintiff fails to identify where this motion appears in the record on appeal, but the record shows plaintiff filed an amended motion to reconsider on July 11, 2011, with leave of the court. On September 26, 2011, the circuit court entered an order

denying the motion to reconsider. On October 24, 2011, plaintiff filed a timely notice of appeal to this court.

¶ 18

#### DISCUSSION

¶ 19 Initially, we address Linn's request to strike plaintiff's brief for failing to comply with Illinois Supreme Court Rule 341(h) (eff. July 1, 2008), which sets out the requirements for appellants' briefs. Where an appellant's brief violates the requirements of our supreme court rules, the appellate court has the discretion to strike the brief and dismiss the appeal or disregard the appellant's arguments. *Carter v. Carter*, 2012 IL App (1st) 110855, ¶ 12. However, where the violations of supreme court rules are not so flagrant as to hinder or preclude review, the striking of a brief in whole or in part may be unwarranted. *Carter*, 2012 IL App (1st) 110855, ¶ 12.

¶ 20 Linn maintains plaintiff's brief fails to state the facts accurately and fairly without argument or comment, in violation of Illinois Supreme Court Rule 341(h)(6) (eff. July 1, 2008). Linn is correct to the extent that plaintiff's statement of facts fails to address the matters and evidence raised in defendants' motion to dismiss. Linn also contends plaintiff's brief fails to include a reference to the record on appeal for each factual proposition stated, in violation of Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). Plaintiff is only required to provide "citation of the authorities and the pages of the record relied on." *Id.* Nevertheless, plaintiff's argument entirely fails to provide record citations. Although Linn does not mention it, we also note that plaintiff's brief violates Illinois Supreme Court Rule 341(h)(9) (eff. July 1, 2008), which requires an appendix including "a complete table of contents, with page references, of the record

on appeal." See Ill. S. Ct. R. 342(a) (eff. Jan 1, 2005). To the extent that plaintiff's brief does not comply with Rules 341(h) and 342(a), those violations do not hinder our review of the case, because we have the benefit of the relatively simple record before us, as well as Linn's citations to the record on appeal. Accordingly, we decline to strike plaintiff's brief. *Carter*, 2012 IL App (1st) 110855, ¶ 12.

¶ 21

#### The Standards of Review

¶ 22 On appeal, plaintiff contends the circuit court erred in dismissing her claims of breach of fiduciary duty and violation of the Consumer Fraud Act pursuant to section 2-619 of the Code. The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proven issues of fact at the outset of litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). Defendants' motion was based on subsections (a)(5) and (9). Subsection (a)(5) permits dismissal where "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2010). Defendants' argument related to the one-year limitations period is contained in decedent's customer agreement. The circuit court denied this aspect of the motion, finding there was a genuine issue of material fact regarding decedent's mental capacity to enter into the agreement. Linn did not cross-appeal from that ruling.

¶ 23 Subsection (a)(9), the other basis for defendants' motion, permits dismissal where "the claim asserted \*\*\* is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010). Our supreme court has explained "[t]he phrase 'affirmative matter' encompasses any defense *other than a negation of the essential allegations of the plaintiff's cause of action.*" (Emphasis added.) *Kedzie and 103rd Currency Exchange, Inc. v.*

*Hodge*, 156 Ill. 2d 112, 116 (1993); see *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 122 (2008) (same). "For that reason, it is recognized that a section 2-619(a)(9) motion to dismiss admits the legal sufficiency of the plaintiff's cause of action \*\*\*." *Hodge*, 156 Ill. 2d at 116 (citing *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1071 (1992)).

¶ 24 A section 2-619 motion also "admits as true all well-pleaded facts, along with all reasonable inferences that can be gleaned from those facts." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). A defendant, however, does not admit the truth of any allegations in plaintiff's complaint that may touch on the affirmative matters raised in the 2-619 motion. *Barber-Colman Co.*, 236 Ill. App. 3d at 1073. "The defendant bears the initial burden of proof of the affirmative matter and, if satisfied, the burden shifts to the plaintiff to show that 'the defense is unfounded or requires the resolution of an essential element of material fact before it is proven.'" *Mondschein v. Power Construction Co.*, 404 Ill. App. 3d 601, 606 (2010) (quoting *Hodge*, 156 Ill. 2d at 116).

¶ 25 Aside from properly raised affirmative matter, "[i]f a defendant wishes to challenge the factual sufficiency of a plaintiff's claim, the summary judgment motion is the proper vehicle." *Barber-Colman Co.*, 236 Ill. App. 3d at 1073. "The affidavits filed by a defendant in support of a summary judgment motion, which contest the allegations in plaintiff's complaint, are specifically challenging the truth of these charges." *Id.* "A section 2-619 motion and its accompanying affidavits, however, are not attacking the factual basis of the plaintiff's claim; they are asserting

'other affirmative matter avoiding the legal effect of or defecting the claim.' " *Id.* (quoting Ill. Rev. Stat. 1991, ch. 110, par. 2-619(a)(9)).

¶ 26 Under section 2-619 of the Code, our standard of review is *de novo*. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). Accordingly, this court conducts an independent review of the propriety of dismissing the complaint and is not required to defer to the trial court's reasoning. *E.g., In re Marriage of Sullivan*, 342 Ill. App. 3d 560, 563 (2003).

¶ 27 Although these are the proper standards for review of a section 2-619 dismissal, Linn devotes much of its appellate brief to arguing both counts of plaintiff's complaint fail to state a claim for which relief may be granted. Technically, this is improper. A section 2-619(a)(9) motion to dismiss admits the legal sufficiency of the plaintiff's cause of action. *Hodge*, 156 Ill. 2d at 116. If defendants wanted to test the legal sufficiency of plaintiff's claims, they should have moved to dismiss the complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)). See, *e.g., Kindernay v. Hillsboro Area Hospital*, 366 Ill. App. 3d 559, 576 (2006). Defendants could also have brought a proper hybrid motion pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2010)), but did not do so in this case.

¶ 28 Plaintiff, however, does not argue defendants' motion to dismiss was brought under the wrong section of the Code. "[A] decision to grant a motion to dismiss that should have been brought under section 2-615 but was instead brought pursuant to section 2-619 may nonetheless be upheld by a reviewing court 'on any grounds which are called for by the record regardless of whether the [circuit] court relied on those grounds or whether the [circuit] court's reasoning was

correct.' " *Morris ex rel. Morris v. Williams*, 359 Ill. App. 3d 383, 386-387 (2005) (quoting *Caruth v. Quinley*, 333 Ill. App. 3d 94, 97 (2002)).

¶ 29 When reviewing the legal sufficiency of a claim, the inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to establish a cause of action upon which relief may be granted. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008). Additionally, exhibits attached to a complaint become part of the pleading for every purpose, including the decision on a motion to dismiss. *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18. In ruling upon a 2-615 motion, however, a trial court may consider only the allegations of the complaint and may not consider other material produced by a defendant. See *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 91-92 (1996). Such material is considered under the rules applicable to a section 2-619 dismissal. *Id.* A motion to dismiss a complaint pursuant to section 2-615 of the Code should not be granted unless it is clear no set of facts can be proved entitling the plaintiff to recovery. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006).

¶ 30 A dismissal under section 2-615 is reviewed *de novo*. *Young v. Bryco Arms*, 213 Ill. 2d 433, 440 (2004). Again, "[u]nder the *de novo* standard of review, the reviewing court does not need to defer to the trial court's judgment or reasoning." *Platinum Partners Value Arbitrage Fund, Ltd. Partnership v. Chicago Board Options Exchange*, 2012 IL App (1st) 112903, ¶ 12. "*De novo* review is completely independent of the trial court's decision." *Id.*

¶ 31 Accordingly, we turn to consider not only whether defendants have proven affirmative matter avoiding the legal effect of or defeating plaintiff's claims under section 2-619(a)(9) of the Code, but also the legal sufficiency of the claims under section 2-615 of the Code.

¶ 32 Breach of Fiduciary Duty

¶ 33 We first address the dismissal of plaintiff's claim of breach of fiduciary duty. Linn maintains the dismissal was proper because its production of decedent's customer application and agreement shows decedent's account was non-discretionary. Thus, Linn concludes it owed no duty to decedent.

¶ 34 Linn's argument is problematic. As our supreme court has stated:

"Initially, we bear in mind that we are not determining whether a fiduciary relationship actually existed between the \*\*\* defendants and plaintiffs \*\*\*. We determine only whether the well-pleaded factual allegations of the complaint adequately alleged that a fiduciary relationship existed and was breached by the \*\*\* defendants. In making this determination, we are limited to the factual allegations of the complaint and reasonable inferences drawn therefrom. We may not consider extraneous matters." *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 49.

Accordingly, Linn's attack on the legal sufficiency of the claim using the customer application and agreement is dubious. *Id.*; see *Bryson*, 174 Ill. 2d at 91-92. During oral argument, Linn complained plaintiff failed to attach these documents to the complaint. However, Linn does not suggest it ever sought to strike or dismiss the complaint pursuant to section 2-606 of the Code, which provides that if a claim "is founded upon a written instrument, a copy thereof, or of so

much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein \*\*\*." 735 ILCS 5/2-606 (West 2010); see also *Sherman v. Ryan*, 392 Ill. App. 3d 712, 733 (2009). The exhibits to which section 2-606 applies generally consist of instruments being sued upon, such as contracts. *Garrison v. Choh*, 308 Ill. App. 3d 48, 53 (1999). Linn makes no argument that plaintiff is suing upon these documents.

¶ 35 Furthermore, assuming *arguendo* Linn could rely on the customer application and agreement in this context, Linn's attack on the legal sufficiency of the claim would fail. The elements of a breach of fiduciary duty claim are: (1) a fiduciary duty on the part of the defendant; (2) the defendant's breach of the duty; and (3) damages were proximately caused by the defendant's breach. See, e.g., *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000). In general, a fiduciary relationship may be established either as a matter of law or as a matter of fact due to "the special circumstances of the parties' relationship where one places trust in another so that the latter gains superiority and influence over the former." *Benson v. Stafford*, 407 Ill. App. 3d 902, 912 (2010). The relevant factors in determining whether special circumstances create a fiduciary relationship in fact include: "the degree of kinship between the parties; the disparity in age, health, and mental condition, education, and business experience between the parties; and the extent to which the allegedly 'servient party' entrusted the handling of its business affairs to the 'dominant party' and placed its trust and confidence in it." *State Security Insurance Co. v. Frank B. Hall & Co.*, 258 Ill. App. 3d 588, 597 (1994). "The mere fact that business transactions occurred or that a contractual relationship existed is insufficient to support such a finding." *Id.*

¶ 36 In this case, defendants are commodities brokers. "This court has held '[t]he duty of care owed by a broker carrying a nondiscretionary account is an exceedingly narrow one, consisting at most of a duty to properly carry out transactions ordered by the customer.'" *First American Discount Corp. v. Jacobs*, 324 Ill. App. 3d 997, 1012 (2001) (quoting *Index Futures Group, Inc. v. Ross*, 199 Ill. App. 3d 468, 475 (1990)). "However, a broker may become the fiduciary of his customer in a broad sense, as, for example, when he handles a discretionary account or a hybrid-type account in which the broker has usurped actual control over a technically non-discretionary account." *Martin v. Heinold Commodities, Inc.*, 139 Ill. App. 3d 1049, 1055 (1985) (citing *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951, 953-54 (E.D. Mich. 1978)), *aff'd in part, rev'd in part on other grounds*, 117 Ill. 2d 67 (1987). In determining whether a broker has assumed control of a nondiscretionary account, courts examine (among other factors) the age, education, intelligence and investment experience of the customer. *Leib*, 461 F. Supp. at 954. Indeed, at least one court has recognized where a client has impaired faculties, the law may impose duties on brokers who can take unfair advantage of their customers' incapacity or simplicity. *De Kwiatkowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293, 1309 (2d Cir. 2002).

¶ 37 Plaintiff's complaint here alleges defendants gained control and discretion over the trading decisions on decedent's account, due to decedent's dementia and other mental disabilities. The complaint also alleges defendants used their discretion to implement an extremely complex and risky investment plan, causing substantial losses to the decedent while generating large commissions for defendants.

¶ 38 Linn argues "[p]ersons of mature age are presumed to be mentally competent; their incompetence cannot be inferred merely from old age, physical illness or defective memory." *In re Estate of Gruske*, 179 Ill. App. 3d 675, 678 (1989). "Impairment of the mind incident to old age and disease will not invalidate a transaction so long as the person in question was able to comprehend the nature of the transaction and to protect her interests." *Id.* In this case, however, the circuit court ruled there was an issue of material fact regarding decedent's mental capacity, regardless of his age.

¶ 39 Although the parties' briefs barely allude to the subject, the parties spent time during their oral arguments on the issue of whether Linn had a duty to investigate decedent's competence. The issue is forfeited for failure to present an adequate argument on the issue in the briefs, contrary to Illinois Supreme Court Rules 341(h)(7) and (i) (eff. July 1, 2008). *Vancura v. Katris*, 238 Ill. 2d 352, 373 (2010). Moreover, assuming *arguendo* the issue was preserved, a section 2-619(a)(9) motion to dismiss admits the legal sufficiency of the plaintiff's cause of action. *Hodge*, 156 Ill. 2d at 116. As defendants did not file a proper hybrid motion pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2010)), the issue was not properly before either the circuit court or this court. Furthermore, even when viewed in the alternative as a section 2-615 dismissal under *Morris*, this case does not implicate any legal duty to investigate the mental capacity of clients. Plaintiff alleges no such duty or breach in the complaint. Rather, the issue is whether the facts alleged in the complaint may establish a fiduciary relationship between decedent and defendants which was breached by defendants.

¶ 40 In this vein, the circuit court ruled plaintiff failed to allege facts establishing defendants knew of decedent's mental condition. We disagree. The complaint specifically alleges plaintiff told Pearl of decedent's mental incapacity shortly after defendants opened decedent's trading account, but defendants ignored the information. The complaint also alleges plaintiff's telephone conversation should have corroborated Pearl's prior experience and conversations with decedent.

¶ 41 Linn relies, as the circuit court did, on the Pearl affidavits. In his supplemental affidavit, Pearl stated he had only one substantive conversation with plaintiff in the summer of 2006, which did not include decedent's mental capacity. In his original affidavit, Pearl stated decedent spoke knowledgeably and clearly about each trade and the circumstances motivating him to make the trade.

¶ 42 Moreover, in ruling defendants did not gain *de facto* control over decedent's trading account, the circuit court relied on the original Pearl affidavit to conclude: decedent was an experienced commodities trader<sup>2</sup>; the trades were based on decedent's directions; and decedent approved all of the transactions. The complaint, however, specifically alleges decedent lacked mental capacity and Pearl had to repeatedly explain trades and strategies to the decedent.

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<sup>2</sup> Plaintiff does not appear to claim decedent was an inexperienced commodities trader. Yet in determining whether a fiduciary relationship existed, a trier of fact may consider decedent's purported prior experience in light of his alleged mental incapacity during the relevant time period. See *State Security Insurance Co.*, 258 Ill. App. 3d at 597.

¶ 43 The Pearl affidavits cannot support a dismissal pursuant to section 2-615 of the Code. As our supreme court has stated, in ruling upon a 2-615 motion, a trial court may consider only the allegations of the complaint and may not consider defendants' other supporting material. *Khan*, 2012 IL 112219, ¶ 49; *Bryson*, 174 Ill. 2d at 91-92. In addition, the Pearl affidavits cannot support a dismissal pursuant to section 2-619 of the Code, because the affidavits merely negate the essential allegations of the complaint. *Hodge*, 156 Ill. 2d at 116. For this reason, the contents of the affidavits are not "affirmative matter" warranting dismissal under section 2-619(a)(9) of the Code. *Id.* If defendants wanted to challenge the factual sufficiency of the claim, a summary judgment motion would have been the proper vehicle. *Barber-Colman Co.*, 236 Ill. App. 3d at 1073. Accordingly, we conclude the circuit court erred in dismissing plaintiff's claim of breach of fiduciary duty.

¶ 44 Consumer Fraud Act

¶ 45 Lastly, we consider whether the circuit court erred in dismissing plaintiff's Consumer Fraud Act claim. The circuit court ruled it was undisputed that defendants only placed trades at decedent's direction and there was no showing defendants gained *de facto* control over the account. The ruling is based on the circuit court's use of the Pearl affidavits to negate the essential allegations of the complaint. For the reasons already stated, the Pearl affidavits are not "affirmative matter" warranting dismissal under section 2-619(a)(9) of the Code. *Hodge*, 156 Ill. 2d at 116.

¶ 46 Linn also contends plaintiff's complaint fails to allege the proper elements of a claim under the Consumer Fraud Act and fails to meet the heightened pleading standard for a claim of

fraud. Again, this argument does not assert affirmative matter of the sort recognized under section 2-619 of the Code. Rather, this argument should have been made in support of a motion to dismiss filed pursuant to section 2-615 of the Code. See, e.g., *Kindernay*, 366 Ill. App. 3d at 576. Nevertheless, as previously stated, this court may review the complaint to determine whether it is clear no set of facts can be proved entitling the plaintiff to recovery. See *Marshall*, 222 Ill. 2d at 429; *Morris*, 359 Ill. App. 3d at 386-87.

¶ 47 In this case, the complaint asserts a violation of section 2 of the Consumer Fraud Act, which provides in part:

"Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the 'Uniform Deceptive Trade Practices Act', approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act." 815 ILCS 505/2 (West 2004).

Accordingly, the general elements of a private cause of action for damages based on a violation of section 2 of the Consumer Fraud Act are: "(1) a deceptive act or practice; (2) intent by the

defendant that the plaintiff rely on the deception; (3) the deception occurred in the course of conduct involving trade or commerce; and (4) the plaintiff's injury was proximately caused by the fraud complained of." *Rockford Memorial Hospital v. Havrilesko*, 368 Ill. App. 3d 115, 121 (2006).

¶ 48 A plaintiff, however, may recover under the section 2 of the Consumer Fraud Act for unfair as well as deceptive conduct. *Id.* Generally, issues involving concealment of facts are treated as deceptive conduct cases, while issues involving excessive fees are generally treated as unfairness cases. *Id.* The factors considered by the Federal Trade Commission in measuring unfairness are: (1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417-18 (2002) (citing *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n. 5 (1972)). A practice may be deemed unfair under the Consumer Fraud Act "because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." *Robinson*, 201 Ill. 2d at 418 (quoting *Cheshire Mortgage Service, Inc. v. Montes*, 612 A.2d 1130, 1143 (1992)).

¶ 49 The parties agree a broker's breach of fiduciary duty to his customer may constitute fraud under the federal Commodities Exchange Act (7 U.S.C. § 1 *et seq.* (2006)). See, e.g., *Evanston Bank v. Conticommodity Services, Inc.*, 623 F. Supp. 1014, 1023-24 (D.C. Ill. 1985).

Accordingly, the alleged practice would offend public policy. Moreover, the alleged knowing exploitation of a man lacking mental capacity, allegedly destroying his life savings while taking large commissions, would be immoral, unethical, oppressive, or unscrupulous. Accordingly,

construing the allegations of the complaint in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, we conclude it is not clear no set of facts can be proved entitling the plaintiff to recovery. See *Marshall*, 222 Ill. 2d at 429; *Morris*, 359 Ill. App. 3d at 386-87.

¶ 50 Linn further argues plaintiff did not and cannot adequately plead any deceptive practice by Linn. As already noted, plaintiff may recover under the statute for unfair as well as deceptive conduct." *Havrilesko*, 368 Ill. App. 3d at 121. "Thus, a practice can be unfair without being deceptive." *Id.* Plaintiff here framed her claim as one involving deceptive acts and failed to specifically plead defendants' acts violated public policy or were immoral, unethical, oppressive, or unscrupulous. See *Robinson*, 201 Ill. 2d at 421. Nevertheless, this court's ultimate inquiry is whether it is clear no set of facts can be proved entitling the plaintiff to recovery. Given the unusual procedural posture of this case, considering the legal sufficiency of the complaint on appeal from a dismissal under section 2-619 of the Code, pursuant to this court's discretionary authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we conclude plaintiff should be permitted the opportunity to replead her Consumer Fraud Act claim on remand. See also *Spengler v. V & R Marathon, Inc.*, 162 Ill. App. 3d 715, 718 (1987) (refusing opportunity to remand for repleading where plaintiff elected to stand on complaint in the circuit court).

¶ 51

#### CONCLUSION

¶ 52 In sum, we conclude the circuit court erred in dismissing plaintiff's complaint alleging breach of fiduciary duty with prejudice. Moreover, plaintiff should be permitted to replead her claim alleging a violation of the Consumer Fraud Act. For all of the aforementioned reasons, we

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reverse the order of the circuit court of Cook County and remand the case for further proceedings consistent with this order.

¶ 53 Reversed and remanded.