UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

JOHN M. PLANK v. CHESAPEAKE INVESTMENT SERVICES, INC., VISION LIMITED PARTNERSHIP, RICHARD TEAL BARNEY, and YU-DEE CHANG	CFTC Docket No. 02-R066 ORDER re APPLICATION FOR INTERLOCUTORY REVIEW

This matter is before the Commission on interlocutory review for the second time to resolve the question of whether the instant reparation complaint is barred under the legal doctrines of *res judicata* or *collateral estoppel,* in light of a previous arbitration decision by the National Futures Association ("NFA"). On January 29, 2003, the Administrative Law Judge ("ALJ"), acting *sua sponte*, certified this issue to the Commission and subsequently stayed proceedings below. In an order dated July 22, 2004, we decided that interlocutory review would be premature because the ALJ had not yet ruled on the issue he certified. *Plank v. Chesapeake Investment Services, Inc.,* 2004 WL 1632017 (CFTC July 22, 2004). We noted that to make a decision on whether complainant's claims were barred, "further development of the facts may be necessary," July 22, 2004 Order at 4, and suggested that the ALJ might need to review the record of the arbitration proceeding. *Id.* at 5. On remand, respondents produced the arbitration record for the ALJ's inspection and the parties submitted arguments for and against dismissing the case. On October 6, 2004, the ALJ ruled without explanation that the NFA decision did not bar the reparation complaint. Respondents then applied for interlocutory review.

Thereafter, the Commission determined, pursuant to delegated authority, that interlocutory review was appropriate and stayed the proceedings below to consider the question presented. *Plank v. Chesapeake Investment Services, Inc.*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,934 (Order pursuant to Delegated Authority Dec. 20, 2004). For the reasons that follow, we find that complainant's claims are barred by *res judicata*.

As explained below, complainant invokes Commission Regulation 12.310(f) to argue that interlocutory review is not available from a denial of a motion for summary disposition. We propose to waive that regulation pursuant to Commission Regulation 12.4(b) and afford the parties an opportunity to show cause why waiver should not take place.

BACKGROUND

Complainant John M. Plank ("Plank") is a real estate broker who lived in Arlington, Virginia at the time relevant to this action. Respondent Chesapeake Investment Services, Inc. ("Chesapeake") is a registered introducing broker ("IB") based in McLean, Virginia and Richard Teal Barney ("Barney") is a registered associated person ("AP") of Chesapeake. Yu-Dee Chang ("Chang") is a registered AP and principal of Chesapeake. Vision Limited Partnership ("Vision") is a New York-based futures commission merchant ("FCM") that guaranteed Chesapeake. It is not a member of any commodity futures exchange, and is a non-clearing FCM. Vision did not did not execute any of the trades in Plank's account.

In April 2000, Plank opened an account with Vision, introduced by Chesapeake, after hearing a radio presentation by Barney and Chang. Barney became Plank's broker and Chang was Barney's supervisor. All of the trades in Plank's account were S&P 500 futures contracts or options on S&P 500 futures contracts, traded on the Chicago Mercantile Exchange ("CME"). Plank traded options exclusively from April through July, and both futures and options

thereafter. Plank began trading with $500,000 and deposited an additional $100,000 in August. Most of Plank's trades were executed by BNP Paribas Brokerage Services, Inc ("BNP"), a member of the CME. Plank closed the account in January 2001.

In March 2001, Plank filed a Demand for Arbitration with the NFA, No. 01-ARB-16, against Chesapeake, Barney, Chang and Vision--the same parties that are respondents in this reparation proceeding--and alleged wrongdoing in violation of NFA rules and the Commodity Exchange Act ("CEA" or "Act"). He alleged that respondents engaged in futures and options fraud, failure to disclose risk, misrepresentations or omissions, excessive trading (churning), unauthorized trading, and failure to supervise in violation of the Act. Plank also charged that respondents violated various NFA compliance rules including, among others, those regarding fraudulent activity, and supervision and that respondents committed common law fraud.[1] *Id.*

Plank's Hearing Plan, filed with the NFA, expanded his causes of action to include alleged violations of Commission Regulation 1.35 (recordkeeping requirements); CEA Section 4m (commodity trading advisor registration); the Commission's Part 4 Regulations regarding

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[1] Specifically, Plank's arbitration claim contained factual allegations describing his dealings with respondents from April through December, which he summarized as "misrepresentations and omissions of material facts" regarding: the "specific risks of [respondents'] straddle futures trading strategy;" "the likelihood of profits and their ability to manage risk;" "Respondents' expertise and prior investment performance;" and respondents' "management of the account, and compliance with the agreed upon trading strategy to be used in the account." Demand for Arbitration at 27. Plank alleged that "Respondents' acts constituted unauthorized trading and excessive trading of the account." *Id.* He alleged further that Chesapeake failed to properly supervise "its employees and agents including Respondents Barney and Chang," and that Vision did not properly supervise "its agent Chesapeake." *Id.* at 28.

Plank asserted eight separate "claims for relief" based on his factual allegations, not all of which are necessarily cognizable in our reparations forum: violation of CEA Section 4c(b) and Commission Regulation 33.10 (options fraud) against all respondents; violation of CEA Section 4b (futures fraud) against all respondents; violation of Commission Regulation 166.3 (failure to supervise) against Chesapeake and Vision; violation of CEA Section 13(a) (aiding and abetting) against Chesapeake, Chang and Vision); common law breach of contract and breach of duty of care; violation of NFA Rules 2-2, 2-4, 2-8, 2-9, 2-16 and 2-29; common law constructive fraud against Chesapeake and Vision for the acts of Barney and Chang; and common law fraud and deceit against all respondents.

Plank asserted that each of his individual claims resulted in "compensatory damages" to him in the amount of $652,000 and $200,000 in "investment opportunity loss damages." In addition, he claimed $350,000 in punitive damages on his common law fraud and deceit claim.

trading advisor disclosure; and NFA Compliance Rules 2-10 (recordkeeping); 2-30 (disclosure) and NFA Registration Rule 206 for commodity trading advisors.

After five days of evidentiary hearings, the NFA arbitrators dismissed the claim in its entirety on March 8, 2002.[2] In its final determination, the NFA did not make findings of fact, but found that Plank had presented issues of violations of NFA Compliance Rules 2-2, 2-8, 2-9, 2-10, 2-16, 2-29, and 2-30 and violations of NFA Registration Rule 206. It also found that Plank presented issues of "violation[s] of [the] Commodit[y] Exchange Act, misrepresentation, failure to disclose risks, unauthorized trading, breach of contract, fraud, breach of fiduciary duty, negligence, and failure to supervise."

On August 2, 2002, Plank filed a reparation complaint with the Commission against the same parties named in the NFA proceeding, and alleged violations of the CEA and Commission Regulations in connection with the same account that was the subject of the NFA proceeding. In Count 1 Plank alleges various audit trail irregularities in violation of Regulation 1.35 and maintains that these factual assertions provide "proof" for Counts 2 and 3.[3] Count 2 alleges "price-fixing" and "false price reports" in violation of CEA Sections 4b and 4c. The "price fixing" allegation appears to stem from his claim that nearly all the losses occurred at an "even dollar amount." Count 2 also embraces unauthorized trading and churning. Count 3 concerns fraudulent trade allocation by Chesapeake and cites Sections 4b and 4c of the CEA. In Count 4, Plank alleges that Chang failed to disclose that he maintained and traded his own trading account

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[2] Thereafter Plank filed a Motion to Vacate the Arbitration Award in the United States District Court for the Northern District of Illinois, No. 02 C 4453. The federal district court denied Plank's Motion on January 9, 2003. *Plank v. Vision Limited Partnership,* [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,284 (N.D. Ill. 2003) (2003 WL 76864).

[3] Specifically, Plank alleged that order tickets contained four identical time stamps for events that could not have occurred simultaneously; that an order ticket was dated "September 32;" and other anomalies.

and traded the same contracts as complainant. Count 5 reiterates the churning claim. Count 6 alleges failure to provide accurate reports in violation of Section 4g of the Act.

Respondents answered on October 3, 2002, denying liability and asserting as an affirmative defense that the case was barred under *res judicata.*

As noted above, the ALJ certified to the Commission in January 2003 the issue of whether the complaint was barred and in March 2003 stayed the proceedings while the issue was pending. Once the Commission returned the case to the ALJ in July 2004, respondents filed the NFA record and renewed their contention that the case was barred. On September 27, 2004, Plank limited his reparation claim to allegations respecting specific futures transactions that occurred on twenty specific days in August, September, October and November 2000. *See* Complainant's Motion to Compel, September 27, 2004. On October 6, 2003, the ALJ found that the case was not barred and went forward with discovery. Respondents sought interlocutory review on October 28, 2004.

In his Pre-Hearing Memorandum of December 3, 2004, Plank described the issues to be decided as alleged violations of Regulation 1.35 (failure to maintain records, including accurate time stamped order tickets); violations of CEA Sections 4b and 4c (churning, false price reports, and fraudulent trade allocation); and failure to supervise. These are the claims regarding which we must determine whether Plank's reparation claim is barred.

DISCUSSION

It is well-settled that arbitration decisions may be given preclusive effect under *res judicata. Harter v. Iowa Grain Co.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,644 at 48,075 (CFTC May 20, 1999); *see also Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985) ("[w]hen an arbitration proceeding affords basic elements

of adjudicatory procedure, such as an opportunity for presentation of evidence, the determination of issues in an arbitration proceeding generally should be treated as conclusive in subsequent proceedings"); *Rudell v. Comprehensive Accounting Corp.*, 802 F.2d 926 (7th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987) (arbitration award given *res judicata* effect).

Respondents, who bear the burden of proof in this matter, argue that the reparation complaint is barred because the August-November trades at issue are part of the same transaction or series of transactions out of which the NFA arbitration complaint arose. They emphasize that *res judicata* bars not only claims that were actually litigated, but extends to claims that could have been raised in the prior proceeding. They assert that Plank's move to "limit" his claims to 20 trading days is meaningless inasmuch as all of his out-of-pocket losses occurred on those dates. *See* Respondent's Memorandum of January 31, 2005 at 2.

Complainant argues that the reparation complaint is not barred because he is alleging different violations of the CEA from those presented to the NFA. He maintains that his reparation complaint alleges wrongdoing in connection with the execution of orders on the CME floor, the subsequent allocation of orders to his account, and an undisclosed conflict of interest by his account executive, whereas his NFA claims focused on fraudulent inducement to trade.

Under *res judicata* or "claim preclusion" a judgment on the merits in a prior suit bars a second suit involving the same parties (or their proxies) based on the same cause of action. *Golden v. Barenborg*, 53 F.3d 869-70 (7th Cir. 1995). One of the purposes of *res judicata* is to prevent piecemeal litigation. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 415 (9th Cir. 1985). *Res judicata* bars relitigation not only of those issues that were raised and decided in the earlier proceeding, but also issues that *could have been raised* in the prior action. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 476-77 (1998); *Golden,* 53 F.3d at 869-70; *Legani v. Alitalia Linee*

Aeree Italiane, S.P. A., 2005 WL 5033712 (2d Cir. March 4, 2005); *Pueschel v. U.S*, 369 F.3d 345, 355-56 (4th Cir. 2004); *Boston Cattle Group v. ADM Investor Services, Inc.*,[1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,553 at 43,476-77 (N.D. Ill. 1995). It is also well-accepted that a mere change in legal theory does not create a new cause of action for *res judicata* purposes. *L-Tec Electronics Corp. v. Cougar Electronic Org., Inc.*, 198 F.3d 85, 88 (2d Cir. 1999); *Harnett v. Billman*, 800 F.2d 1308, 1314 (4th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987).

Here, it is undisputed that the NFA proceeding and the instant reparation complaint involve the same parties and that the NFA issued a final decision. The remaining question is whether the two proceedings arise from a common cause of action. Under the traditional "transactional test," "once a final judgment has been entered on the merits of a case, that judgment will bar any subsequent litigation by the same parties or those in privity with them 'concerning the transaction, or series of connected transactions out of which the [first] action arose.'" *Cieszkowska v. Gray Line New York*, 295 F.3d 204, 205 (2d Cir. 2002) (internal citation omitted). Stated another way, under this analysis a claim has identity with a previously litigated matter, for purposes of *res judicata*, if it emerges from the same "core of operative facts" as the earlier action. *Golden*, 53 F.3d at 869-70 (single core of operative facts derived from the sale of a home); *Cieszkowska,* 295 F.3d at 206 (because "factual predicates of plaintiff's allegations in the first and second complaints involved the same events concerning her employment, pay history and termination," her new theory of discrimination could have been brought in the prior suit); *Pueschel v. U.S.*, 369 F.3d 345, 355-56 (4th Cir. 2004) (action alleging that the Federal Aviation Administration violated plaintiff's civil rights under Title VII and the Rehabilitation Act was barred by *res judicata* based on controller's prior action against the FAA under the

Federal Tort Claims Act where both suits asserted claims based on the same alleged pattern of FAA conduct during the same particular time frame).

Here, the core of operative facts common to both lawsuits relate to alleged wrongdoing by respondents in connection with Plank's futures and options trading account. The record in the NFA proceeding reflects that evidence was received concerning the transactions--futures day trades occurring between August and November 2000--that are the subject of Plank's current reparation complaint.

For example, the NFA arbitrators heard testimony by Plank's expert on whether the volume of day trades and their attendant commission charges constituted churning and Plank contended at the hearing that he did not authorize the futures day trading in his account that is the subject of the reparation complaint. NFA Tr. Vol. I, Jan. 7, 2002 at 115; 89 *et seq.*; Vol. III, January 8, 2002 at 72-83. Moreover, the customer confirmation statements and monthly account statements for Plank's account, along with Chesapeake's order tickets, were in evidence in the arbitration proceeding. *See* Plank NFA Exhs. 31, 32, and 46. Plank complains now about the prices at which his trades were executed, but could very well have raised that issue before the NFA. Indeed, having specifically alleged violations of Commission Regulation 1.35 before the NFA, Plank could have raised all suspected violations of that rule, together with claims that relied on records maintained pursuant to it.

Plank maintains that the evidence in the reparation proceeding would be different than the evidence in the NFA proceeding because floor order tickets for his account (as distinguished from office order tickets) and documents relating to Chang's account were not in evidence in the prior proceeding. Plank asserts that he was prevented from litigating claims relying on floor

order tickets before the NFA because respondents did not produce all records reflecting transactions in his account and the NFA did not compel respondents to do so.

Floor order tickets are required to be kept by executing brokers under Commission Regulation 1.35. The respondents in this case were not executing brokers and therefore were not required to keep floor order tickets.

NFA's refusal to order respondents to produce documents they did not possess is not determinative of whether this matter is barred. As the party with the burden of proof before the NFA, Plank could have sought these documents directly from the executing broker. Also, Plank cannot defeat the operation of *res judicata* even if the NFA erred in not requiring respondents to obtain the floor order tickets, because the doctrine does not afford litigants a second chance to pursue a claim that was frustrated by errors committed by the forum. Therefore, we find that allegations relating to audit trail irregularities or recordkeeping violations, and claims based on records required to be kept under Commission Regulation 1.35, were or could have been litigated before the NFA, and accordingly are barred.

Moreover, factual claims alleging fraudulent allocation of trades, trading against or ahead of customers, and similar misconduct by Chang also were or could have been litigated before the NFA, and are therefore barred. Chang's personal trading activity was raised at the hearing, and any claims arising from it were, or could have been, aired. NFA Tr. Vol. VIII, Jan. 10, 2002 at 90-91. Also, the scope of Plank's pleadings before the NFA about Chang clearly encompass his fraudulent allocation and related claims in this proceeding. The NFA case dealt with violations of NFA rules prohibiting broker fraud, and mandating members to follow just and equitable principles of trades, and to meet high standards of commercial honor. The NFA case also included common-law fraud and breach of fiduciary duty. Plainly, both the legal and factual

bases for fraudulent allocation and related claims were present in the NFA case, and are barred here. "Were we to focus on the claims asserted in each suit, we would allow parties to frustrate the goals of *res judicata* through artful pleading and claim splitting given that '[a] single cause of action can manifest itself into an outpouring of different claims, based variously on federal statutes, state statutes, and the common law.'" *Pueschel*, 369 F. 3d at 355 (internal citation committed).

For the foregoing reasons, we find that all of Plank's claims in this proceeding are part of the same transaction or series of transactions out of which the NFA action arose and, accordingly, were, or could have been raised before the NFA. Accordingly, we find that this reparation claim is barred by *res judicata.*

Complainant maintains that interlocutory review of this matter is not available pursuant to Commission Regulation 12.310(f), which provides that an application for interlocutory review of an order denying a motion for summary disposition shall not be allowed.[4] We propose to apply Commission Regulation 12.4(b) to waive Commission Regulation 12.310(f).[5] To do so would expedite the decision in this matter, and, given our analysis of the *res judicata* issue, no party will be prejudiced by the waiver and the ends of justice will be served. Pursuant to the notice requirement of Commission Regulation 12.4(b), we give the parties ten days from the date

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[4] Commission Regulation 12.310(f) reads in pertinent part:

An application for interlocutory review of an order denying a motion for summary disposition shall not be allowed.

[5] Commission Regulation 12.4(b) reads:

In the interest of expediting [a] decision or to prevent undue hardship on any party or for other good cause the Commission may order the adoption of expedited procedures, may waive any rule in this part in a particular case, and may order proceedings in accordance with its direction upon a determination that no party will be prejudiced thereby, and that the ends of justice will be served. Reasonable notice shall be given to all parties of any action taken pursuant to this provision.

this order is served to show cause why Commission Regulation 12.310(f) should not be waived.

The proceedings below shall continue to be stayed until further notice.

IT IS SO ORDERED.

By the Commission (Acting Chairman BROWN-HRUSKA, and Commissioners LUKKEN, HATFIELD and DUNN).

Catherine D. Daniels
Assistant Secretary of the Commission
Commodity Futures Trading Commission

Dated: May 31, 2005