

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-~~2006~~

ORDER GRANTING
APPLICATION FOR
INTERLOCUTORY REVIEW

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On May 31, 2005, the Commission entered an order on interlocutory review holding that this reparation matter is barred by *res judicata* in light of a prior final arbitration decision by the National Futures Association (“NFA”). The NFA dismissed complainant John M. Plank’s (“Plank”) arbitration claim, which involved the same parties and cause of action as this proceeding. The Commission determined that the two proceedings had a common cause of action, based upon alleged wrongdoing in connection with the same trading account, and that all of Plank’s claims in this case were, or could have been, raised before NFA.

In its order the Commission noted Plank’s assertion that interlocutory review was not available pursuant to Commission Regulation 12.310(f), which provides that “[a]n application for interlocutory review of an order denying a motion for summary disposition shall not be allowed.” In response to Plank’s argument, the Commission proposed to apply Commission Regulation 12.4(b) to waive Commission Regulation 12.310(f).¹ The Commission then ordered the parties to show cause why Commission Regulation 12.310(f) should not be waived.

¹ 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

Respondents submitted a pleading urging the application of our waiver rule. Plank maintains that Commission Regulation 12.310(f) should not be waived. For the most part, however, he repeats his earlier arguments as to why *res judicata* should not apply. These contentions are inapposite to the question the Commission directed him to address.

Plank, however, also raises an argument that he will be prejudiced if the Commission waives rule 12.310(f). He cites Commission Regulation 1.35, under which respondents are required to retain certain records of commodity futures or options transactions for a period of five years from the date of such records, in accordance with Commission Regulation 1.31. Plank points out that, because the five-year retention period applicable to records germane to his claim is approaching its end (because his account was traded in 2000), respondents legally may dispose of such records at that time. He contends that if potentially relevant records are disposed of, he will be prejudiced because further pursuit of his claim would be impaired. Plank argues that respondents continue to frustrate his discovery attempts.

To the extent that Plank refers to the preservation of trading documents not already in his possession, that argument fails because our conclusion that *res judicata* applies forecloses any arguments flowing from discovery disputes in this or the prior forum about potential evidence not already obtained. A core policy underlying *res judicata* is to preclude relitigation of causes of action brought (or that could have been brought) in the prior litigation to avoid another a trial, including discovery. *See Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593-94 (7th Cir. 1986); *see also McLaughlin v. Bradlee*, 602 F. Supp. 1412 (D.D.C. 1985) (plaintiff's request for discovery barred by *res judicata*); *In re Wilcher*, 56 B.R. 428, 440 (Bkrtcy. N.D. Ill. 1985) (*res*

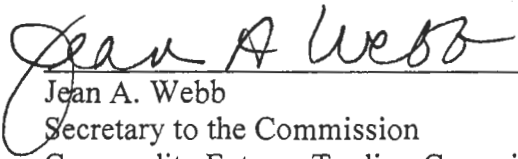
expedited procedures, may waive any rule in this part in a particular case, and may order proceedings in accordance with its direction upon a determination that no party will be prejudiced thereby, and that the ends of justice will be served. Reasonable notice shall be given to all parties of any action taken pursuant to this provision.

judicata averts actual relitigation and discovery which potentially encourages relitigation of closed matters).

We hold that Plank has failed to show cause why Commission Rule 12.310(f) should not be waived. Accordingly, we grant the application for interlocutory review and dismiss Plank's reparation claim under the doctrine of *res judicata* as explained in our Order of May 31, 2005.

IT IS SO ORDERED.²

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



Jean A. Webb
Secretary to the Commission
Commodity Futures Trading Commission

Dated: September 8, 2005

² Under Sections 6(c) and 14(e) of the Commodity Exchange Act (7 U.S.C. §§ 9 and 14(e) (1994)), 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 was 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 effect of the order, the appealing party files with the clerk of the court a bond equal to double the amount of the reparation award.