UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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

Respondents Chesapeake Investment Services, Inc. ("Chesapeake"), Vision Limited Partnership ("Vision"), Richard Teal Barney ("Barney"), and Yu Dee Chang ("Chang") seek interlocutory review of a question that the presiding Administrative Law Judge ("ALJ") certified in a January 29, 2003 Order:

> Does [an] arbitration award by the [National Futures Association], bearing the date March 8, 2002, preclude consideration of this reparations claim by the Commission.[1]

Relying on Commission Rule 12.24, as well as the doctrines of *res judicata* and collateral estoppel, respondents urge the Commission to undertake review of this question and answer it in the affirmative. Complainant John M. Plank ("Plank"), who appears *pro se*, argues that immediate review of the question posed by the ALJ is inappropriate because the record does not establish the type of extraordinary circumstances required by Commission Rule 12.309.

For the reasons explained below, we deny review.

[1] In addition to certifying the above-referenced question to the Commission, the ALJ's order denied a motion filed by Vision seeking to have the ALJ disqualify himself for bias. Vision alone seeks interlocutory review of this aspect of the ALJ's January 29, 2003 Order. For reasons similar to those described in *In re Global Telecom, Inc.*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,039 (CFTC May 15, 2002), we deny review of the disqualification issue.

BACKGROUND

The question posed by the ALJ arises out of the somewhat unusual circumstances that preceded Plank's submission of his reparations complaint in August 2002. Plank maintained a futures and options account at Vision, a registered futures commission merchant, between April and December 2000. He deposited $600,000 to margin trading in the account and lost the bulk of those funds. Chesapeake, which had a guarantee agreement with Vision, was the introducing broker for the account. Chang and Barney were associated persons sponsored by Chesapeake.[2]

Initially, Plank sought to recover his losses by filing a demand for arbitration against respondents with the National Futures Association ("NFA").[3] In March 2002, a three-member NFA arbitration panel denied Plank's request for relief in its entirety. In January 2003, the United States District Court for the Northern District of Illinois denied Plank's appeal from NFA's arbitration decision. *Plank v. Vision Limited Partnership*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,284 (N.D. Ill. Jan. 9, 2003).

Plank filed his reparations complaint against respondents while his appeal from NFA's arbitration decision was pending in federal district court. Plank's complaint acknowledged that he had filed arbitration claims against respondents with both NFA and NASD, but insisted that his reparations case involved different facts and claims. Respondents' joint answer to the complaint included a motion that urged the Office of Proceedings ("Proceedings") to terminate

[2] Chang was a principal of Chesapeake.

[3] Plank also filed a claim against Chesapeake, Barney, and Chang in an arbitration forum of the National Association of Securities Dealers ("NASD"). In the NASD proceeding, Plank sought to recover losses in a securities account that he had opened at Fiserv Investor Services, Inc. ("Fiserv"), a registered broker-dealer. The account was introduced by Chesapeake. An NASD arbitration panel issued an award against Chesapeake and Fiserv for $81,000 in damages, plus costs and attorney fees. Plank's charges against Barney, Chang, and Plank's account executive at Fiserv were dismissed.

the complaint under Commission Rule 12.24.[4] Proceedings denied the motion on January 17, 2003, but noted that respondents could file a motion seeking similar relief with the presiding ALJ.

None of the respondents filed a motion with the ALJ raising issues under Rule 12.24. In a scheduling order dated January 28, 2003, however, the ALJ acknowledged the decision of the NFA arbitration panel against Plank and characterized it as "devoid in substance, conclusory as to law, and entirely lacking in reference to any pertinent facts." On the same day, Vision filed a motion requesting that the ALJ disqualify himself from this proceeding in light of errors he had committed in resolving another reparations case.[5] On January 29, 2003, the ALJ denied Vision's motion to disqualify. In the order of denial, the ALJ certified the question described above.[6]

DISCUSSION

In their application, respondents focus on the substantive arguments that they believe justify disqualifying the ALJ and dismissing Plank's complaint. As noted above, we conclude that the record does not establish the type of extraordinary circumstances that justify immediate review of the disqualification issue. As for the other issues addressed in the application, a close analysis demonstrates that there is nothing, in fact, to review.

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[4] Rule 12.24 governs dismissals of complaints in the context of certain "parallel proceedings." It defines a parallel proceeding as an "arbitration proceeding or civil court proceeding, involving one or more of the respondents as a party, which is pending at the time [a] reparation complaint is filed and involves claims . . . that are based on the same set of facts which serve as a basis for all of the claims in the reparation complaint, and which . . . was commenced at the instance of the complainant in reparations." *See* Rule 12.24(a)(1)(i). Pursuant to Rule 12.24(c)(1), the Director of the Office of Proceedings "shall refuse to institute a [Part 12 proceeding] in which there is a parallel proceeding described in paragraph (a)(1) of this section." Likewise, under Rule 12.24(c)(2), if notice of a parallel proceeding is received after a proceeding has commenced, the proceeding "shall be dismissed, without prejudice." Any action taken under Rules 12.24(c)(1) or 12.24(c)(2) is deemed a final order of the Commission and is not subject to Commission review on appeal. *See* Rule 12.24(f).

[5] *See Biekovsky v. Bunyard*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,170 (Initial Decision September 27, 2002), *reversed in part*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,427 (CFTC March 5, 2003).

[6] On March 28, 2003, the ALJ issued an order staying the proceeding until "the question certified to the Commission is resolved."

As an initial matter, respondents' application for interlocutory review relies on Commission Rule 12.24 as one basis for dismissing the complaint. The ALJ, however, was never asked to rule on the applicability of Rule 12.24, and his brief reference to the decision of the NFA arbitration panel did not resolve the issue. In any event, actions taken under Rule 12.24 are treated as final orders from which no appeal may be taken. *See* Rule 12.24(f).

With respect to the question certified by the ALJ, Commission Rule 12.309(a)(3) provides for interlocutory review by the Commission "upon a determination by the [ALJ] . . . that (i) a ruling sought to be appealed involves a controlling question of law or policy; (ii) an immediate appeal may materially advance the ultimate resolution of the issues in the proceeding; and (iii) subsequent reversal of the ruling would cause unnecessary delay or expense to the parties." Because the ALJ has not yet ruled on the question that he certified for review, it would be premature for us to resolve it at this juncture.[7]

In this regard, in deciding whether complainant's reparations claims should be barred by *res judicata* or collateral estoppel, further development of the facts may be necessary. As we have observed, the doctrines of *res judicata* and collateral estoppel are based on the proposition that a party who has unsuccessfully litigated an issue before a court of competent jurisdiction

[7] The certification process prescribed in Rule 12.309(a)(3) is similar to the process set forth in 28 U.S.C. § 1292(b), which permits U.S. district court judges to certify: (a) that an order not otherwise appealable on an interlocutory basis involves a controlling question of law as to which there is substantial ground for a difference of opinion and (b) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Under 28 U.S.C. § 1292(b), once an order is so certified, the parties may appeal it to the appropriate circuit of the United States Court of Appeals, which, in its discretion, can except or reject the appeal. In making that determination, courts have stressed the importance of the order, rather than issue certified by the district court, as the focus of review. *Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (jurisdiction under § 1292(b) "applies to the *order* certified to the court of appeals, and is not tied to the particular question articulated by the district court") (emphasis in original). Likewise, it has been held that, if the question certified by the district court can be better decided after further development of the facts, it would inappropriate for a court of appeals to accept review. *Palandjian v. Pahlavi*, 782 F.2d 313, 314 (1st Cir.1986) (noting certification under § 1292(b) "'should be used sparingly and only in exceptional circumstances, and where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority'") (internal citation omitted).

ordinarily should not be permitted to relitigate the issue in a subsequent proceeding.[8] *Harter v. Iowa Grain Company*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,644 at 48,076 (CFTC May 20, 1999). Under the traditional rules of merger and bar, a valid and final judgment rendered in an action extinguishes all of the plaintiff's rights to remedies against the same defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. This determination is a pragmatic one, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, and whether they form a convenient trial unit. RESTATEMENT (SECOND) OF JUDGMENTS, § 24 (1982).

Although the ALJ criticized the summary nature of the decision issued by the NFA arbitration panel, it is well settled law that arbitration decisions may be given preclusive effect under either doctrine. *Harter v. Iowa Grain Company*, ¶ 27,644 at 48,075. In analogous circumstances, we have suggested that, before such a decision can be made, the finder of fact must be given an opportunity to review the pleadings in the arbitration proceeding, as well as the transcript of the hearing.[9] *Tager v. ContiCommodity Services, Inc.*, [1987-1990 Transfer Binder]

[8] Collateral estoppel precludes relitigation of an issue of fact or law that was actually litigated and determined in a prior proceeding involving the party against whom it is being asserted, if the determination was necessary to the judgment in that proceeding. *Boston Trading 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). Under *res judicata*, 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. Thus, unlike collateral estoppel, *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. *Id*.

[9] Various pleadings and motions the parties have submitted in this proceeding to date suggest that they each possess documents potentially relevant to a *res judicata* or collateral estoppel analysis by the ALJ. For example, Plank attached to his reparations complaint a copy of his demand for arbitration before the NFA, office order tickets and other trading records that may have been used in connection with the NFA proceeding, and the NFA arbitration panel's decision denying him an award. Similarly, in March 2003, respondents filed a motion for summary disposition—still pending before the ALJ—seeking dismissal of Plank's complaint on grounds of *res judicata* and collateral estoppel. Among other documents attached to that motion were Plank's demand for arbitration by the NFA, the arbitration panel's decision, and Plank's hearing plan, which summarizes his arguments before the NFA and lists his prospective witnesses and hearing exhibits. Since the record of the NFA proceeding is available to both parties, we expect them each to rely on it in arguing for, or against, the ALJ's application of *res judicata* or collateral estoppel to bar some, or all, of the claims and issues raised in Plank's reparations complaint.

Comm. Fut. L. Rep. (CCH) ¶ 23,907 at 34,215 (CFTC Sept. 18, 1987). Because both estoppel and *res judicata* are affirmative defenses, the burden of proof falls on respondents.

CONCLUSION

For the foregoing reasons, respondents' application for interlocutory review is denied.

IT IS SO ORDERED.

By the Commission (Chairman NEWSOME and Commissioners LUKKEN and BROWN-HRUSKA).

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

Dated: July 22, 2004