U.S. COMMODITY FUTURES TRADING COMMISSION
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ATS CAPITAL MANAGEMENT CORP. Complainant, v. JOHN WILLIAM SENDLOSKY and TRADESTATION SECURITIES, INC., Respondents.	*	CFTC Docket No. 10-R015

ORDER OF DISMISSAL

Overview

ATS Capital Management Corporation brought an interesting case against Tradestation Securities, Inc., ... to NFA arbitrators over two years ago. Over 16 months ago, that case was decided on the merits; ATS's claim was denied and dismissed with prejudice. And about a year ago, ATS sued Tradestation again here. As all the elements are present for a *prima facie* case of *res judicata*, ATS's suit here is barred.

Of additional interest is ATS's unusual procedural history here at the Commission. Simply put, this case should not have been forwarded, as the complainant openly acknowledged its prior loss on the merits in arbitration. Nevertheless, the case was permitted to proceed, and the Office of Proceedings spent nearly a year developing non-dispositive issues. This imposed unnecessary costs on the parties – particularly the complainant – as well as on this court and (oddly enough) the British Virgin Islands. Accordingly, although

this opinion begins with a discussion of *res judicata,* it also explains how these unnecessary litigation costs might have been avoided.

Res Judicata

ATS has brought a reparations complaint against John Sendlosky and Tradestation.[1] It alleges that on August 16, 2007, Tradestation improperly liquidated ATS's position on 35 contracts of e-muni S&P 500 futures, resulting in a loss of approximately $150,000.[2] On January 21, 2008, Tradestation once again improperly liquidated a position of e-muni S&P 500 futures, this time causing losses of approximately $350,000.[3] ATS claims a total of $506,364 in damages for loss of funds and an additional $23,486 in interest.[4]

We do not, however, reach the merits of ATS's claim. Among its filings, ATS included what it described as a copy of the "arbitration claim and result"

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[1] ATS Capital Management Corporation Complaint ("Complaint"), at 1. Sendlosky is an employee of Tradestation. As such, we will collectively refer to the respondents as "Tradestation."

[2] *Id.* at Annex #4, 1.

[3] *Id.* at 2.

[4] *Id.* We ignore ATS's interest calculation. An award of interest can only be calculated on the date of judgment, because the interest rate (imposed by regulation) is constantly changing. *See Anderson v. Beach*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,496 at 63,579 (CFTC Dec. 3, 2009); *Newman v. Bache Halsey Stuart Shields, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L Rep. (CCH) ¶22,432 at 29,919 (CFTC Nov. 19, 1984) (*holding* that "[t]he relevant date for ascertaining the rate for all post-judgment interest, and for those cases where, as here, the presiding officer decides to award prejudgment interest, shall be the date of the initial decision."); 17 C.F.R. §12.407(d). As no judgment has been entered, no interest calculation could be accurate. Therefore, its inclusion in damages is clearly improper.

of "ATS Capital Management Corp. against Tradestation Securities."[5] ATS's statement of facts before the NFA includes the same key dates – August 16, 2007 and January 21, 2008 – as well as the exactly same amount claimed for loss of funds.[6] And on April 15, 2009, the National Futures Association denied and dismissed with prejudice all claims by ATS against Tradestation.[7]

Immediately upon our receipt of this case we issued an order staying discovery and requiring ATS to show cause why the case should not be dismissed under the doctrine of *res judicata.*[8] As stated therein, the doctrine of *res judicata* precludes relitigation of a cause of action brought in a prior litigation.[9] This basic principle of law is designed to prevent a losing party from

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[5] Letter to the Office of Proceedings enclosing a copy of Arbitration Claim and Result ("Arbitration Claim and Result"), dated August 29, 2009, at 1.

[6] *Id.* at 2.

[7] *Id.* at 6.

[8] Order to Show Cause and Staying Discovery, dated July 9, 2010 ("Order to Show Cause").

[9] *Plank v. Chesapeake Investment Services, Inc.,* [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,087 at 57,338 (CFTC May 31, 2005). The Commission held in *Plank* that "...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.'" (*Citing Cieszkowska v. Gray Line New York,* 295 F.3d 204, 205 (2nd Cir. 2002). *See, e.g., Rivet v. Regions Bank of Louisiana,* 522 U.S. 470, 476 (1998) (*holding* that *res judicata* bars relitigation not only of those issues that were raised and decided in the prior case but also issues that could have been previously raised).

getting multiple chances to litigate what is substantially the same case.[10] Moreover, "*[r]es judicata* is considered a rule of fundamental and substantial justice, because it encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes."[11]

Res judicata bars relitigation when three conditions are met: (1) a prior final decision on the merits by a court of competent jurisdiction; (2) involving the same parties or their privies; (3) arising out of the same cause of action.[12] ATS's response to our Order to Show Cause discusses (to a limited extent) the third condition; it argues in effect that it has new and different claims and legal theories.[13] Yet its argument is flawed; there can be no doubt that ATS's prior litigation against Tradestation meets all three conditions for dismissal.

As stated, the NFA denied and dismissed with prejudice all claims by ATS against Tradestation – on April 15, 2009.[14] Clearly, this qualifies as a "prior final decision on the merits." Thus, the only remaining determination

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[10] *See Hatch v. Reliance Ins. Co.,* 758 F.2d 409, 415 (9th Cir. 1985) (*holding* that one of the purposes of *res judicata* is to prevent piecemeal litigation).

[11] *Smith v. City of Chicago,* 820 F.2d 916, 917 (7th Cir. 1987) (*citing Hart Steel Co. v. Railroad Supply Co.,* 244 U.S. 294, 299 (1917); *Brown v. Felsen,* 442 U.S. 127, 131 (1979)).

[12] *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 327 n.5 (1979).

[13] ATS Capital Management Corp. Responses (sic) to Order to Show Cause and Staying Discovery (ATS's Response to Order to Show Cause), dated July 30, 2010, at 1-3. The remainder of the response discusses issues unrelated to *res judicata.*

[14] Arbitration Claim and Result at 6.

necessary to satisfy the first condition is whether the NFA is a court of competent jurisdiction. And, of course, it is.

The Commission has held that it is "well-settled that arbitration decisions may be given preclusive effect under *res judicata*."[15] Federal Courts of Appeal agree; for instance, the Eleventh Circuit has held, "when an arbitration proceeding affords basic elements of adjudicatory procedure, such as an opportunity for presentation of evidence, the determination . . . should be treated as conclusive in subsequent proceedings."[16]

Similarly, there can be no question that this case involves the same parties or their privies.[17] Sendlosky was and remains an employee of Tradestation, and ATS does not dispute that he was acting within the scope of

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[15] *Plank,* [2005-2007 Transfer Binder] ¶30,087 at 57,337 (*citing Harter v. Iowa Grain Co.,* [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,644 at 48,075 (CFTC May 20, 1999)). Moreover, the arbitrators discussed in the *Plank* decision were also from the NFA, and the Commission goes on at length concerning the NFA's treatment of claims under the Commodity Exchange Act – and expressly confirms that the NFA can hear such claims. *See Id.* at 57,338-39. Thus, there can be no doubt that the NFA arbitrators in the case at bar could also have heard any claim ATS cared to bring.

[16] *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985); *See generally Rudell v. Comprehensive Accounting Corp.*, 802 F.2d 926 (7th Cir. 1986).

[17] The Commission has held that "[u]nder *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." *Plank,* [2005-2007 Transfer Binder] ¶30,087 at 57,338 (citation omitted). Moreover, we note that ATS does not argue that its inclusion of Sendlosky as a respondent somehow allows it to avoid dismissal on the basis of *res judicata.* Nevertheless, we discuss it for the sake of completeness.

his employment with respect to the facts at issue.[18] As such, he is in privity with Tradestation.[19] This is hornbook law and a matter of routine for federal courts; indeed, the Second Circuit addressed this precise issue just a few months ago.[20] In that case, the Court of Appeals held that the plaintiff could not avoid dismissal on the ground of *res judicata* by adding an employee of the defendant to the second suit.[21]

And finally, the cause of action at issue here is exactly the same as that litigated before the NFA. Though ATS discusses this element of *res judicata*, it displays its confusion by conflating the distinct concept of "cause of action" with "legal theory" or "claim," by arguing (in effect) that it had different legal

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[18] On the contrary, ATS's complaint directly supports this conclusion. *See* Complaint, Annex #4 at 1-2.

[19] As stated, ATS does not even argue the point. *See* ATS's Response to Order to Show Cause.

[20] *Krepps v. Reiner,* Slip Copy, 2010 WL 1932318 at *2-3 (2nd Cir. May 14, 2010).

[21] *Id.* The court held that "[a]s for Reiner not being a party to the EA action, claim preclusion bars a second suit 'involving the same parties *or their privies.*'" *Id.* (*citing Semtek Int'l, Inc. v. Lockheed Martin Corp.,* 531 U.S. 497, 502 (2001)). Thus:

> Even if Reiner were not an officer of Cognitive Arts, it is undisputed that he was an employee acting within the scope of his employment in connection with the matter here at issue. Thus, Cognitive Arts clearly had a relationship of vicarious liability with Reiner supporting a determination of privity for the purpose of claim preclusion. (*citing* Restatement (Second) of Judgments § 51 cmt. B).

theories in the NFA arbitration.[22] For instance, ATS argued before the NFA that Tradestation was liable for breach of contract because it failed to communicate its margin calls and incorrectly calculated its margin requirements.[23] Conversely, ATS argues here that Tradestation made "false, materially misleading statements and omissions in connection with the alleged issuance of two intraday margin calls to ATS."[24] It summarizes its case here as being "futures contracts fraud."[25]

A cause of action is the underlying set of facts over which a dispute arises.[26] Thus, the cause of action here is that ATS lost certain sums of money, on specific dates, as a result of liquidations by Tradestation.[27] Meanwhile, a legal theory is a theory of liability. In other words, a legal theory explains *why* the respondent should pay for the complainant's loss – given an underlying cause of action.[28] Thus, although ATS has new legal theories that

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[22] ATS's Response to Order to Show Cause, at 2-3. The Commission has held that "[i]t is also well-accepted that a mere change in legal theory does not create a new cause of action for *res judicata* purposes." *Plank* [2005-2007 Transfer Binder] ¶30,087 at 57,338 (*citing L-Tec Electronics Corp. v. Cougar Electronic Org., Inc.,* 198 F.3d 85, 88 (2nd Cir. 1999)).

[23] ATS's Response to Order to Show Cause, at 2-3.

[24] *Id.* at 2. (emphasis in original).

[25] *Id.* at 3.

[26] *See, e.g., Nilsen v. City of Moss Point, Miss.,* 701 F.2d 556, 560 (5th Cir. 1983).

[27] Complaint at Annex #4, 1-2.

[28] *See supra* n.22.

differ from those it presented before the NFA, this is irrelevant to our determination whether to dismiss the action on the ground of *res judicata.*

ATS has requested an oral hearing to supplement its written response to our Order to Show Cause.[29] However, it provides no reasonable basis for its request; that is, it suggests no reason *why* a hearing is necessary.[30] Rather, it says only that it wants to support its written response.[31] With what, we do not know. Conversely, the respondents argue that no hearing is needed; they say that the law is clear, the facts are uncontested, and that any hearing would be "a waste of administrative resources and cause the respondents undue expense."[32] We agree.[33]

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[29] Complainant's Request for Hearing, dated August 9, 2010.

[30] *Id.*

[31] *Id.*

[32] Respondents' Reply to Complainant's Response to Order to Show Cause and Staying Discovery and Request for Hearing, filed August 9, 2010, at 1-2.

[33] Indeed, the respondents cannot know the whole of the expense that they would have had to incur. Since all the parties reside within 30 miles of Miami, Florida, it is obvious that – if we had determined a hearing was warranted – the most convenient location would be in Miami. However, had we set a hearing, we would have been forced to do so in St Petersburg – some 250 miles away. Why would we put the parties through such needless expense and inconvenience? The answer is that the Rule 12.312(b) requires it. 17 C.F.R. §12.312(b).

This rule was instituted in a period where the Commission had exponentially more reparations cases per Administrative Law Judge than we have today, and was designed to reduce travel time and expense by consolidating the locations for hearings to a select group of cities. *See Final Rules Relating to Reparations,* [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,006 at 28,483 (continued..)

In sum, ATS has brought suit for a second time: (1) after a final judgment on the merits by the NFA; (2) against the same party (and one of its privies); and (3) on the same underlying cause of action. Clearly then, this case meets all of the conditions for dismissal on the ground of *res judicata.* Accordingly, we conclude that a hearing is not warranted because (1) the issues and material facts are clear from the written submissions, and (2) a

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(..continued)

(CFTC Jan. 11, 1983). However, for many years (and for the foreseeable future) we have had very few cases. And many, like this one, never go to hearing.

Though this rule is now senseless, the Commission has retained it and has applied it strictly. For instance, in a very similar case, *Kaps v. Executive Commodity Corp.,* the majority of the respondents resided in Miami. [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,550 at 60,174 (CFTC June 26, 2007). Accordingly, the judge set the hearing there. *Id.* The Commission vacated the order, explaining:

> Commission Rule 12.312(a) states in relevant part that '[i]f and when the proceeding has reached the stage of an oral hearing, the [ALJ], *giving due regard for the convenience of the parties,* shall set a time for the hearing, as well as a location *prescribed in paragraph (b) of this section* . . . .' Section 12.312(b) states in relevant part that 'except as provided in this subparagraph, the location of an oral hearing *shall be* in one of the following cities.' There follows an alphabetical list of 20 cities within the continental United States, which [does not include] . . . Miami.

Id. at 60,175 (emphasis in original). The Commission noted that the judge may only waive this rule and set the hearing at a "more convenient locale" when none of the listed cities are within 300 miles of a party's residence. *Id.* It further took "notice of the fact that Miami, where the respondents reside, is within 300 miles of one listed city, St. Petersburg." *Id.* at 60,175 n.1. Thus, hearings must be held only in an arbitrary list of cities, unless one of the parties is outside an arbitrary distance from any of the arbitrary cities. Here, none are.

hearing would only impose further unnecessary costs on the parties.[34] We therefore **DENY** the request for a hearing.

Finally, it is well established that a case may be dismissed when the complaint itself reveals a clearly meritorious defense.[35] While the arbitration

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[34] We say "further" unnecessary costs, because the parties – particularly the complainant – have already been put through substantial and unnecessary expense. The Office of Proceedings spent nearly a year developing another issue that proved to be non-dispositive; that is, whether the complainant met the bond requirement for foreign residents. 17 C.F.R. §12.13(b)(4)(i)(A)-(B). (For a detailed discussion of the bond requirement, see *Vargas v. FX Solutions, LLC,* [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,360 at 62,881-86 (CFTC June 1, 2009). Strangely, this included the initiation by the Office of Proceedings of direct contact with the government of the British Virgin Islands – in an apparent attempt to develop the complainant's evidence for it.

Over the course of that year, the Office of Proceedings never issued a deficiency letter with respect to the completed arbitration, nor did it work to develop the issue in any way. Further, when the respondents filed a motion requesting that the Director reconsider forwarding the complaint (on the grounds of *res judicata and collateral estoppel*), the Director exercised his prerogative to deny the motion without a reason. *See Final Rules Relating to Reparations*, [1982-1984 Transfer Binder] ¶22,006 at 28,468.

Although the rules leave discretion with the Director, it is hard to imagine a clearer case for dismissal under the doctrine of *res judicata.* And a gate-keeping function that never shuts does not serve its intended purpose. Here, the decision to ignore the issue had the direct result of increasing costs for both parties and even the British Virgin Islands. The complainant had to file nearly a dozen times to reach this stage, and the respondents filed an 18 page answer/motion to dismiss along with multiple exhibits – all unnecessarily, as no court in the country would permit ATS's complaint to be litigated for a second time.

[35] *See Yeager v. Jedlicki,* [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶29,935 at 56,841 (CFTC Dec. 16, 2004). *See also Brooks v. City of Winston-Salem,* 85 F.3d 178, 181 (4th Cir. 1996) (*holding* that "dismissal nevertheless is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense."); *Weiler v. Household Fin. Corp.,* 101 F.3d 519, 524 (7th Cir. 1996).

agreement was not included with the complaint, it was filed by ATS as an addendum shortly thereafter.[36] As such, ATS's own filings demonstrate that this case is barred on the ground of *res judicata*, and *res judicata* without doubt qualifies as a clearly meritorious defense. We therefore **DISMISS** this case **WITH PREJUDICE** under the doctrine of *res judicata*.

IT IS SO ORDERED.

On this 2nd day of September, 2010

Bruce C. Levine
Administrative Law Judge

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[36] *See* Arbitration Claim and Result. The key is that the complainant introduced the evidence of the meritorious affirmative defense; as such, it is uncontested, making dismissal appropriate. And regardless, the United States Supreme Court has clearly held that a case may be dismissed on the ground of *res judicata* on the Judge's own motion. *Plaut v. Spendthrift Farm, Inc.* 514 U.S. 211, 231 (1995) (*holding* that "...as many Federal Courts of Appeals have held, waivers of *res judicata* need not always be accepted – that trial courts may in appropriate cases raise the *res judicata* bar on their own motion.")