U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
www.cftc.gov

Office of Proceedings

SHUNLIAN HOU, Complainant,	*	
v.	*	CFTC Docket No. 13-R12
KEM H. CHONG, Respondent.	*	

ORDER GRANTING SUMMARY DISPOSITION

As explained below, after carefully reviewing complainant's and respondent's submissions, I have granted respondent's motion for summary disposition, and thus have dismissed Hou's complaint on grounds that it is barred by the doctrine of *res judicata*.

Undisputed Facts

The parties

1. Complainant ShunLian Hou ("Hou") is a resident of Zhuzhou, Peoples' Republic of China. Hou's account application indicated that she had a 1942 birthdate, was employed as a member of the "general staff" by Zhuzhou Cemented Carbide Group, a large state-owned enterprise, and had some prior investment experience.

Hou's submissions show that while she has valiantly strived to communicate in English, she is not remotely fluent or conversant in English. As a result, my office advised her that it would likely be in her best interest to hire a competent attorney, who presumably would be

adequately proficient in English. However, Hou rejected this advice, and has appeared throughout *pro se*. [*See* Thompson to Hou May 5, 2014 e-mail; and Hou's June 12, 2014 reply.]

Notwithstanding Hou's awkward and imprecise English, it is sufficiently apparent from her various submissions that the gravamen of her reparations complaint is a series of alleged breaches by Chong, principally in January and February 2011, in connection with: one, certain disputed liquidations in her self-directed account; two, restrictions on her ability to carry offsetting trades in her account, which she characterized as restrictions on her attempts to "hedge;" and three, purported operational problems related to a change in trading platforms. [*See, e.g.*, Hou's initial reparations complaint and various addenda to complaint (*see* fn. 1, transmittal letter from Gizzarelli to Hou, dated May 15, 2013); and Hou's submissions dated September 17, October 24 and 29, November 2, and December 29, 2013; March 11, June 12, September 19, and October 6, 2014; and January 5 and 13, 2015.]

2. Kem Hong Chong ("Chong"), a resident of Chicago, Illinois, at the relevant time was registered as an associated person with Peregrine Financial Group, Incorporated ("PFG"), which at the relevant time was a registered futures commission merchant. [NFA records.] Chong initially appeared *pro se*, but hired an attorney, Rebecca Wing, Esq., to press his *res judicata* defense.

National Futures Association ("NFA") Compliance Rule 2-48

3. On February 4, 2011, NFA Compliance Rule 2-48 went into effect. NFA Rule 2-48 requires all Forex Dealer Members to file daily electronic reports of trade data. [Attachment to Chong's Statement of Undisputed Facts in Support of Motion for Summary Disposition.]

Opening and Trading the Account

4. On May 20, 2010, Hou opened a forex account at PFG. [*See* account application and customer agreement, Exhibit A, and ¶ 2, Kem Chong Affidavit (originally produced as exhibit in NFA arbitration between Hou, and Chong and PFG), Exhibit B, Hou's Motion for Summary Disposition ("MSD").]

5. Complainant's account was a self-directed account that was initially traded on a Currenex front-end retail platform known as Viking. [¶ 3, Chong Affidavit, *id.*]

6. On February 4, 2011, NFA Compliance Rule 2-48 became effective, requiring all Forex Dealer Members to file daily electronic reports of trade data with the NFA. At that time, the Viking platform did not have the technology to provide PFG the order data necessary to comply with Rule 2-48, and therefore PFG transitioned clients from the Viking to the MT4 trading platform, which did have the necessary technology for compliance with NFA Rule 2-48. [¶ 4, Chong Affidavit, *id.*; and ¶¶ 2-4 Krystian Kling Affidavit (originally produced as exhibit in NFA arbitration between Hou, and Chong and PFG), Exhibit C, MSD.]

7. In late January 2011, Hou began experiencing losses and complaining to PFG about those losses. On February 7, 2011, PFG liquidated an under-margined trade in Hou's account. [*See* copies of e-mails attached to Hou's reparations complaint; and ¶¶ 8 and 9, Chong Affidavit, *id.*]

Hou's NFA Arbitration Claim (11-ARB-95)

8. On December 7, 2011, Hou filed an NFA arbitration claim against Chong and PFG. Her claim arose from factual circumstances in late January and February 2011, and focused on purported shortcomings of PFG's MT4 trading platform, on restrictions on her ability to "hedge," and on certain liquidations. [*See* Hou's NFA Arbitration Claim, Exhibit D, MSD.]

9. On September 28, 2011, the NFA arbitrator issued an award denying in its entirety and dismissing with prejudice Hou's claim against Chong. [NFA Arbitration Award (11-ARB-95), Exhibit E, MSD.] Hou subsequently filed her reparations complaint, in which she primarily alleges breaches by Chong, in late January and early February 2011, in connection with purported shortcomings of PFG's MT4 trading platform, restrictions on her ability to "hedge," and certain liquidations.

Discussion and Conclusions

Summary disposition

Summary disposition is appropriate when three conditions are met: one, there is no genuine issue as to any material fact; two, there is no need for further factual development; and three, the moving party is entitled to a decision as a matter of law. *See Levi-Zeligman v. Merrill Lynch Futures, Inc.*, Comm. Fut. L. Rep. ¶ 26,236, at 42,031 (CFTC 1994). CFTC rule 12.310(d) provides that a presiding official who "believes that there is no genuine issue of material fact to be determined and that one of the parties is entitled to a decision as matter of law . . . may direct the parties to submit papers in support of and in opposition to summary disposition . . . substantially as provided in [CFTC rules 12.310(a), (b) and (c).]"

As explained below, after carefully reviewing both sides' submissions, I have concluded that there is no genuine issue as to any fact material to the allegations in the complaint, and thus that, as a matter of law, Chong is entitled to dismissal of the complaint on grounds that it is barred by the doctrine of *res judicata.*

Res Judicata ("Claim Preclusion")

Chong did not explicitly raise the *res judicata* defense in his answer, but did assert: "Shun Lian Hou had filed fraudulent complaint against me and PFG in 2011 and 2012 where she lost her case in PFG's Compliance Dept. and NFA's Arbitration Committee." [¶ 9, Chong's Answer.] On October 31, 2014, Chong filed a motion to dismiss the complaint on grounds that it is barred by *res judicata*. Attached to this motion were copies of Hou's NFA arbitration claim and the NFA arbitrator's Award denying Hou's claim. Hou did not reply to Chong's motion to dismiss.

By Notice dated November 21, 2014, I notified the parties that the appropriate procedure to resolve Chong's request to dismiss the complaint was via the summary disposition procedure. On December 5, Chong filed his Motion for Summary Disposition requesting dismissal of Hou's complaint on grounds that it is barred by *res judicata*. Attached to this motion were a Statement of Undisputed Facts in Support of Motion for Summary Disposition, and copies of the Chong and Kling affidavits that originally had been submitted by Chong and PFG in the NFA arbitration proceeding. On January 5 and 13, 2015, Hou filed replies to Chong's motion for summary disposition, in which she basically repeated the allegations in her complaint, and otherwise did not challenge any of Chong's undisputed facts.

Under *res judicata* or "claim preclusion," a judgment on the merits in a prior suit bars a second suit involving the same parties based on the same cause of action. *Plank v. Chesapeake Investment Services, Inc.*, Comm. Fut. L. Rep. ¶ 30,087, at 57,338 (CFTC 2005) (*citing Golden v. Barenburg*, 53 F.3d 869-70 (7th Cir. 1995)). This basic principle of law is designed to prevent a losing party from getting multiple chances to litigate the same case, in other words, to prevent wasteful, piecemeal litigation. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 415 (9th Cir. 1985).

Res 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." *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) and *Brown v. Felsen,* 442 U.S. 127, 131 (1979)). *Res judicata* bars re-litigation 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. *Plank*, at 57,338 (*citing 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); and *Boston Cattle Group v. ADM Investor Services, Inc.*, Comm. Fut. L. Rep. ¶ 26,553, at 43,476-77 (N.D. Ill. 1995)).

Res judicata will bar re-litigation when three conditions are met: one, a prior final decision on the merits by a court of competent jurisdiction; two, involving the same parties or their proxies; and three, arising out of the same cause of action. *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 327 n.5 (1979). *Res judicata* is an affirmative defense. Thus, the burden is on Chong to establish these three conditions.

As for the first condition, the Commission has held that it is "well-settled that arbitration decisions may be given preclusive effect under *res judicata.*" *Plank,* at 57,337. The Commission's *Plank* opinion is in accord with the federal circuit courts. *See e.g., Greenblatt v. Drexel Burnham Lambert, Inc.,* 763 F.2d 1352, 1360 (11th Cir. 1985) ("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."). *See generally Rudell v. Comprehensive Accounting Corp.,* 802 F.2d 926 (7th Cir. 1986). The arbitrators at issue in *Plank*, like the arbitrator in Hou's claim against Chong and

PFG, were NFA arbitrators, and in its opinion the Commission expressly confirmed that the NFA can hear claims under the Commodity Exchange Act. *See Plank,* at 57,338-39. Thus, since NFA arbitration forum is a court of competent jurisdiction and since the NFA arbitrator's award denying in its entirety and dismissing with prejudice Hou's claim against Chong clearly qualifies as a "prior final decision on the merits," Chong has established the first condition.

Here, it is undisputed that the NFA arbitration and Hou's reparation complaint involve the identical parties and that the NFA issued a final decision adverse to Hou. Thus, Chong has established the second condition.

The remaining question is whether the two proceedings arise from a common cause of action. In this connection, in *Plank*, the Commission noted:

> 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). 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).

Plank, at 57,338. Here, the core of operative facts common to both of Hou's lawsuits relate to alleged breaches by Chong in connection with the same factual circumstances in January and February 2011: that is, the same disputed liquidations, the same purported problems related to the switch in trading platforms, and the same restrictions on "hedging." Thus, Hou's arbitration

claim and the Chong and Kling affidavits submitted by Chong and PFG in the arbitration proceeding focus on the same subject matter as Hou's reparations complaint, and the scope of Hou's pleadings before the NFA against Chong clearly encompasses her claims against Chong in this proceeding. In other words, all of Hou's claims in this proceeding are part of the same transaction or series of transactions out of which her NFA action arose and were, or could have been, raised before the NFA. Accordingly, Hou's reparation complaint is barred by *res judicata.*

ORDER

Chong has established that Hou's reparations complaint is barred by the doctrine of *res judicata*. Accordingly, Hou's reparations complaint is hereby DISMISSED with prejudice.

Dated January 26, 2015.

Philip V. McGuire,
Judgment Officer