UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1913
Petition for Review from CFTC Docket No. 83-R852

STEINER OF MINNEAPOLIS, INC.
and LEONARD M. STEINER,

Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION
and LEWIS F. SAWYER,

Respondents.

On Petition For Review of an Order of the
Commodity Futures Trading Commission

BRIEF AND APPENDIX OF THE COMMODITY FUTURES TRADING COMMISSION, Respondent

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COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Commission properly dismissed the appeal here when Petitioners failed to comply with the Commission's rules requiring them to file an administrative appeal fifteen days from the Administrative Law Judge's order declining to vacate a default, when such rules authorize dismissal of appeals filed out of time, and when such rules were published in the Federal Register seven months before, and became effective five months before, Petitioners were required to file their appeal?

2. Whether the Administrative Law Judge's orders declining

to vacate Petitioners' default orders should not be reviewed by this Court, because: (a) the Commission obtained in personam jurisdiction over Petitioners when they voluntarily appeared in the reparations forum to contest the existence of personal jurisdiction; (b) Petitioners failed to appeal an adverse determination on that issue in accordance with the Commission's prescribed appellate procedures; and (c) Petitioners, therefore, failed to exhaust their administrative remedy?

JURISDICTIONAL STATEMENT

The Commission has subject matter jurisdiction over Petitioners' reparation action pursuant to Section 14(a) of the Commodity Exchange Act (the "Act"), 7 U.S.C. § 18(a). Section 14(e) of the Act, 7 U.S.C. § 18(e), provides the basis of jurisdiction in this Court. The Commission's order from which this appeal is taken finally disposes of all claims with respect to all parties. The petition for review of that order was timely filed in this Court, in accordance with the requirements of Section 14(e) of the Act.

PRELIMINARY STATEMENT

On September 3, 1985, Steiner of Minneapolis, Inc. and Leonard M. Steiner ("Petitioners") filed a petition for review with this Court seeking reversal of an August 20, 1985 order of the Commodity Futures Trading Commission ("Commission") in Sawyer

v. Steiner of Minneapolis, Inc., CFTC Docket No. 82-R 949, a reparation proceeding conducted pursuant to Section 14 of the Act (see infra). Petitioners, both formerly registered with the Commission as commodity professionals (see infra), had appealed to the Commission from an order dated November 8, 1984, by a Commission Administrative Law Judge ("ALJ") denying Petitioners' second motion to vacate an initial decision on default rendered by the ALJ on March 22, 1984. The ALJ, on September 19, 1984, had denied Petitioners' first Motion To Vacate that decision, and they failed to appeal that decision to the Commission. The March 22 default order awarded reparation complainant Lewis F. Sawyer, a respondent here, $13,792 in damages against Petitioners, plus interest at the annual rate of 11% since February 8, 1982, and costs.[1/]

COUNTERSTATEMENT OF THE CASE

A. Statutory Overview.

In 1974, Congress substantially revised the Commodity Exchange Act[2/] to create the Commission as an independent agency of the United States to administer and enforce the Act. See Section

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1/ On September 18, 1985, Petitioners filed a $28,000 bond to secure payment of the reparation award, interest, costs and a reasonable attorney's fee for Mr. Sawyer, should he prevail in this appeal, as required by Section 14(e) of the Act, 7 U.S.C. § 18(e) (1982). On December 28, 1985, Petitioners filed a motion to refund or reduce this bond, which was opposed by the Commission by a memorandum filed January 6, 1986.

2/ Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 et seq. (1974).

2a(2) of the Act, 7 U.S.C. § 4a (1976). The 1974 amendments expanded the Act's coverage to include previously unregulated commodities, and substantially expanded the law enforcement powers previously held by the Commission's predecessor agency. In the 1974 amendments, Congress also vested the Commission with authority to administer a reparations forum under Section 14 of the Act.[3/] Reparations was intended to be a new remedy for aggrieved commodity customers seeking redress for losses resulting from violations of the Commodity Exchange Act, or any rule or order promulgated thereunder, committed by commodity firms or professionals registered under the Act.[4/]

Section 14 of the Act requires the Commission to serve a copy of a reparation complaint stating a cognizable claim upon the Commission registrant named as a respondent. The registrant is required to satisfy the complaint or file an answer to it in writing within a reasonable time as prescribed by the Commission. Once a timely answer is filed, the respondent is afforded a hearing before an Administrative Law Judge. See 14(b) of the Act; 7 U.S.C. § 18(b). The hearing is to determine whether the

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3/ A copy of Section 14 of the Act, 7 U.S.C. § 18 (1976), as enacted in 1974, has been included in the Commission's Appendix to this brief (herein designated as "___a") at 1a,2a.

4/ See H.R. Rep. No. 975, 93d Cong., 2d Sess. 22 (1974). Reparations was intended to operate like a "small claims" court for aggrieved commodity customers, see S. Rep. No. 850, 95th Cong., 2d Sess. 16, reprinted in [1978] U.S. Code Cong. & Admin. News pp. 2087, 2104; Rosenthal v. Commodity Futures Trading Commission, 614 F.2d 1121, 1123 (7th Cir. 1980), and was intended to be an "informal settlement procedure" designed to supplement the implied judicial remedy under the Act that existed in 1974. See Merrill Lynch Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 384-85 (1982).

respondent violated the Act, or any rule or order thereunder, and, if any such violation is found, the respondent is ordered to pay the complainant the amount of any losses sustained as a result of the violation. Sections 14(c) and (e) of the Act; 7 U.S.C. §§ 18(c) and (e). Either party, complainant or respondent, aggrieved by the Commission's reparation order is entitled to petition a U.S. Court of Appeals for review of the Commission's order. Section 14(g) of the Act, 7 U.S.C. § 18(g). Pursuant to Section 14(g), incorporating by reference Section 6(b) of the Act, 7 U.S.C. § 9 (reproduced at 3a), the Commission's findings of fact, if supported by the weight of evidence, are conclusive. If a respondent against whom a reparation award is made fails timely to pay the award, his registration is to be automatically suspended, and he is to be automatically prohibited from trading in the futures markets. Section 14(h) of the Act; 7 U.S.C. § 18(h).5/

1. The Commission's Former Reparation Rules, As Relevant Here.

To implement these statutorily prescribed procedures, the Commission in July, 1976, adopted a comprehensive set of rules governing reparation proceedings (the "former rules"). 41 Fed. Reg. 3994 (1976). As relevant here, Section 12.22 of the former rules provided that service of the reparation complaint be made

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5/ Sections 14(d), (f), (g), (h), and (i) of the Act were redesignated on January 11, 1983, as Sections 14(c), (d), (e), (f), and (g) of the Act, respectively. See 7 U.S.C. § 18 (1982) Section 231 of the Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294, 2327 (1983). (5a.)

by mailing it to:

> an office previously designated with the Commission by the registrant for receipt of reparation complaints or, if no such designation has been filed with the Commission, at the registrant's principal place of business as shown in the records of the Commission.

17 C.F.R. § 12.22 (1982). (6a.) In 1978, the Commission made clear that actual receipt of a complaint by the registrant was not necessary to obtain jurisdiction over a respondent under this rule. Troll v. Lloyd, Carr & Company, et al., [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,676 (Sept. 22, 1978) at p. 22,758 and n.7 (applying the doctrine of constructive service and exercising personal jurisdiction over registrants by serving them with reparation complaints by certified or registered mail at their designated address in accordance with former Commission Reparation 12.22).[6/] (16a.)

Former rule 12.26, provided that failure timely to answer a

6/ Thereafter, on May 4, 1981, the Commission adopted Regulation 3.30, among other things, to supplement former rule 12.22 to provide that service of reparation complaints be made on the address provided in the registrant's application for registration, and that registrants have the express duty to keep such information current. Section 3.30 further provided that default judgments can be entered when registrants fail to respond to complaints sent to the most recently provided address in the registration application. 46 Fed. Reg. 24940 (1981); 17 C.F.R. § 3.30 (1982). (7a.) Although Section 3.30's effective date was deferred until July 1, 1982, the Commission stated in the preamble accompanying Section 3.30 that the new rule "would make explicit a registrant's . . . continuing duty to furnish the Commission with a current address for the purpose of receiving Commission communications." 46 Fed. Reg. 24940, 24942 (1981); see also 45 Fed. Reg. 80539, 80540 (1980). Regulation 3.30 was one of a series of new registration rules, some of which required for their implementation updated data processing facilities which the Commission would not have in place until July 1, 1982. 46 Fed. Reg. 24940 (1981).

complaint would result in the commencement of a default proceeding, in which findings and conclusions of liability could be made on the basis of the allegations in the complaint. 17 C.F.R. § 12.26(a) (1982). (8a.) Former Section 12.26(b) provided that default orders could be set aside upon motion filed within a reasonable time "in order to prevent injustice." (8a.)

In 1983, the Commission explained in Reho v. Dean Witter Reynolds, Inc., [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,993 (Mar. 31, 1983), that it would apply the standards enunciated in Rule 60(b) of the Federal Rules of Civil Procedure, and federal cases applying those standards, in determining whether to vacate a default order pursuant to this rule. Id., at p. 28,373. (20a.) The Commission treated ALJ orders denying motions to set aside a final default order as initial decisions for the purposes of obtaining Commission review, e.g. Coleman v. Bolard Precious Metals Corp., [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,826, at p. 27,496 n.3 (June 30, 1983) (28a), and thus such decisions were required to be appealed to the Commission within fifteen days after service upon the parties. See Former rule 12.101; 17 C.F.R. § 12.101; 17 C.F.R. § 12.101 (1982). (10a.)

2. The Commission's Current Reparations Rules That Govern In This Case.

At the Commission's request, Congress amended Section 14 of the Act, effective May 11, 1983, to grant the Commission broader rulemaking authority to modify its reparation procedures to promote efficiency and to expedite the processing of reparation

cases.[7/] Amended Section 14(b) provides as follows:

> The Commission may promulgate such rules, regulations, and orders as it deems necessary or appropriate for the efficient and expeditious administration of this section. Notwithstanding any other provision of law, such rules, regulations, and orders may prescribe, or otherwise condition, without limitation, the form, filing, and service of pleadings or orders, the nature and scope of discovery, counterclaims, motion practice (including the grounds for dismissal of any claim or counterclaim) hearings (including the waiver thereof, which may relate to the amount in controversy), rights of appeal, if any, and all other matters governing proceedings before the Commission under this section. (5a.)

Pursuant to this broad grant of authority, the Commission adopted a revised set of reparation rules (the "current rules"), effective April 23, 1984 (49 Fed. Reg. 6602 (1984)), that, among other things, alter somewhat the procedures for setting aside a default order. Current Section 12.23 (superseding the former default rule 12.26 in all cases as of April 23, 1984) explicitly provides that a denial of a motion to set aside a default order shall be treated as an initial decision which is appealable to the Commission "in accordance with the requirements of Section 12.401 of these rules." 17 C.F.R. § 12.23(b) (1984). (14a.) Section 12.401 provides that

> [a]n appealing party shall serve upon all parties and file with the Proceedings Clerk a notice of appeal within fifteen days (15) days after service of the initial decision . . . . [Failure to comply with this requirement] shall constitute a voluntary waiver of any objection to the initial decision or other [dispositive] order . . . . and of all further administrative or judicial

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7/ Section 231 of the Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294, 2327 (1983). (5a.)

review under the reparation rules and the Commodity Exchange Act.

Id. at (a).[8] (15a.)

B. The Reparation Proceeding Before The Commission.

At all times relevant the proceedings below, Petitioners were registered with the Commission as commodity trading advisors ("CTAs") under 7 U.S.C. § 6m (1976), engaging in the business of advising others as to the value of, inter alia, trading in commodity futures contracts, as well as in the business of executing trades on behalf of persons who had vested discretionary trading authority in Petitioners. Petitioner Leonard Steiner was registered as an associated person ("AP") of a futures commission merchant ("FCM"), or commodity broker,[9] under Section 4k of the Act, 7 U.S.C. § 6k (1976).

On August 9, 1982, respondent Lewis F. Sawyer ("Sawyer") filed a reparations complaint with the Commission against Petitioners Leonard M. Steiner, Jr. ("Steiner") and his wholly owned company, Steiner of Minneapolis, Inc. ("Steiner, Inc.") (herein

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8/ The latter provision of Section 12.401(a), providing notice that a failure to appeal to the Commission constitutes a waiver of judicial review, has been in effect since 1982. See Former rule 12.101(f), 17 C.F.R. § 12.101(f) (1983) (10a); see also 47 Fed. Reg. 5998 (1982); 46 Fed. Reg. 9958, 9959 (1981); Section 14(b) of the Act; 7 U.S.C. § 18(b) (1982) (empowering Commission to promulgate rules conditioning rights of appeal). (5a.)

9/ In Section 2a(1) of the Act, 7 U.S.C. § 2 (1976), a futures commission merchant is defined as any person or entity "engaged in soliciting or in accepting orders for . . . [futures contracts] and that, in or in connection with such solicitations or acceptance of orders, accepts any money, securities, or property . . . to margin, guarantee, or secure any trades or contracts that . . . may result therefrom."

referred to collectively as "Petitioners"), and also against Lind-Waldock and Company ("Lind-Waldock"), alleging that they had engaged in fraudulent misrepresentations in violation of Sections 4b and 4o of the Act, 7 U.S.C. § 6b, 6o (1976). (C.R. at 002.)[10/] Mr. Sawyer complained that in early January 1982 he responded to an advertisement for Petitioners' managed commodity accounts. Steiner allegedly then contacted Sawyer and made material misrepresentations that induced him to open an account with Petitioners, including a promise that Petitioners' handling of Mr. Sawyer's account would generate a 10 per cent profit each month. Sawyer alleged that, in reliance on these misrepresentations, he deposited $18,000 in an account with FCM Lind-Waldock to be managed by Petitioners. Sawyer complained that, within a matter of weeks, his equity had shrunk to $3,333 as a result of losing Treasury Bill and Treasury Bond futures trades. As a result of these violations, Mr. Sawyer sought reparations of $14,667, plus interest, costs, and attorney's fees.

On August 25, 1982, the Commission served the complaint upon

10/ "C.R." refers to the Certified Record of the proceeding below. On October 15, 1985, pursuant to F.R.A.P. 17, the Commission filed a certified list of the contents of the record, and on November 13, 1985, it filed an amended certified list.

On December 24, 1985, Petitioners' filed the appellants' brief, together with a document labeled "Joint Appendix." Petitioners filed the Joint Appendix apparently upon the mistaken belief that F.R.A.P. 30 applies to petitions for review of final agency orders in U.S. Courts of Appeals. But see F.R.A.P. 16,17. In any event, Commission counsel was not consulted by Petitioners in designating any portions of Petitioners' "Joint Appendix," as was required by F.R.A.P. 30(b), and thus the Commission never discussed the joint filing of an appendix with Petitioners.

Petitioners and Lind-Waldock by certified mail. Separate copies were served on each Petitioner at the same address, "564 Minneapolis Grain Exchange, Minneapolis, Minnesota" (Amended Certified Record ["A.C.R."] at 251, 253) which was taken from the Commission's records. (C.R. 169, 170.) Both copies were returned to the Commission with labels that read, "MOVED - LEFT NO ADDRESS[.] RETURN TO SENDER." (A.C.R. at 251, 253.) A Prehearing Order issued on May 17, 1983, by Commission Administrative Law Judge William G. Spruill found that Steiner and Steiner, Inc. were in default and concluded that further service of process on them was not required. (C.R. 105.)

After Lind-Waldock, in February 1984, settled the case against it, ALJ Spruill, on March 22, 1984, issued an Initial Decision on Default, holding Steiner and Steiner, Inc. liable for the balance of the amount sought in the Complaint, $13,792, plus interest and the $25 filing fee. (C.R. 158.) The default order, issued and served on March 22, became final thirty days thereafter, or on April 21, 1984.11/

On August 27, 1984, Petitioners, represented by current counsel, jointly filed a Motion To Vacate the Default Judgment. (C.R. 173.) Petitioner Steiner alleged that he had been informed of the action by "a Minneapolis acquaintance," had contacted the

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11/ Under Section 12.84 of the Commission's former rules, and Section 12.22(c) of the current rules, unappealed initial decisions on default, like any other such initial decision, become a final order of the Commission thirty days after service. 17 C.F.R. § 12.84 (1982); 17 C.F.R. § 12.22(c) (1984); see also Gillette v. Republic Advisory Corp., CFTC Docket No. R81-728-81-719 (Commission Slip Opinion June 15, 1984) (included in the Appendix to this brief at 24a.).

Commission, obtained copies of some of the pleadings, and learned of the default order. In the Motion to Vacate, Steiner alleged that his offices at 564 Minneapolis Grain Exchange were closed on June 30, 1982, two months before the complaint was served; that he had substantive defenses to the complaint; and, in particular, that Sawyer had been fully apprised of the risks of Steiner's trading program. Under default rule 12.23(b), Petitioners, in moving to vacate a final default order, were required to show fraud perpetrated on the ALJ, mistake, excusable neglect, or that the default was void for want of jurisdiction. 17 C.F.R. § 12.23(b) (1984). (14a.) In addition, they were required to show that, if the default order were vacated, they would be reasonably likely to succeed on the merits of their defense, and that Sawyer would not be prejudiced by the setting aside of the default. Id. (14a.)

The Administrative Law Judge denied Petitioners' August 27 Motion to Vacate on September 19, 1984. (C.R. 181.) The ALJ noted that Commission rule 3.30, 17 C.F.R. § 3.30 (1982) (7a) (see note 6, supra), required Commission registrants to keep a current address on file for purposes of receiving communications from the Commission, and permits a default order to be entered against the registrant in a reparations case when the registrant fails to respond to a communication sent to the latest such address on file. Since Petitioners had failed to maintain a current address, the ALJ ruled, the default order was proper.12/

12/ Petitioners make no claim that they were not duly served a copy of this September 19, 1984 order.

Petitioners did not, as required by Sections 12.23 and 12.401(a), 17 C.F.R. §§ 12.23, 12.401(a) (1984) (14a,15a), appeal to the Commission within fifteen days after service of the September 19 order denying their motion to set aside the default. Rather, on October 12, 1984, they filed with the ALJ a "Renewed Motion to Vacate Initial Decision on Default," arguing that Rule 3.30 was inapplicable to their case because it did not become effective until July 1, 1982, the day after the commodity trading advisor registrations of both Petitioners had expired. (C.R. 189.) Thus, Petitioners argued that they were under no obligation to maintain a current address in their registration files with the Commission. In their renewed motion, Petitioners argued that the Commission did have in its records a current St. Paul, Minnesota, residence address for Petitioner Steiner in connection with his then still active associated person ("AP") registration. Moreover, Petitioners alleged that they maintained a Minneapolis telephone number and post office box where they could be contacted.

By order dated November 8, 1984, the ALJ denied Petitioners' Second Motion to Vacate. (C.R. 204.) Citing the Commission's Federal Register preamble to rule 3.30, the ALJ stated that even before the effective date of that rule a registrant was implicitly required to maintain a current address with the Commission.[13/] The ALJ determined that Petitioners' closing of their

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13/ Petitioners claim that the ALJ in his November 8 order held that "Regulation 3.30 did apply to Petitioners even though it did not become effective until the day after their CTA registration lapsed." (Pet. Br. 13) The ALJ did not hold that Rule 3.30

Minneapolis office without leaving a forwarding address was a willful attempt to avoid receiving communications from the Commission. The ALJ also found that Petitioners' claim that Mr. Steiner had a separate address in St. Paul, Minnesota in connection with his still active AP registration was contradicted by the Commission's records, and, therefore, this claim was rejected.[14/] Moreover, the ALJ found that Steiner had not shown

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applied to Petitioners in their capacities as CTAs. The judge simply noted that an earlier Federal Register publication announcing Rule 3.30 stated that the rule would make explicit a registrant's continuing duty to keep a current address on file for the purpose receiving reparation complaints. (C.R. 205-06.) As to Mr. Steiner's registration as an associated person ("AP"), which the ALJ found did not expire until 1983, the ALJ found that Steiner was still registered as of July, 1982, and therefore Rule 3.30 required him to update his registration address.

Petitioners cite four cases in their brief for the proposition that "the Commission has consistently recognized that constructive service by mail at an address of an expired registrant is not sufficient to provide to default a respondent." (Pet. Br. 31). Those cases, as Petitioners acknowledged in their brief to the Commission (C.R. 230), are ALJ and Hearing Officer decisions, and thus, they are not binding upon the Commission, cf. Section 12.406(b) of the current reparation rules, 17 C.F.R. § 12.406(b) (1984). Moreover, these decisions were issued before Rule 3.30 went into effect. Rule 3.30 clearly provided notice that constructive service is to be applied even to registrants whose registrations have expired. And, in any event, the ALJ found that Petitioner Steiner's AP registration did not expire until after Rule 3.30 went into effect.

14/ Petitioners claim that the Commission had two other addresses in its records where actual notice of the reparation proceeding would have been accomplished, if service by certified mail had been made at either of these two alternative addresses instead of the "564 Minneapolis Grain Exchange" address listed in the Commission's records. (Pet. Br. at 8,30.) Petitioners apparently are referring to one alternate "25½ Street, Minneapolis" address that does appear in the Commission's records as well as the record of this appeal (C.R. at 169-172) and a St. Paul address which did not appear in the Commission's records in the proceeding below.

Petitioner never made the argument in their two motions to vacate the default order before the ALJ, or in their brief before

that he could present a meritorious defense to the substance of Sawyer's claims. Accordingly, the ALJ declined to vacate the initial decision on default pursuant to Section 12.23(b), 17 C.F.R. § 12.23(b) (1984). (14a.)

On November 28, 1984, Petitioners filed a notice of appeal with the Commission from the denial of their Renewed Motion to Vacate. (C.R. 210.) Their appeal brief raised the same issues raised before the ALJ in the Renewed Motion to Vacate, and also argued that to the extent Rule 3.30 permits constructive service of process upon a Commission registrant, that rule violates due process of law. (C.R. 215.)

On August 20, 1985, the Commission dismissed Petitioners' appeal as untimely, due to their failure to appeal within fifteen days the ALJ's order denying their first motion to vacate the default, as expressly required by 17 C.F.R. §§ 12.23(b) and

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the Commission, that had service been attempted at the 25½ Street, Minneapolis address, they would have received notice of the reparation proceeding. Since neither the ALJ nor the Commission was given an opportunity to address that argument, it certainly should not be permitted to be raised for the first time here. See, e.g Kennedy For President Committee v. FEC, 734 F.2d 1558, 1560 n.2 (D.C. Cir. 1984) ("Kennedy"); Monark Boat Co. v. NLRB, 708 F.2d 1322, 1325 and n.5 (8th Cir. 1983) ("Monark").

The other address, "996 St. Clair, St. Paul, Minn.," was raised in an argument before the ALJ, but the ALJ specifically ruled that the Commission's records did not show an address for Petitioner Steiner in St. Paul, Minnesota. The documents on which Petitioner rely to show the alternative St. Paul address, were produced by Petitioners for the first time appended to their renewed motion to vacate. They were not taken from the Commission's records and placed upon the agency record by any Commission official. The specific finding by the ALJ that Petitioners did not have a St. Paul address listed in the Commission records should not be retried here. United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37 (1952); Kennedy, 734 F.2d at 1560 n.2; Monark, 708 F.2d at 1325 and n.5.

12.401(a)(1984). (C.R. 245.) (14a,15a.) The Commission also observed that it had previously announced in its 1983 decision in Reho v. Dean Witter Reynolds, Inc [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,993 (Mar. 31, 1983) (20a), that in considering motions to set aside final default orders under the former rules, it would be "'guided by the standards enunciated in Rule 60(b) of the Federal Rules of Civil Procedures, and federal cases applying those standards.'" Id. at p. 28,373. The Commission noted that under federal case law interpreting Fed. R. Civ. P. 60(b) a litigant cannot extend the time for filing an appeal of a denial of a Rule 60(b) motion by filing a subsequent Rule 60(b) motion. And, in any event, the Commission concluded that Steiner had not offered any excuse for the untimeliness. Moreover, apart from the express language in the reparation rules requiring the taking of an appeal from an order denying a motion to vacate a default order, Petitioners' second motion to vacate was filed after the time for appealing the denial of their first motion had already expired, and thus they could not argue that the second motion tolled the fifteen day time for appeal from the denial of their first motion to vacate. Finally, the Commission concluded that Petitioners had not demonstrated, as required by 17 C.F.R. § 12.23(b) (1984) (14a), a likelihood of success on the merits of their defense as they failed to offer any evidence refuting Sawyer's misrepresentation claim (e.g. a verified answer). Nor had they produced the brochure on their commodity trading advisory service that Sawyer complained promised average

monthly profits of ten percent. Id. at p.6 n.2.[15]

STATUTES AND RULES INVOLVED

Section 6(b) of the Commodity Exchange Act, 7 U.S.C. 9 (3a), Section 14 of the Act, 7 U.S.C. § 18 (1976) (1a,2a), including amendments to Section 14 effected by Section 21 of the Futures Trading Act of 1978, Pub. L. 95-405, 92 Stat. 865 et seq. (4a), and by Section 231 of the Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294, 2327 (5a), as well as all former and current Commission rules and regulations involved herein are reproduced in the Commission's appendix filed with this brief.

ARGUMENT

I. IN DISMISSING PETITIONERS' APPEAL, THE COMMISSION ACTED IN ACCORDANCE WITH ITS PREVIOUSLY PUBLISHED RULES AS WELL AS PREVIOUSLY ANNOUNCED DECISIONS.

Petitioners argue that they were improperly denied appellate review by the Commission under a newly promulgated rule of which Petitioners had no prior notice. Relying on Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) ("Chevron"), and this Court's decision in Zemonick v. Consolidation Coal Co, 762 F.2d 381 (4th Cir.

15/ Representations that any system of futures trading guarantees 10% profits per month would fly in the face of the truth. Commodity futures are high-risk investments and no "system" eliminates that risk. See Gordon v. Shearson Hayden Stone, Inc., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,016, at pp. 23,981-82 (1980), aff'd sub nom. Shearson Loeb Rhodes, Inc. v. CFTC, No. 80-7212 (9th Cir. Feb. 12, 1982) (unpublished); cf. Kelley v. Carr, 442 F. Supp. 346, 354 (W.D. Mich. 1977); Graves v. Futures Investment Co., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,457 at 26,165 n.20 (1982). See also 17 C.F.R. § 4.31 (1982). (11a.)

1985) ("Zemonick"), Petitioners argue that this rule should not be retroactively applied.

To the contrary, the Commission's holding below did not represent a "newly promulgated rule," but constituted a simple and straightforward application of already-existing, publicly announced procedural rules of which Petitioners had clear, prior notice. Moreover, the Commission's holding below is consistent with, and buttressed by, its decision in Reho v. Dean Witter Reynolds, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,993 (1983) (20a), of which Petitioners also had clear prior notice--since it was decided in 1983. Because of the absence of a "newly promulgated rule" in the proceedings below, the Chevron and Zemonick cases have no application to this appeal.

A straightforward application of the Commission's current reparation rules explicitly dictated the result reached by the Commission below. By virtue of Section 12.1(c) of the current rules (12a), all motions seeking to vacate a default order that has become final, regardless of whether finality occurred before or after April 23, 1984 (the effective date of the current rules, see p.8, supra) are governed by current rule 12.23(b).[16/] Section 12.23(b) expressly provides:

> A denial of a motion to set aside a default order that has become final shall be treated as an initial decision, which may be appealed to the Commission in accordance with the requirements of Section 12.401 of these rules.

16/ See also Gillette v. Republic Advisory Corp., CFTC Docket No. R81-728-81-710, Commission Slip Opinion at p. 4 n.5 (June 15, 1984), included in the Appendix to this brief at 24a.

17 C.F.R. § 12.23(b) (1984). (14a.) Section 12.401(a) of the current rules, expressly provides, as relevant here, that each appeal must be filed

> within fifteen days after service of the initial decision . . . The failure of a party timely to file and serve a notice of appeal . . . shall constitute a waiver of any objection to the initial decision, or other . . . [dispositive order], and of all further administrative or judicial review under these rules and the Commodity Exchange Act.

17 C.F.R. § 12.401(a) (1984). (15a) See note 8, supra.[17/]

These rules, construed collectively, make it clear that: on and after April 23, 1984, parties seeking to appeal an order denying their motions to set aside a default must appeal to the Commission by filing a notice of appeal within fifteen days after service of that order, or forfeit their right to appeal at all.[18/] Petitioners did not file their first motion to vacate

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17/ In an effort to portray the Commission's current rules as "confused" and "chaotic," Petitioners quote Section 12.1(c), the Commission's transitional rule, omitting by ellipsis from Section 12.1(c) critical language necessary to understand its application to this case, and incorrectly paraphrase the language of that rule. (Pet. Br. at 25.) (12a.) Section 12.1(c), as relevant here, simply states that Section 12.23 of the current rules applies to all reparation cases, including those pending on April 23, 1984, regardless of when the reparation complaint was filed. (Section 12.23(b) provides that an order denying a motion to set aside a default shall be treated as an initial decision.) Although omitted from Petitioners' quoted language, Section 12.1(c) also provides that Subpart F of its rules (which includes Section 12.401) applies to all proceedings in which initial decisions were rendered on and after April 23, 1984. The order denying Petitioners' first motion to vacate, treated as an initial decision, was rendered on September 19, 1984. Because this order was an "initial decision" rendered after April 23, 1984, Subpart F, including 12.401, expressly applied.

18/ Cf. Section 10(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704 (requiring exhaustion of administrative remedies whenever agency rules require an appeal of an initial

the default judgment until August 27, 1984. Their first motion to vacate was denied by order dated September 19, 1984, five months after the current rules became effective, and seven months after they were promulgated and published.

In the opinion below, the Commission dismissed Petitioners' appeal based on this simple and straightforward application of its rules, stating:

> Section 12.23(b) of the reparation rules, 17 C.F.R. § 12.23(b) (1984), provides that '[a] denial of a motion to set aside a default order that has become final shall be treated as an initial decision which may be appealed to the Commission in accordance with the requirements of § 12.401 of these rules.' After the ALJ denied Steiner's first motion to vacate on September 19, 1984, Steiner had until October 9, 1984 to file a notice of appeal to the Commission. 17 C.F.R. §§ 12.401, 12.10(b) (1984). Steiner's second motion to vacate was not filed until October 12, 1984, and Steiner did not file a notice of appeal until November 28, 1984.

Thus, it was the Commission's previously announced reparation rules,[19/] and not any unforeseeable new rule adopted in their case, which constituted the basis for the Commission's order

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decision first be taken to the agency itself, prior to seeking judicial review. Stauffer Chemical Co. v. FDA, 670 F.2d 106, 107-08 (9th Cir. 1982); Montgomery v. Rumsfeld, 572 F.2d 250, 252-53 n.3 (9th Cir. 1978); United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 440 (9th Cir. 1971)).

19/ Thomas v. Arns, ___ U.S. ___, 54 U.S.L.W. 4032 (December 4, 1985), cited by Petitioners (Pet. Br. at 15-16) is inapposite to this appeal because it involved a rule conditioning appeal that was announced in a prior judicial decision, and, unlike here, did not involve a published administrative rule. The rule in Thomas v. Arns was upheld because parties were given clear prior notice of its existence. In any event, because Petitioners here had clear prior notice, see 49 Fed. Reg. 6602, 6628 (Feb. 22, 1984), of the requirement to appeal the first order declining to set aside the default order, Thomas v. Arns actually supports the Commission's decision below.

dismissing their appeal. Because these rules were published in the Federal Register on February 22, 1984, Petitioners were afforded legal notice of their content, see Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947); see also South Central Bell Telephone v. Louisiana Public Service Comm'n, 744 F.2d 1107, 1119 (1984); Kirkhuff v. Nimmo, 683 F.2d 544, 550 n.8 (D.C. Cir. 1982); Bilbao-Bastida v. Immigration and Naturalization Service, 409 F.2d 820, 822 (9th Cir. 1969), well in advance of the filing on August 27, 1984, of their first motion to set aside the default order.

As additional support for its holding, the Commission observed that nothing in the reparation rules provides that the time for filing an appeal from an initial decision is stayed pending an ALJ's consideration of a motion for reconsideration. Indeed, in Reho v. Dean Witter Reynolds [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,993 (Mar. 30, 1983), in which the Commission announced that in considering motions to set aside default orders that have become final "it 'will be guided by the standards enunciated in Rule 60(b) of the Federal Rules of Civil Procedure, and federal cases applying those standards.'" Id. at 28,373. (20a.) In Reho, decided while the Commission's former default rule was still in effect, the Commission expressly stated:

> There is nothing in the regulations that purports to toll the fifteen-day period for service and filing of an application for review pending the decision of an Administrative Law Judge on a motion to set a default order or award. Because of the importance of the concept of the finality to the . . . [proper] interpretation of Section 14 of the Act, an automatic tolling of the 15 day period

> is not a reasonable interpretation of the Commission's regulatory intent.

Id at 28,372.

In response to the Commission's citation to its 1983 Reho decision in its opinion below, Petitioners make two baseless arguments. First, they argue that the Commission failed to announce in the preamble to its proposed or current reparation rules that it intended to follow federal decisions construing Rule 60(b) in interpreting its current default rule. (Pet. Br. 26.) Therefore, they argue, they had no notice of the applicability of Rule 60(b) cases to the proceeding below. The simple answer to that argument is that it was the Commission's rules that dictated its dismissal of their appeal. The Commission discussed the 60(b) cases only to show that its decision was consistent with what the Federal Circuit Courts have held in analogous circumstances.20/

Next, Petitioners argue that they had no reason to believe that Reho would have continued applicability after the effective date of the current rules, because it was rendered while the Commission's former default rule was still in effect, and a new default rule superseded the old one. (Pet. Br. 26.) But if

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20/ See, e.g. Burnside v. Eastern Airlines, Inc., 519 F.2d 1127, 1128 (5th Cir. 1975).

Moreover, an announcement in the Federal Register that Fed. R. Civ. P. 60(b) principles would apply in the context of motions to set aside defaults would have been superfluous because it would have merely restated the holding of the Reho decision which had already been published. In any event, the continued relevance of Rule 60(b) cases under current rule 12.23(b) was announced by the Commission in Gillette v. Republic Advisory Corp., CFTC Docket No. R 81-728-81-719 (June 15, 1984), discussed infra. (24a.)

Petitioners had any doubt about the continued relevance of Rule 60(b) principles, they needed only to look at the language of the current default rule, 17 C.F.R. § 12.23(b) (1984), which mirrors Rule 60(b) itself. Moreover, a Commission decision rendered after the current rules became effective on April 23, 1984, but before Petitioners filed their first motion to vacate the default order on August 27, 1984, expressly announced the continued applicability of Reho and Rule 60(b) principles for setting aside defaults. In Gillette v. Republic Advisory Corp., CFTC Docket No. R 81-728-81-710 slip opinion at 4 (June 15, 1984) (included in the appendix to this brief at 24a),[21/] the Commission specifically stated that the judicial cases construing Federal Rule 60(b) "have continued relevance" for setting aside default judgments under the new rules.

Thus, Petitioners had clear prior notice of the continued validity of Reho, and the continued applicability of Rule 60(b) decisions under the current reparation rules. Because the Commission's dismissal of Petitioners' appeal was based in any event on legislative rules promulgated and published in February 1984, and which became effective in April, 1984, at least five months before Petitioners became subject to them, the Chevron and Zemonick cases are simply inapposite.[22/]

21/ All Commission slip opinions are available on LEXIS; FEDSEC Library; CFTC File. Moreover, they are available for public inspection and copying pursuant to 17 C.F.R. § 145.2(a) (1984).

22/ Chevron, followed by the Fourth Circuit in Zemonick, decided that a judicial decision construing the applicable limitations period for filing a claim would be applied prospectively only, if the decision: (1) announced a new principle of law, either by

II. PETITIONERS HAVE WAIVED ANY OBJECTIONS THEY MIGHT HAVE HAD ON GROUNDS OF IN PERSONAM JURISDICTION.

Petitioners argue at length (Pet. Br. at 27-45) that the manner in which the Commission served them with Mr. Sawyer's complaint was insufficient to confer personal jurisdiction over them, and thus, they argue that the ALJ's initial decision on default, affirmed by the ALJ's September 19, 1984 order declining to set aside the default and by the Commission's order dismissing their appeal, was a nullity and should be overturned by this Court. In so arguing, Petitioners ask this Court to declare the Commission's constructive service procedure for providing notice to Commission registrants about reparation claims filed against them unconstitutional. It is unnecessary for this Court to decide this constitutional issue because the Commission clearly obtained in personam jurisdiction over Petitioners when they litigated the personal jurisdiction issue in their first motion to vacate the March 22, 1984 initial decision on default, and then failed timely to appeal to the Commission, and thereafter to

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overruling clear past precedents or deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) would frustrate the purpose of the rule if applied retroactively; and (3) would cause injustice or hardship unless applied non-retroactively. 404 U.S. at 106-07. The Chevron Court made it clear that all three criteria for applying a newly announced principle of law must be satisfied before it would order non-retroactivity. Thus if one of these criteria fails, Chevron, and hence, Zemonick, is inapplicable.

As discussed above, the holding below simply did not "establish a new principle of law." Id. at 106. And, there is no injustice in treating Petitioners the same as other parties who, although not in default, have received an adverse initial decision, and have missed their deadline for filing an appeal.

on personal jurisdiction grounds thereafter barred the movants from pursuing that attack in a separate proceeding. In Timmons descendants of former property owners defended a federal ejectment action on the ground that in an earlier condemnation proceeding they or their ancestors had not been properly served. The defendants also filed a Rule 60(b) motion in the original condemnation proceeding seeking relief from judgment for lack of personal jurisdiction. The Court presiding over the condemnation action denied that motion, and the movants failed to appeal. In declining to consider claimants' personal jurisdiction argument on appeal from the ejectment order, the Eleventh Circuit in Timmons stated:

> If a party puts the issue of personal jurisdiction before a court, which then finds that jurisdiction was properly established, that decision is conclusive unless reversed on direct appeal . . . . Thus defendants' motion to reopen the original condemnation judgment placed the issue of service of process before a court of proper jurisdiction, and that court's unappealed determination, no matter how flawed, bars further assertions by defendants of inadequate notice.

672 F.2d at 1378 (citations omitted).[24/]

Thus, once a party appears to contest a forum's personal jurisdiction, and loses, it must timely file an appeal of the adverse jurisdictional ruling. If no appeal is taken, the lower

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24/ Had the defendants in Timmons filed successive Rule 60(b) motions in the condemnation proceeding, they would have lost their right to appeal in the condemnation action, just like Petitioners did in this case, and the result in Timmons would have been the same. Burnside v. Eastern Airlines, 519 F.2d 1127, 1128 (5th Cir. 1975); cf. Planet Corp. v. Sullivan, 702 F.2d 123, 126 (7th Cir. 1983); Winfield Associates, Inc. v. Stonecipher, 429 F.2d 1089, 1091 (10th Cir. 1970); Collex, Inc. v. Walsh, 74 F.R.D. 443, 449 (E.D. Pa. 1977).

tribunal's decision on the jurisdictional issue, even if erroneous, is forever binding. Petitioners, like the parties in Baldwin and Timmons, were not forced to appear in the reparations forum to litigate whether the Commission obtained personal jurisdiction because of allegedly invalid service of process.25/ Having voluntarily elected to do so, however, and upon receiving an adverse determination on this issue by the first ALJ order, as the Baldwin and Timmons cases hold, Petitioners were required to appeal in the manner prescribed by the Commission's rules. See Stauffer Chemical Co. v. FDA, 670 F.2d 106, 107-08 (9th Cir. 1982) ("Stauffer"); see also Montgomery v. Rumsfeld, 572 F.2d 250, 252-53 n.3 (9th Cir. 1978); United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 440 (9th Cir. 1971); S. Rep. No. 752, 79th Cong., 1st Sess. (1945); cf. United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37 (1952). Having failed to have done so, Petitioners have not preserved the issue for this appeal.

Petitioners' brief devotes a lengthy discussion to the invalidity of the ALJ's September 19, 1984, and November 8, 1984, orders, and the original March 22, 1984, order of default because of alleged invalidity of service of the reparation complaint upon

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25/ By virtue of Section 14(d) of the Act, 7 U.S.C. § 18(d) (1982) (5a), Commission orders awarding reparations are not self-enforcing. The party seeking to enforce a reparation award must file a certified copy of the award in U.S. District Court. Petitioners clearly could have used this judicial forum to challenge the validity of the default order, had they not appeared in the reparations forum, and had Sawyer sought to enforce his award against them.

them. (Pet. Br. 27-44.)[26/] Because Petitioners did not appeal to the Commission the ALJ's September 19 order denying their motion to set aside the default, arguments about the propriety of that order and the March 22 default order have not been preserved for review by this Court, see, e.g., Stauffer, 670 F.2d at 107-08, and notes 8 and 18, supra, and thus should not be considered by this Court.

This is not an unfair result. When the ALJ issued the September 19 order, Petitioners were in a position no different from a party in any other reparation proceeding (including non-default cases) who received an adverse decision and was required by the Commission's rules to file a timely notice of appeal.

26/ Petitioners contend that the manner in which the Commission amended its former service rule is an implicit admission that its constructive service methods are unconstitutional. (Pet. Br. at 40-41) Current rule 12.15(a) (reproduced at 13a) now requires reparation complaints to be served by registered or certified mail upon registrants at the address designated pursuant to Rule 3.30, or, if no such designation has been filed, "at such address as will accomplish actual notice to the respondent." 17 C.F.R. § 12.15(a). That amendment to the Commission's former service rule is consistent with the Commission's holding in Washington v. Republic Advisory Corp., CFTC Docket No. 81-389-81-499 Commission slip opinion at 4-5 n.8 (June 10, 1983) (included in the appendix to this brief at 30a) to the effect that the doctrine of constructive service will not be applied against unregistered persons who have never registered, and who have not designated an address, with the Commission. The rule amendment was necessary because, while Congress in 1982 amended Section 14 of the Act to repeal the Commission's reparation jurisdiction against unregistered persons, the Commission still may exercise such jurisdiction over limited classes of non-registrants, who may have no address designated with the Commission. See S. Rep. No. 384, 97th Cong., 2d Sess. 48 (1982) (unregistered willful aider and abettors still subject to reparations jurisdiction). Thus, the quoted language from current rule 12.15(a) above cannot be construed as an admission that its constructive service methods as applied to registrants or former registrants is unconstitutional, and has no bearing on this appeal.

Petitioners were not entitled to ignore the Commission's procedural rules simply because they had doubts about the existence of personal jurisdiction.

This is not a case where a party acting under an innocent, but nevertheless, mistaken belief that a procedure analogous to Fed. R. Civ. P. 59 applied in reparations, filed a motion for reconsideration of the first order refusing to set aside the default, expecting the reconsideration motion to toll the running of the appeal period. Petitioners clearly filed the second motion to vacate the default after the time for appealing the first unsuccessful motion had expired.27/

CONCLUSION

For all the foregoing reasons, the Commission respectfully requests that the petition for review of the Commission's August 20, 1985 order in Sawyer v. Steiner of Minneapolis, et al., CFTC

27/ Thus, the Court should not consider the manner in which Petitioners were served. As Petitioners have conceded (Pet. Br. 20), the Commission itself has not addressed the issue whether Petitioners were served in accordance with its rules. Any such consideration might require reopening the record of this proceeding to determine whether Petitioners' claim that the Commission had an alternative St. Paul address for Petitioners in its records where actual notice could have been achieved (a claim specifically rejected by the ALJ in his November 8, 1984 order) is true.

And the Commission would need to examine closely information already in the record which, if presented in testimonial form, could support an inference that Petitioners were aware in April 1982 that the filing of the reparation complaint was imminent and that they subsequently pursued a course of action to evade service of the complaint. See C.R. at 183, 185 (Letter dated April 8, 1982, from B. Pinkowitz to Petitioners warning them of the imminency of a reparations lawsuit if dispute was not settled expeditiously, cited by Mr. Sawyer's counsel in response to Petitioners' first motion to vacate as not having being returned unclaimed, as was all subsequent correspondence).

Docket No. 82-R949, filed with this Court on September 3, 1985, be denied in all respects.

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