No. 19-

IN THE

Supreme Court of the United States

EFFEX CAPITAL, LLC AND JOHN DITTAMI,

Petitioners,

v.

NATIONAL FUTURES ASSOCIATION, THOMAS P. SEXTON AND JAMES P. O'HARA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit wrongly expanded the doctrine of implied conflict preemption by holding that an obstacle could form the basis of preemption even if the obstacle is uncertain to occur and the obstacle will not prevent a regulator from fulfilling its duties.

2. Whether the Commodities Exchange Act, 7 U.S.C. § 1 et seq. (the "CEA"), impliedly preempts state law tort claims of general application brought by an unregulated person against the National Futures Association (the "NFA") when such unregulated person has no statutory remedy under the CEA and the state law claim would not create a concrete definable and definite obstacle or otherwise conflict with the administration of the NFA's regulatory activities.

3. Whether the regulatory actions of the NFA, a federally authorized Self-Regulatory Organization (an "SRO"), can preempt state law to the extent the manner of the SRO's regulatory action is not expressly prescribed in detail by the grant of regulatory authority from the federal agency.

LIST OF PARTIES

A. Petitioners

Effex Capital, LLC

John Dittami

B. Respondents

National Futures Association

Thomas P. Sexton

James P. O'Hara

CORPORATE DISCLOSURE STATEMENT

The Petitioners are John Dittami, an individual, and Effex Capital, LLC, a limited liability company whose controlling interest is owned by John Dittami and the balance owned by the Dittami Dynasty Trust.

RELATED CASE STATEMENT

Effex Capital, LLC and John Dittami, v. National Futures Association, Thomas P. Sexton, James P. O'Hara and John Does 1-5, and Jane Does 1-5, United States District Court for the Northern District of Illinois, Eastern Division, Case No. 17-cv-04245 (ARW). Judgment was entered on April 5, 2018.

Effex Capital, LLC and John Dittami, v. National Futures Association, Thomas P. Sexton, James P. O'Hara and John Does 1-5, and Jane Does 1-5, United States Court of Appeals for the Seventh Circuit, No. 18-1914. Judgment was entered on August 3, 2019.

Petitioners John Dittami and Effex Capital, LLC respectfully request this Court grant a *writ of certiorari* to review the Decision and Order of the Seventh Circuit Court of Appeals affirming the dismissal by the United States District Court for the Northern District of Illinois of Petitioners' Amended Complaint with prejudice and without leave to amend.

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Petitioners Effex Capital, LLC and John Dittami are the Plaintiffs-Appellants in the courts below. The Respondents are National Futures Association, a self-regulatory organization organized under 7 U.S.C. §21, Thomas P. Sexton and James P. O'Hara, Defendants-Appellees in the Courts below.

OPINIONS BELOW

The Decision and Order of the United States Court of Appeals for the Seventh Circuit in *Effex Capital and John Dittami v. NFA et al.*, No. 18-1914 (7th Cir. August 13, 2019) is reprinted in Appendix A. The Order of the Seventh Circuit denying Effex's Petition for Rehearing or, In the Alternative for Rehearing *En Banc* (7th Cir. October 2, 2019) is reprinted in Appendix C.

The Decision and Order affirmed an Order dated April 5, 2018 by the United States District Court for the Northern District of Illinois ("USDC") in *Effex et al. v. NFA et al*, No. 17-cv-04250 granting NFA's motion to dismiss is reprinted in Appendix B.

JURISDICTION

The Seventh Circuit Court of Appeals issued its judgment on August 13, 2019, and denied John Dittami's and Effex Capital, LLC's petition for rehearing *en banc* on October 2, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

7 U.S.C. 2(a)(1)(A)

The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in the Wall Street Transparency and Accountability Act of 2010 (including an amendment made by that Act) and subparagraphs (C), (D), and (I) of this paragraph and subsections (c) and (f) of this section, with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving swaps or contracts of sale of a commodity for future delivery (including significant price discovery contracts), traded or executed on a contract market designated pursuant to section 7 of this title or a swap execution facility pursuant to section 7b–3 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title. Except as hereinabove provided, nothing contained in this section shall (I) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

U.S.C.A. Const. Art. VI cl.2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

INTRODUCTION

This petition seeks to have this Court find that: (i) "obstacle preemption" does not exist when an alleged obstacle is uncertain to occur and does not prevent an SRO from fulfilling its regulatory function; (ii) the CEA does not preempt state law tort claims of general application brought by an unregulated person against NFA when such unregulated person has no statutory remedy under the CEA and the state law claim would not create a concrete definable and definite obstacle or otherwise conflict with the administration of NFA's regulatory activities; and (iii) an SRO's regulatory activities do not preempt state law to the extent the SRO's regulatory action is not expressly prescribed in detail by the grant of regulatory authority from the governing federal agency.

By way of specifics, in connection with entering into and publishing an enforcement settlement with a regulated person under the CEA, NFA: (a) disclosed confidential information of Effex Capital, LLC ("Effex") and its principal John Dittami ("Dittami" collectively referred to with Effex as the "Petitioners"), both of which were unregulated persons and non-parties to the

enforcement proceeding; and (b) published false and defamatory statements about Petitioners.[1] (Dkt 45, ¶¶ 21, 60-62). NFA had the ability to undertake its regulatory function without disclosing Petitioners' confidential information and without publicly defaming Petitioners with false disclosures that resulted in the destruction of Petitioners' business.

After suffering injury from NFA's conduct, Petitioners sought to pursue state law statutory and common law tort claims against NFA for its conduct. The District Court dismissed Petitioners' claims finding that they had failed to exhaust "administrative remedies" that Petitioners actually did not have as non-members of NFA. (Appendix B.) Effex appealed to the Seventh Circuit Court of Appeals (hereinafter the "Seventh Circuit"). Rather than addressing the grounds raised in the decision below, the Seventh Circuit sustained the dismissal of Petitioners' state law claims of general application by applying the alternative theory of preemption. (Appendix A)

The decision by the Seventh Circuit is neither in conformity with the CEA or the doctrine of preemption. The CEA contains no express preemption provision, and the Seventh Circuit engaged in a tortured analysis to find that Petitioners' state law claims of general application could potentially obstruct NFA's ability to regulate, thereby requiring them to be preempted. The Seventh Circuit's preemption holding erroneously contends that Petitioners' state law claims would interfere with NFA's regulatory function; and such finding was made

1. NFA is an SRO which regulates the commodities industry. NFA was granted legal authority pursuant to the CEA.

by the Seventh Circuit without any detailed analysis or a developed record on this issue. The holding also ignores the fact that: (i) NFA had the full ability to conduct its regulatory enforcement function without disclosing Petitioners' confidential information or making defamatory statements about Petitioners; and (ii) while NFA was delegated the function of regulatory enforcement, the specific manner of action by NFA which caused injury to Petitioners was not itself mandated under NFA's regulatory authority—such that NFA could have satisfied its regulatory obligation without injuring the Petitioners. In essence, the holding improperly expands the definition of "obstacle" from an actual impediment to a potential impediment so it would eliminate the actual impossibility standard to establish a conflict; and also improperly holds that NFA's discretionary manner of implementing its regulatory function creates preemption even if NFA could have implemented its regulatory function in a less intrusive manner consistent with its grant of authority as an SRO.

Under the Seventh Circuit's decision, Court's would be given carte blanche to expand preemption to prevent almost all state court legal action against an SRO for any activity merely because the activity fulfills a regulatory function—even when such activity could have been conducted in a less intrusive manner while maintaining the regulatory function. Preemption requires a greater showing and the Seventh Circuit drastically lessened the standard for obstacle conflict preemption so that the party's burden for preemption went from extraordinary to minimal. If not reversed, this new standard will result in the dismissal of many heretofore viable claims. As a result, the Seventh Circuit's decision and order should be reversed.

STATEMENT OF THE CASE

1. NFA Regulatory Regime

Congress enacted the CEA "to ensure fair practice and honest dealings on commodity exchanges as well as to protect those who could be injured by unreasonable fluctuations in commodity prices." *Tamari v. Bache & Co.*, 730 F.2d 1103, 1106 (7th Cir. 1984); *In re: Libor Based Financial Instruments Antitrust Litigation*, 935 F.Supp.2d 666, 697 (S.D.N.Y. 2013). To facilitate this objective, the CEA authorized the creation of self-regulatory organizations ("SRO's) pursuant to which NFA gains its authority. (See 7 U.S.C. §21.) The importance of the CEA should not be underestimated as the CFTC estimated the "2019 notional value of U.S. derivative markets was $27 trillion for U.S. futures and $353 trillion for U.S. Swaps."[2]

2. Underlying Events

Effex, has been managed and controlled by Dittami since its inception. Effex is an institutional over the counter ("OTC") foreign exchange ("FX" or "Forex") currency liquidity provider engaged solely in transactions with other eligible contract participants ("ECP's"). (Appendix A, pg. 8). In other words, Effex only transacts business with financial institutions or highly capitalized trading counterparties. Effex has never been a member of Defendant-Respondent National Futures Association ("NFA") or subject to its jurisdiction.[3](Appendix A, pg. 8).

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2. Message from the Chairman, Heath P. Tarbert, November 7, 2019 at https://www.cftc.gov/About/CFTCReports/index.htm

3. NFA is a self-regulatory organization ("SRO") which regulates commodities and futures trading and is overseen by

On February 7, 2017, NFA concluded an investigation ("NFA Investigation") of Forex Capital Markets, LLC ("FXCM"), Ornit Niv ("Ornit"), Drew Niv ("Drew") and William Adhout ("Adhout" collectively referred to with FXCM, Ornit, Drew and William as the "FXCM Defendants"). At the end of its investigation, NFA simultaneously issued and published a regulatory complaint ("NFA Complaint," Dkt. 13, pg. 7-30), a decision ("Consent Order," Dkt. 13, pg. 32-36), a narrative ("Narrative," Dkt. 13, pg. 38-41) and a release regarding the Consent Order ("Release," Dkt. 13, pg. 43, collectively referred to with the NFA Complaint, Consent Order and Narrative as the "NFA Publications"). The simultaneous publishing of the NFA Complaint and Consent Order, was done as a shortcut to resolve NFA's regulatory claims against the FXCM Defendants who were NFA members with the NFA Publications constituting the paperwork in which NFA implemented its settlement with the FXCM Defendants. Notably, the Consent Order did not result from a trial or hearing, but was a document agreed to by NFA and the FXCM Defendants as part of their agreed settlement. The Petitioners were not a party to any of the NFA Publications. Although the Consent Order was published making purported findings, in fact, the FXCM Defendants "neither admitted nor denied the allegations of the Complaint." (Dkt. 13, pg. 34). In addition, the Consent Order – while making purported findings about the Petitioners - did not even indicate that Petitioners were not parties to the proceeding.[4] Nonetheless, the

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the United States Commodities Futures Trading Commission ("CFTC")(Appendix B, pg. 1).

4. Notably, the CFTC after investigating Appellants did not institute any proceedings against Appellants.

FXCM Defendants and NFA agreed upon the terms of the settlement set forth in the Consent Order.

The specific naming of Petitioners in the Consent Order settling charges against the FXCM Defendants constituted a stark departure from NFA's typical practice in its enforcement actions (complaints, releases, decisions and narratives) in which NFA rarely, if ever, makes unopposed and unappealable findings or references about a non-NFA-member non-party over whom NFA has no jurisdiction. (Dkt. 66-4). Notwithstanding that Petitioners were neither members of NFA nor parties to the NFA proceeding, the NFA Publications purported that NFA had investigated Effex (see paragraph 16 of the NFA Complaint which states: "NFA commenced an investigation about Effex and its involvement with FXCM in 2013")(Dkt. 13, pg. 11); and NFA referenced Effex and/or Dittami (its owner) in 19 of the 22 paragraphs in Count I of the NFA Complaint (Dkt.13 pg. 15-20).

Even to the extent that NFA may have believed these statements about Petitioners were true, Effex was never apprised of any investigation and no one from Effex was ever interviewed. (Dkt. ¶¶ 39-43, 45, 52, 54-55). Effex was also not a participant or subject of the regulatory enforcement proceeding against FXCM and its principals. It should also be noted that there was no evidentiary hearing in the enforcement proceeding against FXCM since FXCM's case was disposed of by a negotiated resolution. (Dkt. 13, pg. 32-36). Thus, even if there was a contention that Petitioners had committed some impropriety (again outside of NFA's jurisdiction), Petitioners were not a party to any proceeding and did not present any evidence or any defense against any allegation of impropriety. (Appendix B, pg. 3).

The NFA Complaint incontrovertibly focused in large part on Effex and contained many false, misleading and defamatory statements (the "False and Defamatory Statements") regarding Petitioners, which collectively made it appear that Petitioners were guilty of fraud and had violated NFA Rule 2-4 which requires liquidity providers to follow just and equitable principles of trade. The False and Defamatory Statements include, but are not limited to Effex: (a) was "supported and controlled by FXCM" (Dkt. 13, pg. 11)[5]; (b) "engaged in abusive execution practices that denied FXCM's retail customers favorable price improvement" (Dkt. 13, pg. 11); and (c) was "what amounted to a dealing Desk" and profited when customers lost money (Dkt. 13, pg. 39). The NFA Complaint also disclosed Petitioners' confidential information constituting trade secrets ("Trade Secrets") which are the foundation of Effex's trading strategy and algorithms.[6]

The majority of the False and Defamatory Statements were also recited in the Narrative and Consent Order. These statements were false because:

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5. By stating Effex was owned and controlled by FXCM, NFA misled the public into believing that Effex violated the same statutes and regulations as if it was the same as the member, FXCM.

6. In response to a subpoena issued by the CFTC, Appellants provided CFTC with numerous documents ("CFTC Docs") which were properly marked privileged and confidential. In addition, Dittami testified in CFTC's private investigation and the transcript of his testimony ("JD Transcript") should have been afforded confidential treatment. Appellants believe the CFTC Docs and JD Transcript were provided to NFA (Dkt. 7-1, ¶23).

(i) Effex was solely managed and controlled by Dittami;

(ii) Effex never shared profits with FXCM but rather had a written contractual per volume pay for flow agreement with FXCM;

(iii) Effex took all risk in its trades;

(iv) Effex paid its own expenses;

(v) Effex never had access to data that was unavailable to other liquidity providers, such as FXCM's customer positions; and

(vi) Effex obtained order flow because it provided best price and execution and its superlative execution services added in excess of $100,000,000 dollars in execution benefit to FXCM relative to the competing prices offered FXCM by its other competing liquidity providers.[7]

(Dkt. 7-1, ¶¶10, 11, 12, 15 and 28).

Petitioners filed a complaint against NFA for the injury caused to them. Petitioners contended in their complaint against NFA (as amended) ("Petitioners' Complaint") that after NFA published these false and

7. Effex's providing such benefits necessarily meant it won a tremendous volume of business. This was obviously to the detriment of NFA members who were thus unable to process such transactions.

defamatory statements and disclosed its trade secrets, Petitioners' business was financially ruined leading to the cessation of Petitioners' operations. (Dkt 45, ¶¶ 77-83). Since Petitioners were not parties to any NFA proceeding, they had no avenue to appeal NFA's conduct or to pursue any other relief post-issuance of the Consent Order.[8]

Petitioners' Complaint also alleged that NFA's publication of the False and Defamatory Statements was an intentional act by NFA to: (i) attempt to regulate Effex (which is not subject to NFA's jurisdiction) (Dkt. 20, pg. 1); (ii) terminate and destroy Effex's (a non-registrant) business (Dkt. 20, pg. 1); (iii) promote the public perception that NFA policed usage of "last look/hold timer"[9]; (iv) force all retail forex trading to be conducted on exchange to generate revenue for NFA and its member firms. (Dkt. 7-1, ¶43); and (v) benefit its member firms that competed with Effex.[10] (Dkt. 7-1, ¶43).

NFA's publication of the False and Defamatory Statements occurred outside of its jurisdiction and constituted *ultra vires acts* beyond the scope of its legal authority and a *de facto* regulation and conviction of Petitioners without providing them with the opportunity to

8. Even assuming arguendo that Appellants had a right to appeal to CFTC that should not preempt their pursuing state law claims which provide for damages not available under the CEA.

9. Concurrently, NFA condoned and permitted the use of "last look/hold timer" by many of its highest paying members, some of whom had seats on NFA's board (Dkt. 7-1, §41).

10. NFA generates a fee for all on exchange retail forex trading but has no income from off exchange retail forex trading (Dkt. 66, ¶8).

protect Petitioners' economic interests, defend themselves against false allegations, or otherwise be heard.

What is of key importance is that NFA's publication of the False and Defamatory Statements *via* the NFA Publications was unnecessary to prosecute or settle NFA's charges against FXCM. NFA could have undertaken its regulatory function without making the false and defamatory statements and without publicly releasing Effex's confidential information. Thus, there is no "conflict" to satisfy a finding of preemption. It should be noted that the Seventh Circuit Court of Appeals also decided that preemption existed without even a developed record to support their conclusions. Additionally, to the extent that Effex's contention is true that NFA intended to try to regulate Effex through this process without proper jurisdiction, this *ultra vires* function should not be subject to preemption. (Dkt. 7-1, ¶31).[11]

11. The genesis of NFA's action against Appellants arose from NFA's prior effort to unilaterally expand its congressionally created statutory jurisdiction beyond retail forex firms to include congressionally exempt firms that provide liquidity to retail brokers (i.e. Effex) over whom NFA had no jurisdiction. Notably, NFA had unsuccessfully lobbied Congress to grant it the authority to regulate ECP's trading solely for their own account with other ECP's. (Dkt. 66, ¶6). At the time NFA issued the False and Defamatory Statements, Effex was one of, if not the only, unregistered United States entity pricing an NFA Registered Foreign Exchange Dealer ("RFED") under the narrow ECP to ECP Congressionally delegated exemption pursuant to 7 U.S.C. §(2)(c)(2)(B). (Dkt. 66, ¶4). Failing to obtain jurisdiction over Effex *via* court or Congress, NFA utilized the FXCM proceeding as a vehicle to *de facto* regulate the Unicorn, known as Effex, since it had no delegated authority to oversee Effex. Interestingly, FXCM's transactions were outside of the exclusive jurisdiction set forth in 7 U.S.C. §2(a)(1)(A).

3. District Court Proceedings

Subsequent to NFA's publication of the False and Defamatory Statements, Petitioners commenced this action asserting Counts seeking monetary relief for: (i) defamation; (ii) violation of the Illinois Trade Secret Act ("ITSA"); (iii) interference with business relations; (iv) interference with economic advantage; and (v) failure to provide due process. In addition, both the due process claim and the defamation claim sought injunctive relief ordering the removal of the NFA Complaint, Consent Order, Narrative and Release from NFA's website, or, in the alternative, to strike all references to Petitioners and their trade secrets, or conduct a name clearing hearing.[12] (Dkt 45, pg 29-31). This injunctive relief sought a remedial step to remove the offensive matter while allowing NFA to maintain the necessary elements in its settlement documentation that would implement its regulatory action and function.

NFA moved to dismiss Petitioners' Complaint arguing that: (i) Petitioners failed to exhaust their administrative remedies prior to filing the Complaint; (ii) Petitioners' claims were barred by the doctrine of immunity; and (iii) Petitioners' state law claims were preempted by the CEA. On April 5, 2018, the District Court issued the Order (see, Appendix B) granting NFA' motion to dismiss holding that Petitioners failed to exhaust their administrative remedies.

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12. Effex recognizes that some of these injunctive requests may be preempted – without regard to the preemption of monetary claims against the NFA.

4. Appeal to the Seventh Circuit

Petitioners appealed to the Seventh Circuit which affirmed the District Court's decision; however, rather than affirming based upon the holding that Petitioners failed to exhaust their administrative remedies, the Seventh Circuit affirmed on the alternative ground of preemption. Petitioners' request for a rehearing was denied by the Seventh Circuit Court of Appeals, and for the reasons set forth below, Petitioners seek leave to appeal to the United States Supreme Court.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's holding has improperly expanded preemption in a manner that would preempt any state law that might potentially infringe on an SRO's activities even when the SRO could have performed its functions consistent with its enabling regulations. If not overturned, this broad new test will likely result in the preemption of claims which previously would have been viable.

The federal preemption doctrine stems from the Supremacy Clause of the Constitution pursuant to which Courts can invalidate state laws which infringe on areas Congress expressly or impliedly reserved for itself. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001); *Am. Agric. Movement, Inc. v. Board of Trade of City of Chicago,* 977 F.2d 1147, 1154 (7th Cir. 1992). Preemption may: (a) arise from express statutory language (*Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 203, 103 S.Ct. 1713, 1721-22, 75 L.Ed.2d 752

(1983)), or (b) be implied by either: (i) "Field Preemption" which requires the Court to determine the depth and breadth of a congressional scheme that occupies the legislative field is "so pervasive as to make reasonable the inference that it left no room for the States to supplement it" (*Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982)); or (ii) a conflict between the state common law claim and a congressional enactment. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). Conflict preemption can only be found if it is either: (i) impossible to comply with both state and federal law; (ii) or a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

Since there is no express conflict between Petitioners' state law claims (they are of general application) and the language of the CEA, the Seventh Circuit's application of conflict preemption must be based upon a finding that the application of the state law creates an obstacle to the implementation of the federal law. Findings of conflict preemption should not be taken lightly since the "teaching of this Court's decisions . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co v. City of Detroit*, Mich., 362 U.S. 440, 446, 80 S.Ct. 813, 817, 4 L.Ed.2d 852 (1960). However, neither a hypothetical nor a potential conflict is sufficient basis to find the state statute preempted. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 3299, 73 L.Ed.2d 1042 (1982). The standard is heightened for a court to find a law of general application constitutes an obstacle.

Entergy Nuclear Vermont Yankee, LLC v. Shumlin, 838 F.Supp.2d 183, 226 (U.S.D.C. Dist. Vt. 2014). In this instance, NFA's position which purportedly satisfied the obstacle test was merely hypothetical and the Seventh Circuits' rudimentary analysis did not and could not show an actual conflict or obstacle. The Seventh Circuit disregarded applicable precedent since the decision does not, and cannot, identify any direct way in which Effex's state law claims interfered with NFA's regulatory duties or regulatory function. More specifically, the Seventh Circuit contended that generic state law claims of general application should be preempted if they could possibly have an impact on a regulator even if the Court is aware that the impact: (i) cannot be identified; and (ii) would not overturn the regulators' decision or change the rules and regulations for its future actions. Such hypothetical obstacle is clearly insufficient for a finding of preemption. *Rice v. Norman Williams Co.*, 458 U.S. at 659.[13] Moreover, the only possible impact on NFA is that Petitioners' state law claims challenge an improper or *ultra vires* act of the regulatory body as it relates to an unregulated person. Since the challenge would not impact the discipline against the regulated members, the FXCM Defendants, it cannot be a conflict sufficient to support a finding of preemption.

The Seventh Circuit's finding that this purported conflict requires preemption is also contradicted by the savings clause contained in the CEA ("Savings Clause") which specifically preserves state law claims. To wit: "[n]othing in this section shall supersede or limit the

13. Currently there is a movement to limit the doctrine of implied preemption. *Wyeth v. Levine*, 555, U.S. 555 587, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009).

jurisdiction conferred on courts of the United States or any State." 7 U.S.C. §2(a)(1)(A). Thus, the clear language of the statute shows Congress had no intent to preclude state law claims. *McKerr v. Bd. Of Trade*, No. 12 C 5008, 2012 U.S. Dist. Lexis 1159333, *14-17, 2012 WL 3544866, at *5–6 (N.D. Ill. Aug. 15, 2012). *Khalid Bin Talal Bin Abdul Azaiz Seoud v. E.F. Hutton & Co.*, 720 F. Supp. 671, 680 (N.D. Ill. 1989); *Patry v. Rosenthal & Co.*, Inc., 534 F. Supp. 545, 551 (D. Kan. 1982).

The applicability of the Savings Clause is reinforced by a careful review of the CEA which conclusively shows that the Seventh Circuit's holding directly contradicts Congressional intent. First, Effex exclusively engaged in transactions with other ECP's which transactions are specifically exempted from the CEA (see 7 U.S.C. §2(c)(2)(B)(i)(II)), and therefore Congress expressly intended to exempt Effex from NFA's jurisdiction. Second, by *de facto* regulating Effex and forcing it to cease operations, NFA acted in an anti-competitive manner thereby conflicting with its Congressional mandate to operate in the least anti-competitive manner as required by 7 U.S.C. §19. Third, by disclosing Petitioners' trade secrets, NFA violated its privacy obligations.[14] In sum, the aforementioned statements, individually and collectively show Congress did not intend to preempt Petitioners' claims or state law claims of general applications. Thus, it is clear that the Seventh Circuit impliedly preempted Petitioners' claims in contravention of express Congressional intent evidenced by both the Savings Clause and NFA's lack of jurisdiction over Petitioners' forex trading.

14. 17 C.F.R. § 145.5(d) precludes the disclosure of "trade secrets" and since the obligation already exists under federal law, it cannot conflict with similar state laws.

In undertaking its regulatory actions in this case, NFA could have entered into the Consent Order without revealing the Trade Secrets, identifying Appellants or making the Defamatory Statements. Thus, the Seventh Circuit wrongfully expanded the scope of conflict preemption under the CEA to preempt state law claims of general application brought by a non-member, non-party where such claims merely reference an underlying disciplinary proceeding but have no impact on the underlying disciplinary proceeding against the SRO member. The inclusion of the Defamatory Statements was neither relevant nor necessary to the Disciplinary Acton and Consent Order, and prosecuting Appellants' state law claims of general application do not require a modification to the Consent Order. Indeed, because the state law claims are of general application they necessarily do not intend to effect how NFA performs its regulatory functions and duties. This broad holding upends existing law and impinges on the state's rights reserved to them under the Constitution and the savings clause in the CEA. 7 U.S.C. §2(a)(1)(A). Taken to its logical conclusion the Decision precludes any subsequent action which quotes or relies on statements from a prior administrative proceeding regardless of whether such subsequent action affects the outcome of the hearing. Thus, Petitioners' claims would have no broad effects on NFA's ability to regulate, would not create binding precedent for any future disciplinary proceedings, and would not modify the findings against the FXCM Defendants.

To the extent, the 7th Circuit found that Petitioners' requests for injunctive relief could have interfered with NFA's ability to regulate, such argument is a red herring. Only the due process and defamation counts sought

injunctive relief rendering such argument irrelevant. Even assuming arguendo all Petitioners' counts sought injunctive relief, such requests are not endemic to Petitioners' claims which could proceed solely for monetary relief without seeking injunctive relief – the request for injunctive relief does not constitute an element of any of Petitioners' counts. At worst, the Court could merely find that injunctive relief would be improper while allowing the monetary claims to proceed. Accordingly, NFA has no serious interest to protect *via* preemption.

If left intact, the Decision: (i) creates a road map for SRO's to commit willful, intentional or negligent torts with impunity under the alleged auspices of an investigation knowing that no viable claims can be filed against them by non-member, non-parties; and (ii) infringes on States constitutional power to protect their citizens. More specifically, NFA can act with impunity by cloaking its clearly anticompetitive actions designed to benefit its member firms under the guise of a legitimate disciplinary proceeding. This is inapposite of current law. To wit: in similar circumstances Courts have found if the application of state law only affects the relationship between brokers and investors or other individuals involved in the market then there is no preemption. *Mallen v. Merrill Lynch Futures, Inc.*, 623 F. Supp. 203, 205 (N.D. Ga. 1985); *Bernstein v. Lind-Waldock & Co.* 738 F.2d 179, 184-85 (7th Cir. 1984). The logic underpinning such decisions also applies to Petitioners' state law claims as they do not have any impact on the underlying proceeding against FXCM – they do not require a change in the substance of the decision, they do not require the decision be revoked, and they do not impact the terms of the settlement between NFA and FXCM.

The Courts should enforce the statutory language as written and not expand it to fit its purposes. *Jimez v. Quarterman*, 555 U.S. 113, 129 S.Ct. 681, 172 L.Ed.2d 475 (2009). To do otherwise could "frustrate rather than effectuate legislative intent". *Wyeth v. Levine*, 555 U.S. at 601 (citing *Norfolk Southern R. Co. v. Sorrell*, 549 U.S. 158, 127 S.Ct. 799, 166 L.Ed.2d 638 (2007). In this instance the CEA contains an express savings clause which indicates the Seventh Circuits' Order actually "frustrate rather than effectuate legislative intent." Id. If not reversed the Seventh Circuit's decision will extend the doctrine of conflict preemption so that almost any state law claim would be preempted.

CONCLUSION

As a result of the foregoing, Petitioners respectfully request that this Court grant their *writ of certiorari* and permit briefing and arguments on the Questions Presented in this Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED AUGUST 13, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-1914

EFFEX CAPITAL, LLC, *et al.*,

Plaintiffs-Appellants,

v.

NATIONAL FUTURES ASSOCIATION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:17-cv-04245 — **Andrea R. Wood**, *Judge.*

November 29, 2018, Argued
August 13, 2019, Decided

Before FLAUM, RIPPLE, and MANION, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Effex Capital, LLC ("Effex"), brought this action alleging that the National Futures Association (the "NFA") had defamed it in documents related to a settlement between the NFA and one of

its members, Forex Capital Markets, LLC ("FXCM").[1] It sought injunctive relief and damages. The district court dismissed the action, holding that Effex had failed to exhaust its administrative remedies.[2] Effex timely appealed the district court's dismissal.[3]

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1. The district court had jurisdiction to adjudicate Effex's due process claims under 28 U.S.C. § 1331 and its state-law tort claims under 28 U.S.C. § 1332.

2. The court's dismissal was without prejudice to Effex's pursuing its administrative remedies and then seeking review of its properly exhausted claims.

3. Our jurisdiction is premised on 28 U.S.C. § 1291. In most cases, dismissal without prejudice "does not qualify as an appealable final judgment because the plaintiff is free to re-file the case." *Larkin v. Galloway*, 266 F.3d 718, 721 (7th Cir. 2001). This rule, however, is not without exception. A dismissal without prejudice is deemed final for the purposes of § 1291 where no amendment to the complaint "could resolve the problem." *Kaba v. Stepp*, 458 F.3d 678, 680 (7th Cir. 2006). Put differently, we treat a district court's dismissal as final where "there are multiple indicia that the district court was finished with the case." *Hernandez v. Dart*, 814 F.3d 836, 841 (7th Cir. 2016). Here, the entirety of the district court's dismissal of Effex's case suggests that it was indeed finished with the case and that Effex could not refile after it seeks any administrative remedy that may be available to it. First, the district court said that review of Effex's "properly exhausted claims" could be taken in "the *appropriate* federal court," R.89 at 15 (emphasis added), which contemplates filing in the court of appeals pursuant to the review process Congress provided in 7 U.S.C. § 21(i)(4). Additionally, the docket entry accompanying the district court's opinion indicates that "[t]his case will be closed," R.88, and the district court entered judgment separately pursuant to Federal Rule of Civil Procedure 58. R.90. Taken together, it appears that Effex could not refile suit with the district court even after seeking its administrative remedies. *Cf.*

Appendix A

For the reasons set forth more fully in the following opinion, we now affirm the judgment of the district court.[4] In the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, Congress has regulated comprehensively all matters relating to NFA discipline. As such, a federal *Bivens* remedy is unavailable.[5] Further, the Commodity Exchange Act preempts Effex's state law claims. Any remedy available to Effex must be based on the provisions of that statute.

Kowalski v. Boliker, 893 F.3d 987, 994 (7th Cir. 2018) (determining there was appellate jurisdiction where the district court dismissed the complaint on grounds that made it "difficult to imagine" that the plaintiff could file a new suit in the future); *Hernandez*, 814 F.3d at 841 (noting one indicia that the district court finished with the case was a docket entry stating "Civil case terminated"); *Gregory v. Hartman*, No. 88-3169, 1990 U.S. App. LEXIS 13166, 1990 WL 112017, at *1 (7th Cir. 1990) (unpublished) (finding jurisdiction where the district court "stated that [its] dismissal was 'not meant to reflect in any way on any legitimate state law claims' that Gregory may have had" and where "the court entered a separate judgment pursuant to [Rule] 58").

4. We "may affirm the district court's dismissal on any ground supported by the record, even if different from the grounds relied upon by the district court." *Slaney v. The Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 597 (7th Cir. 2001).

5. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

Appendix A

I

BACKGROUND

A.

We begin our consideration of this matter with a summary discussion of the relevant provisions of the Commodity Exchange Act. In its current form,[6] the Commodity Exchange Act seeks to curb price manipulation, ensure the financial integrity of commodities transactions, avoid systemic risk, protect market participants from fraud or abusive sales practices, and promote responsible and fair competition within the commodities market. 7 U.S.C. § 5(b). The Commodity Exchange Act serves these public interests "through a system of effective self-

6. The Commodity Exchange Act was enacted in 1936 to amend the Grain Futures Act of 1922. Its original goal was to "prevent and remove obstructions and burdens upon interstate commerce in grains and other commodities by regulating transactions therein on commodity futures exchanges, to limit or abolish short selling, [and] to curb manipulation." Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491, 1491 (1936). The Commodity Exchange Act has been amended many times since, most significantly with the Commodity Futures Trading Commission Act of 1974, § 1(a)(5), Pub. L. No. 93-463, 88 Stat. 1389 (1974) (establishing the independent Commodity Futures Trading Commission), the Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (among other things, renewing the Commission's mandate, clarifying regulation of over-the-counter derivatives, and repealing a ban on trading single stock futures), and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (in part, expanding the Commission's authority to oversee the swaps marketplace).

regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission."[7] *Id.* As part of this regulatory scheme, the Commodity Futures Trading Commission Act of 1974 authorized the creation of registered futures associations as self-regulatory organizations ("SRO") to complement the Commodity Futures Trading Commission's (the "Commission" or the "CFTC") regulation of commodity futures markets and their participants.[8]

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7. Congress created the Commodity Futures Trading Commission as an independent commission to address concerns that the self-regulatory framework of the Commodity Exchange Act as previously enacted no longer met the changing needs of the commodity futures markets without some oversight. *See, e.g.*, H.R. Rep. No. 93-975, at 34-38 (1974); S. Rep. No. 93-1131, at 18-19 (1974).

8. *See* Commodity Futures Trading Commission Act of 1974, § 301, 88 Stat. at 1406-11 (1974) (codified at 7 U.S.C. § 21). The House version of the Commodity Futures Trading Commission Act included the relevant section authorizing SROs and delineating their roles and responsibilities whereas the Senate bill included an amendment striking such authorization and instead providing for further study of the appropriateness of SROs. *See* H.R. Rep. 93-1383, at 39 (1974) (Conf. Rep.). The Conference adopted the House provision with an amendment providing for annual reports to Congress so that Congress could continually review the effectiveness of SROs. *Id.* The House Committee on Agriculture indicated that permitting self-regulation through registered futures associations, under the supervision of a federal agency, struck an appropriate balance between self-regulation and direct federal regulation of futures trading. *See* H.R. Rep. 93-975, at 48 ("The Committee bill does not propose that self-regulatory activities of the exchanges be abolished in favor of continued and direct federal regulation of all aspects of futures trading. ... Yet, with proper Federal supervisory authority, needed self-regulatory efforts of the exchanges can live

Appendix A

The Commodity Exchange Act requires that SROs set forth many types of regulations and rules, including rules that "provide that its members and persons associated with its members shall be appropriately disciplined ... for any violation of its rules." 7 U.S.C. § 21(b)(8). Moreover, disciplinary proceedings against members and persons permitted to register as "associate[s]"[9] of a member must follow "fair and orderly procedure[s]." *Id.* § 21(b)(9). This mandate includes requiring "that specific charges be brought; that such member or person shall be notified of, and be given an opportunity to defend against, such charges; that a record shall be kept; and that the determination shall include" statements setting forth the impermissible acts the member or person took, the rules violated, and penalty imposed. *Id.*; *see also* 17 C.F.R. § 170.6(b) (requiring the SRO to "[c]onduct proceedings in a manner consistent with the fundamental elements of due process").

The statute provides for CFTC review of an SRO's disciplinary action. It requires that SROs "promptly shall give notice" of any final disciplinary action against a member or person associated with a member "to such member or person and file notice thereof with the Commission." 7 U.S.C. § 21(h)(1). Final disciplinary actions

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a useful life into the 21st Century and, hopefully, beyond."); *id.* at 58 ("Association activity would serve solely as a complement rather than a displacement to the authority of the new Commission.").

9. An associated person is a person who solicits orders, customers, or customer funds on behalf of the NFA member. *See* 7 U.S.C. §§ 6k, 21(b)(2).

are "subject to review by the Commission on its motion, or on application by any person aggrieved by the action." *Id.* § 21(h)(2).[10] The accompanying regulations permit appeal to the Commission by "[a]ny party aggrieved by the final decision of the National Futures Association in a disciplinary ... action." 17 C.F.R. § 171.23(a). The regulations define a party as "any person who has been the subject of a disciplinary action ... by the National Futures Association; the National Futures Association itself; [and] any person granted permission to participate as a party pursuant to § 171.27 of these rules." 17 C.F.R. § 171.2(i). Section 171.27 provides that, "[u]pon motion of any interested person or, on its own motion, the Commission may permit, or solicit, limited participation in the proceeding by such interested person." 17 C.F.R. § 171.27(a). Interested persons include "parties and any other persons who might be adversely affected or aggrieved by the outcome of a proceeding; ... and any other person having a direct or indirect pecuniary or other interest in the outcome of a proceeding." *Id.* § 171.27(b). Intervention by such an interested person is appropriate "[i]f the Commission determines that participation would

10. Any application for CFTC review "shall be filed within 30 days after the date such notice is filed with the Commission and received by the aggrieved person, or within such longer period as the Commission may determine." 7 U.S.C. § 21(h)(2). Although application for CFTC review does not automatically stay a final disciplinary action, the Commission may order a stay "summarily or after notice and opportunity for hearing on the question of a stay," *id.* § 21(h)(3)(A), and "[t]he Commission shall establish procedures for expedited consideration and determination of the question of a stay," *id.* § 21(h)(3)(B). *See generally* 17 C.F.R. § 171.22(b) (regulations pertaining to stays).

serve the public interest." *Id.* § 171.27(a). Beyond these specific regulations regarding application for Commission review of an SRO's disciplinary action, there is a general regulation that permits the Commission to "waive any rule" in § 171 "in a particular case" and "order proceedings in accordance with its direction" if waiver would "prevent undue hardship on any party or for any other good cause shown." 17 C.F.R. § 171.14. An order under this provision "shall be based upon a determination that no party will be prejudiced thereby and that the ends of justice will be served," and "[r]easonable notice" shall be "given to all parties of any action taken." *Id.*

The CFTC has the power to "set aside the sanction imposed by the [SRO] and, if appropriate, remand the case to the [SRO] for further proceedings." 7 U.S.C. § 21(i)(1)(B); s*ee also* 17 C.F.R. § 171.33(a) ("Upon review, the Commission may affirm, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the National Futures Association."). The Commission's decision may be appealed to the appropriate United States Court of Appeals. 7 U.S.C. § 21(i)(4) ("Any person aggrieved by a final order of the Commission ... may file a petition for review with a United States court of appeals ... .").

B.

The NFA is an SRO that is registered under the Commodity Exchange Act.[11] It is subject to the broad authority of the CFTC. *See* 7 U.S.C. § 21. This authority

11. *See In re the Application of the Nat'l Futures Ass'n*, 1981 WL 762560, at *37 (CFTC Sept. 22, 1981) (approving the NFA as an SRO under 7 U.S.C. § 21).

includes review of NFA disciplinary actions or denials of membership. *Id.* § 21(h).

Effex is a closely held, foreign-currency trading firm managed and controlled by John Dittami. It operates as an institutional over-the-counter, foreign-exchange liquidity provider and engages solely in transactions with other eligible contract participants such as financial institutions or highly capitalized trading counterparts. Because of the nature of Effex's trading, it is not subject to regulation by the NFA and is therefore not a member of the NFA.[12]

In accordance with its responsibilities under the Commodity Exchange Act, the NFA initiated an investigation into an association member, FXCM, and found that the company had engaged in several practices that violate the NFA's rules. FXCM chose to settle with the NFA, and on February 6, 2017, the NFA released several documents related to the settlement (collectively, the "FXCM Settlement Documents").[13] These documents include: (1) a complaint setting forth the NFA's allegations against FXCM; (2) a decision by the NFA Business Conduct Committee finding that FXCM committed the violations outlined in the complaint and detailing the terms of a settlement between the NFA and FXCM; (3) a publicly accessible narrative summarizing the decision; and (4)

12. R.45 ¶¶ 21, 24. *See also* 17 C.F.R. § 5.22 (delineating persons working within the foreign exchange market who must register with a futures association).

13. The district court refers to these documents as the "NFA Publications." *See* R.89 at 2.

a press release announcing the decision and directing the public to the narrative posted on the NFA's website.

The NFA's complaint against FXCM alleged that FXCM failed to comply with a litany of NFA rules. More pertinently, the NFA claimed that Effex was involved in the misconduct allegedly committed by FXCM. The resulting decision outlined the allegations in the complaint, including those involving Effex, and accepted them as true. The accompanying narrative summarized the decision, including its statements about Effex. The press release, although it did not specifically reference Effex, noted that FXCM committed numerous deceptive and abusive actions and directed the public to the narrative on the NFA's website. Effex alleges that the NFA's findings in the FXCM Settlement Documents are false and that their publication is defamatory.

Although its investigation into FXCM implicated Effex, the NFA did not contact Effex or provide Effex with notice of the investigation. The CFTC, on the other hand, conducted its own investigation into FXCM. As part of its investigation, the Commission subpoenaed documents from Effex and took the deposition of Mr. Dittami and other Effex employees. Effex alleges that the NFA obtained documents necessary for its investigation from the CFTC despite Effex's request that its responses as a third party be kept confidential.

On the same day that the NFA announced its settlement with FXCM, the CFTC issued its own decision about

FXCM and its business practices.[14] It determined that FXCM had concealed an improper trading relationship with a "high-frequency trader" and a company the trader formed (which the Commission termed "HFT Co").[15] Although not explicitly named, the HFT Co is Effex. The CFTC found materially the same facts as the NFA did regarding Effex.

Effex did not seek review of either the NFA's decision or the Commission's decision regarding FXCM. Rather, four months after the decisions were released, Effex filed this action against the NFA in the district court.

C.

On July 31, 2017, Effex brought this action against the NFA. In its federal claims, Effex alleges that the NFA violated its due process rights by not providing it with notice of the investigation or an opportunity for a hearing before the publication of the FXCM Settlement Documents. The federal claims further submit that the NFA denied Effex due process of law when it did not allow Effex access to a post-deprivation remedy. In its state-law claims, Effex alleges that the statements about it in the FXCM Settlement Documents, published by the NFA, were defamatory. Additionally, Effex alleged business tort claims and a claim under the Illinois Trade Secrets Act, 765 Ill. Comp. Stat. 1065/ *et seq.*

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14. *See In re Forex Capital Mkts., LLC*, CFTC No. 17-09, 2017 CFTC LEXIS 6, 2017 WL 564341 (Feb. 6, 2017).

15. *Id.* at *3.

Effex sought injunctive relief, asking for an order requiring the NFA to remove the FXCM Settlement Documents from its website, to delete all references to Effex, or, alternatively, to provide Effex with a "name clearing hearing."[16] It further requested an order compelling the NFA to "issue a new press release stating: (a) NFA did not make any findings against Effex or Dittami; (b) Effex was not a de facto dealing desk of FXCM; (c) Effex was not controlled by FXCM; and (d) FXCM was not ordered to make any customer restitution."[17] Effex also asked for money damages of $10,000,000 for lost profits and to redress its constitutional injury.

The NFA moved to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[18] With respect to the federal claims, it submitted that dismissal was proper because there is no federal *Bivens* remedy and Effex had not exhausted its administrative claims under the Commodity Exchange Act. As for the state-law claims, the NFA contended that all were preempted by the Commodity Exchange Act. Finally, it claimed absolute immunity from any damages because the claims were based on its disciplinary proceedings.

The district court held that Effex failed to exhaust its remedies under the Commodity Exchange Act and dismissed without prejudice. The district court

16. R.45 at 29-30.

17. *Id.*

18. At the same time that the NFA moved to dismiss the action, Effex brought a motion for a preliminary injunction.

determined that the Commodity Exchange Act provides a statutorily mandated exhaustion requirement and that Effex had four avenues to pursue relief under the scheme. First, it found that Effex could have petitioned the CFTC to exercise its authority under 7 U.S.C. § 21(h)(2) to review the FXCM Settlement *sua sponte* because the statute permits the Commission to review an NFA decision "on its motion." *Id.* § 21(h)(2). Second, relying on the CFTC's decision in *Paribas Futures, Inc. v. New York Mercantile Exchange*, CFTC No. 90-E-3, 1990 CFTC LEXIS 122, 1990 WL 282868, at *2 (Mar. 22, 1990),[19] the district court decided that if Commission review under § 21(h)(2) is only available to aggrieved parties, Effex could have intervened to become a party under the relevant regulations. Third, citing *In re Petition of Lake Shore Alternative Financial Asset Ltd.*, CFTC No. CRAA-07-03, 2007 CFTC LEXIS 73, 2007 WL 2751884, at *2 (Sept. 17, 2007),[20] the district court noted that the CFTC had previously suggested that a nonparty could ask the Commission to waive its rules so that the nonparty could obtain CFTC review, but Effex had not made such a request. Finally, the district

19. In *Paribas Futures, Inc. v. New York Mercantile Exchange*, CFTC No. 90-E-3, 1990 CFTC LEXIS 122, 1990 WL 282868, at *2 (Mar. 22, 1990), the Commission noted that "[i]ntervention after an initial decision for the purposes of taking an appeal is appropriate in some circumstances."

20. In *In re Petition of Lake Shore Alternative Financial Asset Ltd.*, CFTC No. CRAA-07-03, 2007 CFTC LEXIS 73, 2007 WL 2751884, at *2 (Sept. 17, 2007), the Commission considered whether it should waive its rules pursuant to 17 C.F.R. § 171.14 to permit the appeal of a membership responsibility action by a nonparty to that action.

court determined that Effex could have turned to the Administrative Procedure Act and petitioned the CFTC to revise its rules generally to permit Commission review in such instances.

The district court rejected Effex's argument that any resort to the Commodity Exchange Act's remedies would have been impossible or futile. It noted that the CFTC had the ability to adjudicate due process claims. Moreover, the court acknowledged that even though the Commission rarely reviews NFA settlements, it previously had reviewed settlements. Finally, observing that Effex's claims "touch on the contents of the NFA Publications—documents generated as a result of the NFA investigation relating to a disciplinary action,"[21] the district court rejected Effex's contention that it was not seeking review of an NFA disciplinary action but rather merely was seeking a court order regarding the publication of the FXCM Settlement Documents containing the alleged defamatory statements.

Therefore, the district court dismissed Effex's Complaint. It did so without prejudice to any rights Effex might have to pursue its remedies before the CFTC and then to seek further review of those exhausted claims in the appropriate court of appeals. Having dismissed the complaint for failure to state a claim, the court also denied Effex's motion for a preliminary injunction as moot. Effex timely appealed.

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21. R.89 at 12.

II

DISCUSSION

A.

We now turn to the merits of this appeal.[22] First, we address whether Effex has a federal cause of action. The comprehensive nature of the federal regulatory scheme, as set forth above, grounded in the language and structure of the statute, makes clear that, in fashioning the disciplinary provisions of the Commodity Exchange Act, Congress certainly did not countenance a separate federal remedy, much less a separate federal remedy fashioned by the judiciary. Indeed, Effex does not maintain that there is a specific federal cause of action to redress harm inflicted by an SRO upon one of its *members*. Rather, it asks that we imply a cause of action to remedy harm to a *nonmember* (such as Effex) resulting from an SRO proceeding. It casts this cause of action as one to remedy a due process violation under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). *Bivens* recognized a damages remedy to compensate persons injured by the federal officers who violated the Fourth Amendment even though the Amendment does not provide

22. The parties correctly agree that our review is de novo. Although the district court's opinion evinced some unease as to whether dismissal should have been based on failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) or for want of jurisdiction under Rule 12(b)(1), resolving that issue does not affect our standard of review or disposition.

for money damages "in so many words." *Id.* at 395-97. In doing so, the Court noted that Congress had not explicitly foreclosed a damages remedy and that there were no "special factors" counseling against authorizing such a remedy to effectuate the statute's purpose. *Id.*

In the years following *Bivens*, the Supreme Court has limited the application of the decision. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857, 198 L. Ed. 2d 290 (2017) (noting that the Court has consistently refused to extend *Bivens* to any new context or new category of defendants).[23] The Court has made very clear that the expansion of the *Bivens* remedy to other constitutional provisions is a "disfavored judicial activity." *Id.* at 1857 (internal quotation marks omitted). *Ziglar* explained

23. As *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857, 198 L. Ed. 2d 290 (2017), recounts, the Supreme Court declined to create an implied damages remedy in the following situations: an Eighth Amendment suit against prison guards at a private prison, *Minneci v. Pollard*, 565 U.S. 118, 120, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012); a due process suit against officials from the Bureau of Land Management, *Wilkie v. Robbins*, 551 U.S. 537, 547-48, 562, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007); an Eighth Amendment suit against a private prison operator, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001); a procedural due process suit against a federal agency for wrongful termination, *FDIC v. Meyer*, 510 U.S. 471, 473-74, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994); a procedural due process suit against Social Security officials, *Schweiker v. Chilicky*, 487 U.S. 412, 414, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988); a substantive due process suit against military officers, *United States v. Stanley*, 483 U.S. 669, 683-84, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987); a First Amendment suit against a federal employer, *Bush v. Lucas*, 462 U.S. 367, 390, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983); and a race-discrimination suit against military officers, *Chappell v. Wallace*, 462 U.S. 296, 297, 304-05, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983).

that "[w]hen a party seeks to assert an implied cause of action under the Constitution itself," "separation-of-powers principles are or should be central to the analysis." *Id.* Under these principles, it is a "significant step" "for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Id.* at 1856. Such a determination is a significant step because there are powerful countervailing considerations to the creation of a *Bivens* cause of action, including that Congress "has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government." *Id.* Therefore, an implied cause of action under the Constitution is not available if there is a "special factor" that "cause[s] a court to hesitate" before determining that a court rather than Congress should provide a remedy. *Id.* at 1858. Such doubt could arise where "there is an alternative remedial structure present." *Id.* An alternative structure "alone may limit the power of the Judiciary to infer a new *Bivens* cause of action" because Congress's decision to create the alternative remedial process is "convincing reason for the Judicial Branch to refrain from providing a new and free-standing remedy in damages." *Id.* (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007)).

Applying these principles, an alternative remedial structure counseling hesitation against expanding the *Bivens* remedy is certainly present here. The enactment of the Commodity Exchange Act provides far more than

a "doubt" about Congress's willingness to tolerate an alternate remedy to the comprehensive remedial structure of federal oversight by SROs found in the statute. In the Commodity Exchange Act, Congress has set forth, with significant precision, the remedies available to members of an SRO and to others. Indeed, in another *Bivens* case, the Court has explained that, where Congress has exercised comprehensively its power to regulate, there is no room, or justification, for additional regulation through court-created causes of action. *See Schweiker v. Chilicky*, 487 U.S. 412, 424-29, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988) (determining that there was no *Bivens* action for alleged due process violations arising from the improper termination of social security benefits because Title II of the Social Security Act provided an "elaborate" system protecting the rights of benefit claimants).

An entity that was not a party to the SRO proceeding is no doubt in a somewhat different position than a party to the proceeding. We do not believe, however, that the difference is so significant that such an entity can maintain a judicially created cause of action against the SRO for harms that the nonparty claims to have suffered as a result of disciplinary proceedings. Such a view presupposes a very narrow, and in our view *too* narrow, understanding of the scope of the Commodity Exchange Act. Effex offers no explanation or support for why Congress, having established a comprehensive mechanism for the governance of the commodities industry, would permit disruption of that mechanism through a judicially created cause of action.[24]

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24. In light of the Supreme Court's explanation of the *Bivens* remedy in *Ziglar*, Effex distanced itself from its federal claims

Indeed, as the CFTC points out in its brief as *amicus curiae*, Congress has decided that a "person aggrieved" by the SRO's action may seek redress before the Commission. *See* 7 U.S.C. § 21(h)(2). To determine who falls within the scope of the provision, the CFTC submits that, like other statutorily created causes of action, there must be an inquiry into the zone-of-interests sought to be protected by the Commodity Exchange Act. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 1388, 188 L. Ed. 2d 392 (2014). This inquiry utilizes "traditional tools of statutory interpretation," *id.* at 1387, and "the breadth of the zone-of-interests varies according to the provisions of the law at issue," *id.* at 1389 (internal quotation marks omitted). The statutory analysis involves "discern[ing] the interests 'arguably ... to be protected' by the statutory provision at issue" and then asking "whether the plaintiff's interests affected by the agency action in question are among them." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492, 118 S. Ct. 927, 140 L. Ed. 2d 1 (1998) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)). Undoubtedly, a "person aggrieved" by an SRO's action always includes a party to the proceedings. And there may be circumstances where a nonparty may fall within the zone-of-interests of

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at oral argument and, indeed, seemed to abandon them. *See* Oral Argument at 14:40-15:03 ("At this point, I've got four other state claims and I'm not pursuing the constitutional claim—I've put that in the briefs—so I don't think the modification of the rules will do anything for us. And as *Ziglar v. Abbassi* has recently come down with, I don't think the constitutional claim would get us monetary relief, which is what we are seeking.").

the statute and therefore have the right to seek redress before the CFTC. Whether a particular entity falls within the zone-of-interests protected by the statute is a determination left to the Commission through case-by-case administration of the statute.

B.

We next address Effex's statelaw claims. The comprehensive way by which the Commodity Exchange Act deals with disciplinary proceedings before an SRO also raises the question as to whether Congress intended the scheme to be free from other remedial devices based on state law. We conclude that Congress did intend to preempt state-tort claims such as the ones brought in this action.

The general principles governing the preemption of state law can be stated succinctly. Preemption is most obvious, of course, when the federal statute expressly commands it and defines the scope of such a preemptive effect. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983); *Frank Bros., Inc. v. Wisconsin Dep't of Transp.*, 409 F.3d 880, 885 (7th Cir. 2005). Preemption also occurs, however, where Congress manifests an intent to occupy exclusively an entire field of regulation through a comprehensive federal regulatory scheme. *See Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 576 (7th Cir. 2012). Additionally, a state law is preempted where it is impossible to comply with both federal and state law,

see Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963); *Kroog v. Mait*, 712 F.2d 1148, 1152-54 (7th Cir. 1983), or where state law would be "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941).[25]

We addressed preemption in the context of the Commodity Exchange Act in *American Agriculture Movement, Inc v. Board of Trade of City of Chicago*, 977 F.2d 1147 (7th Cir. 1992).[26] In that case, we examined claims that a contract market,[27] the Chicago Board of Trade, breached its common law fiduciary duties and acted negligently. *Id.* at 1150-52. We approached the preemption issue cautiously. We first noted that the

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25. *See also NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 711-12 (7th Cir. 2014).

26. In *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-89, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995), the Supreme Court clarified its decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), to reject the proposition that implied preemption analysis is only appropriate when the statute is devoid of express preemptive language, abrogating our statement to that effect in *American Agriculture*, 977 F.2d at 1154. The Court's decision in *Freightliner* does not diminish the application of *American Agriculture* in this case.

27. The Commission has the authority to designate organizations as "contract markets" in which investors may trade commodity futures. *See* 7 U.S.C. § 7. Contract markets have some duties of self-regulation, including enacting and enforcing rules to ensure fair and orderly trading. *See id.* § 7(d).

Commodity Exchange Act does not expressly preempt state law nor is it impossible to comply with both state and federal law. *Id.* at 1154. Moreover, we determined that the Commodity Exchange Act did not manifest an intent to occupy completely the entire field of commodity futures regulation. *Id.* at 1155. Specifically, we pointed to the Commodity Exchange Act's savings clause, which provides that "[n]othing in this section shall supersede or limit the jurisdiction conferred on the courts of the United States *or any State*," *id.* (quoting 7 U.S.C. § 2), and viewed "any State" as "[p]reserving in the futures trading context at least some state law causes of actions," *id.* Turning to the last avenue for preemption—that applying state law would frustrate the purposes of Congress in enacting the Commodity Exchange Act—we decided that such conflict preemption could apply in certain circumstances. *Id.* at 1155-56.

In reaching this conclusion, we noted that, in addition to the savings clause, the Commodity Exchange Act provides that "the Commission shall have exclusive jurisdiction ... with respect to accounts, agreements ..., and transactions involving the contracts of sale of a commodity for future delivery, traded or executed on a contract market." *Id.* at 1155 (quoting 7 U.S.C. § 2). In order to give "full effect" to both the savings clause and the jurisdictional clause, we determined that "Congress intended to preempt some, but not all, state laws that bear upon the various aspects of commodity futures trading." *Id.* Precisely, preemption is appropriate "[w]hen application of state law would directly affect trading on or the operation of a futures market." *Id.* at 1156.

Applying this determination, we decided that common law claims against brokers for breach of fiduciary duty could go forward. We noted that the Commodity Exchange Act's structure evinced a comprehensive regulatory scheme and that the legislative history of the Commodity Futures Trading Commission Act of 1974 suggested that a catalyst for the significant amendments to the Commodity Exchange Act was a fear that, without increased federal regulation, the states would regulate the futures markets to a chaotic effect. *Id.* We also recognized other court decisions holding that common law claims such as negligence, fraud, and breach of fiduciary duty could be brought by futures investors against their brokers. *Id.* With this background in mind, we explained that the claims against brokers had "little or no bearing upon the actual operation of the commodity futures markets" and that "[o]nly in the context of market regulation does the need arise for uniform legal rules." *Id.* By contrast, "there is no need for uniformity when it comes to rules that govern principal-agent relationships between brokers and investors." *Id.*

Here, Effex does not seem to challenge that preemption applies to claims by NFA members contesting its disciplinary actions. The NFA's discipline of its own members is a specific and central element of the role Congress delegated to SROs in its regulation of the commodities futures market. *See* 7 U.S.C. § 21(b); *see also* H.R. Rep. 93-975, at 58 ("Association activity would serve solely as a complement rather than a displacement to the authority of the new Commission."). If a member could challenge the NFA's discipline and disciplinary process

through a state-tort claim, the NFA's capacity to discipline its members—here, FXCM—for violating its rules would be impaired significantly. State courts effectively could supervise the NFA's regulation of its members and thus impede its federally mandated role in the Commodity Exchange Act's overall scheme. The resulting obstacle to Congress's purposes in creating federal regulations overseeing the national commodities futures market is obvious.

Our sister circuits' approaches to cases arising under the very similar Securities Exchange Act[28] support this conclusion.[29] *Turbeville v. FINRA*, 874 F.3d 1268

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28. *See In re Application of the Nat'l Futures Ass'n*, 1981 WL 762560, at *14 ("The provisions of [7 U.S.C. § 21] were modeled closely after Section 15A of the Securities Exchange Act ... . Indeed, Congress adopted some of the language of Section 15A of the Exchange Act verbatim when it drafted [7 U.S.C. § 21]."). *Compare* 15 U.S.C. § 78s(d)(2) (permitting Securities Exchange Commission review of SRO disciplinary actions for "any person aggrieved"), *with* 7 U.S.C. § 21(h)(2) (permitting CFTC review of SRO disciplinary actions for "any person aggrieved").

29. *See In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 114, 383 U.S. App. D.C. 304 (D.C. Cir. 2008) (determining preemption applies under the Securities Exchange Act where "Congress created a self-contained process to review and remedy [] complaints"); *Barbara v. NYSE*, 99 F.3d 49, 59 (2d Cir. 1996) ("Furthermore, allowing suits against the Exchange arising out of the Exchange's disciplinary functions would clearly stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ... ." (internal quotation marks omitted)), *abrogated on other grounds by Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 194 L. Ed. 2d 671 (2016).

(11th Cir. 2017), is particularly instructive. There, the Financial Industry Regulatory Authority ("FINRA") had disciplined a registered representative of a FINRA-affiliated broker firm for conduct violating FINRA's rules.[30] *Id.* at 1272. He filed a suit in Florida state court claiming that FINRA's issuance of a "Wells notice" making a preliminary determination against him was defamatory and tortuously interfered with his businesses. *Id.* at 1272-73.[31] After removal to federal court, the district court dismissed the case, finding that FINRA is absolutely immune from damages claims arising from the exercise of its regulatory functions and that there was no private cause of action. *Turbeville v. FINRA*, No. 8:15-CV-2920-T-30EAJ, 2016 U.S. Dist. LEXIS 15634, 2016 WL 501982, at *4-5 (M.D. Fla. Feb. 9, 2016). The Eleventh Circuit affirmed, determining the Securities Exchange Act preempted these tort claims. Noting the internal appeals and administrative-review process set forth in the Securities Exchange Act, the court explained that permitting the state claims to go forward "implies necessarily the existence of a private right of action against FINRA that operates parallel to the administrative-review processes the Act prescribes." *Turbeville*, 874 F.3d at 1276. Moreover, the statutory review process could correct the claimed injury by "removing information shown to be inaccurate" in the Wells notice. *Id.* at 1276-77.

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30. FINRA is an SRO operating under the oversight of the Securities Exchange Commission.

31. At the time he filed suit, the broker was no longer working in the securities industry and no longer a member of a FINRA-affiliated firm. *Turbeville*, 874 F.3d at 1273.

In the Eleventh Circuit's view, the remedies provided by the administrative-review scheme precluded a separate remedy under state law. *Id.* at 1277. It said that:

> Recognizing the second set of rights and remedies under state law Turbeville seeks would undercut the distinctly federal nature of the Exchange Act. If actions like Turbeville's are permitted, fifty state courts would be authorized to supervise FINRA's regulatory conduct and its application of its internal, SEC-approved rules through the vehicle of state tort law. And given SROs' front-line role in enforcing federal securities laws, such review would in turn lead to state-court supervision of the Exchange Act's securities-regulation regime writ large.

Id. The Commodity Exchange Act is a different statute, but given the similarity of the statutes, the logic of these Securities Exchange Act decisions applies here. Allowing suits against the NFA arising out of the NFA's disciplinary actions would present a serious obstacle to the NFA's ability to carry out its regulatory duties, especially where there are administrative remedies available.

Apparently recognizing the force of these cases, Effex limits its argument. It submits only that preemption should not apply to its claims because it is not a member of the NFA and because its claims arise out of NFA's "intentional *ultra vires* actions to damage Effex which it

cloaked in FXCM Proceeding [*sic*]."[32] We do not believe that this distinction is a principled ground that justifies a different result. At bottom, Effex's challenge remains a challenge to the settlement of a disciplinary proceeding before the NFA that was within the NFA's jurisdiction. Effex claims, in essence, that the NFA improperly conducted its disciplinary proceedings. It does not matter whether Effex is a member or nonmember of the NFA or a party or nonparty to the proceedings. Permitting a collateral attack on those proceedings based on Effex's tort claims would impair the NFA's ability to enforce its rules and carry out its regulatory role.

Preemption does not necessarily mean that Effex has no remedy; it means that it must look to the federally mandated review scheme established by Congress. The fact that these remedies may be different from those afforded by state law, or inadequate by comparison, is not of consequence. Congress has the right to determine the remedies available and the individuals who are eligible for those remedies.[33]

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32. Appellant's Reply Br. 28.

33. Federal law does not need to provide a full portfolio of remedies when it preempts state law. *See In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d at 114 (noting that, although "[p]laintiffs may be troubled by the fact that Congress's approach does not include damage-remedies," "[b]y specifically adopting an appeals process which does not provide monetary relief, Congress has displaced claims for relief based on state common law" because such a suit "is merely an 'attempt ... to bypass the Exchange Act' and the process Congress envisioned therein" (quoting *MM & S Fin., Inc. v. NASD*, 364 F.3d 908, 912 (8th Cir. 2004)).

At our invitation,[34] the CFTC filed an amicus brief outlining its view on whether a nonparty can seek review of an NFA disciplinary procedure or otherwise seek redress before the Commission. The Commission submits that although nonparties do not have a right to CFTC review of an NFA action that implicates them, the Commission does have the discretion to permit nonparties to obtain CFTC review in extraordinary circumstances pursuant to 17 C.F.R. § 171.14. The district court was of the view that nonparties also have the right to CFTC review through intervention or by asking the CFTC to review a matter *sua sponte*.

We do not believe it appropriate for us to delineate in any definitive way the administrative paths that may be open to Effex. It is not at all clear that Effex will choose to pursue the administrative remedies that may be open to it. If, on reflection, Effex does pursue those remedies and then seeks review in this court, we will have an opportunity to address the question of remedies with the benefit of the Commission's views not in the abstract context of an amicus brief but after adversary litigation.

34. We invited the Commission to submit an amicus brief addressing whether a nonparty affected by an NFA disciplinary action could seek the CFTC's review of that action. We thank the Commission for accepting our invitation. The parties were given an opportunity to respond to the Commission's submission and have submitted briefs stating their position.

Appendix A

Conclusion

For the reasons set forth in this opinion, we affirm the judgment of the district court.

AFFIRMED

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED APRIL 5, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 17-cv-04245

EFFEX CAPITAL, LLC AND JOHN DITTAMI,

Plaintiffs,

v.

NATIONAL FUTURES ASSOCIATION, *et al.*,

Defendants.

April 5, 2018, Decided
April 5, 2018, Filed

Judge Andrea R. Wood

MEMORANDUM OPINION AND ORDER

Plaintiffs Effex Capital, LLC ("Effex") and John Dittami have sued Defendants National Futures Association ("NFA"), James P. O'Hara, and Thomas P. Sexton, alleging that Defendants published false and

defamatory statements regarding Plaintiffs and disclosed their trade secrets without authorization. Now before this Court are Plaintiff's motion for a preliminary injunction (Dkt. No. 7) and Defendants' motion to dismiss Plaintiffs' amended complaint (Dkt. No. 58). As discussed below, because Plaintiffs failed to exhaust their administrative remedies prior to filing this lawsuit, the motion to dismiss is granted and the motion for a preliminary injunction is denied as moot.

BACKGROUND[1]

The NFA is a registered futures association that operates as a self-regulatory organization; it is organized under the authority of the Commodity Exchange Act, 7 U.S.C. § 21 *et seq.*, and overseen by the United States Commodity Futures Trading Commission ("CFTC"). (Am. Compl. ¶ 3, Dkt. No. 45.) While the NFA is a private organization, it performs regulatory functions to safeguard the integrity of the derivatives markets that the CFTC would otherwise have to undertake. (*See id.* ¶ 22.) At the time of the events giving rise to this case, Defendant Sexton was the President and Chief Executive Officer of the NFA, as well as its general counsel. (*Id.* ¶ 4.) Defendant

1. For purposes of Defendants' motion to dismiss, the Court accepts the facts alleged in the amended complaint as true and draws all reasonable inferences in Plaintiffs' favor. *See Citadel Sec., LLC v. Chicago Bd. Options Exch., Inc.*, 808 F.3d 694, 698 (7th Cir. 2015) (discussing the standard for motions to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)); *see also Pisciotta v. Old Nat. Bancorp.*, 499 F.3d 629, 633 (7th Cir. 2007) (discussing the standard for Rule 12(c) motions).

O'Hara was a member of the NFA's Business Conduct Committee. (*Id.* ¶ 5.) Sexton and O'Hara participated in some of the NFA's activities described below. (*Id.* ¶ 11.)

Effex is a foreign currency trading firm managed and controlled by Dittami. (*Id.* ¶ 23.) Effex provides foreign currency liquidity to institutional counterparts and utilizes confidential and proprietary trading software in its business. (*Id.* ¶¶ 23, 30.) Effex does not engage in activities that the NFA regulates. (*Id.* ¶ 24.) Hence, Plaintiffs are not members of the NFA. (*Id.* ¶ 21.)

This lawsuit arises out of a disciplinary adjudication by the NFA. (*Id.* ¶¶ 38-49.) Plaintiffs were not themselves the subjects of that adjudication—rather, the NFA was investigating Forex Capital Markets, LLC ("FXCM") and its managers, with whom Plaintiffs did business. (*Id.* ¶¶ 38-43, 60, 61.) While the NFA did not contact Plaintiffs or provide them with notice in connection with its investigation, the CFTC, as part of its own investigation into FXCM, issued subpoenas to obtain documents from Plaintiffs, took a lengthy deposition of Dittami, and obtained various documents and deposition testimony from officers and employees of FXCM. (*Id.* ¶¶ 37, 43.) The NFA then obtained access to various documents, deposition testimony, and other materials (including those originally procured by the CFTC) that contained confidential information related to Plaintiffs' trade secrets. (*Id.* ¶¶ 36, 37, 44, 46-49.) In 2017, the NFA and FXCM reached a settlement, under which a penalty was imposed on FXCM. (*Id.* ¶ 50.) The NFA issued a complaint, decision, narrative, and press release ("NFA Publications") regarding its

disciplinary adjudication against FXCM. (*Id.* ¶ 51.) According to Plaintiffs, the NFA Publications contained false and defamatory statements regarding Plaintiffs (and their connection to FXCM) and revealed Plaintiffs' trade secrets. (*Id.* ¶¶ 50, 51, 60, 61.) In particular, among other things, the NFA Publications stated that Plaintiffs engaged in abusive trade execution practices that denied FXCM's retail customers favorable price improvement and benefitted Effex and FXCM financially, that Effex was controlled by FXCM, and that Effex's relationship with FXCM amounted to a "dealing desk model." (*Id.* ¶ 60.) Plaintiffs did not have an opportunity to participate in the NFA investigation and were not given prior notice regarding the NFA Publications. (*Id.* ¶ 52, 63.)

As a result of the NFA Publications, Plaintiffs claim to have sustained damage to their professional reputations, lost business, and were subjected to several lawsuits. (*Id.* ¶¶ 77-83.) Plaintiffs have brought this suit seeking injunctive relief and monetary damages, alleging that Defendants have defamed Plaintiffs, denied Plaintiffs due process of law, interfered with Plaintiffs' business relations and economic advantage, and violated the Illinois Trade Secret Act. (*Id.* ¶¶ 84-150.) Early in the litigation, Plaintiffs filed a motion seeking a preliminary injunction. (Dkt. No. 7.) While briefing regarding the preliminary injunction was on-going, Defendants filed their motion to dismiss Plaintiffs' amended complaint. (Dkt. No. 58.) Briefing on both motions then proceeded simultaneously and the Court held oral argument.

Appendix B

DISCUSSION

The Court begins its analysis with Defendants' motion to dismiss, which argues that the present case should be dismissed because Plaintiffs failed to exhaust their administrative remedies with the CFTC prior to filing this federal lawsuit.[2] "Generally, a district court is unable to waive a statutorily-mandated exhaustion requirement." *Citadel Sec., LLC v. Chicago Bd. Options Exch., Inc.*, 808

2. The parties have not briefed whether the exhaustion requirement at issue here is jurisdictional. *See Gray v. United States*, 723 F.3d 795, 798 (7th Cir. 2013) (discussing the difference between exhaustion requirements that are jurisdictional and those that are not). However, the Court has an obligation to consider the issue of jurisdiction on its own initiative. *Id.* And the caselaw suggests that the exhaustion requirement is a jurisdictional one. *See Citadel Sec., LLC v. Chicago Bd. Options Exch., Inc.*, 808 F.3d 694, 701 (7th Cir. 2015) (considering a similar exhaustion requirement under the Securities Exchange Act of 1934 and affirming dismissal for lack of subject-matter jurisdiction). Thus, it seems that Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be viewed as a motion for lack of jurisdiction under Rule 12(b)(1), with Plaintiffs bearing the burden of establishing that jurisdictional requirements have been met. *See Ctr. for Dermatology & Skin Cancer, Ltd. v. Burwell*, 770 F.3d 586, 588- 89 (7th Cir. 2014).

Whether or not the exhaustion requirement is jurisdictional, however, does not alter the outcome. Even if exhaustion is not a jurisdictional issue but simply an affirmative defense in this case, then Defendants' motion may properly be viewed as a motion under Rule 12(c), and the Court still has in front of it all that it needs to rule. *See Carr v. Tillery*, 591 F.3d 909, 913 (7th Cir. 2010). There is no dispute that Plaintiffs failed to seek CFTC review before filing suit, and, for the reasons detailed below, the exhaustion requirement applies to Plaintiffs' claims while futility exception does not.

F.3d 694, 700 (7th Cir. 2015). However, exhaustion is not required if it would be futile. *Id.* The futility exception is limited to those situations where it is clearly shown that the administrative procedure would be useless or inadequate to prevent irreparable harm. *Id.* Thus, where a plaintiff has not made such a clear showing, application of the futility exception is unwarranted. *Id.* This is true even if there is no obvious path to the compensation plaintiff seeks. *See id.*

The CFTC has exclusive jurisdiction over certain aspects of the futures trading market. *See* 7 U.S.C. § 2(a)(1)(A). The NFA, as a registered futures association, is subject to comprehensive oversight by the CFTC. *See* 7 U.S.C. § 21; *see also* 17 C.F.R. § 171.1 *et seq.* The CFTC's authority to review registered futures associations' disciplinary actions is set forth in 7 U.S.C. § 21(h), which provides, in relevant parts:

> (1) If any registered futures association takes any final disciplinary action against a member of the association or a person associated with a member, denies admission to any person seeking membership therein, or bars any person from being associated with a member, the association promptly shall give notice thereof to such member or person and file notice thereof with the Commission. The notice shall be in such form and contain such information as the Commission, by rule or regulation, may prescribe as necessary or appropriate to carry out the purposes of this chapter.

> (2) Any action with respect to which a registered futures association is required by paragraph (1) to file notice ***shall be subject to review by the Commission on its motion, or on application by any person aggrieved by the action***. Such application shall be filed within 30 days after the date such notice is filed with the Commission and received by the aggrieved person, or within such longer period as the Commission may determine.

7 U.S.C. §§ 21(h)(1), (2) (emphasis added). Thus, the statute offers two options to pursue the CFTC's review: on the CFTC's own motion and on "application by any person aggrieved by the action." *Id.*

Someone seeking CFTC review does not have to sit and wait for the CFTC to make a motion. CFTC regulations governing motions provide that "[a]n application for a form of relief not otherwise specifically provided for" can be made by a written motion. 17 C.F.R. § 171.10(a). Thus, it appears that one can move the CFTC to exercise its authority to review NFA's decision on the CFTC's own motion.[3]

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3. The regulations governing the CFTC's review of actions in the absence of an appeal provide that the CFTC may review an NFA decision on its own motion in the following manner: "At any time prior to the effective date of a final decision of the National Futures Association in a disciplinary, membership denial or registration action, the Commission may take review of a decision by issuing an appropriate order." 17 C.F.R. § 171.31(d). If the CFTC "determines that it is appropriate to take review on its own motion, it shall by

But more importantly for present purposes, the statute includes a second option for obtaining CFTC review: that "any ***person*** aggrieved by the action" may appeal, indicating that appeals are not restricted only to those by the parties to the underlying NFA action. *See* 7 U.S.C. § 21(h)(2) (emphasis added). The CFTC regulation governing notice of appeal provides that "[a]ny ***party*** aggrieved by the final decision of the National Futures Association in a disciplinary . . . action may . . . file a notice of appeal," thus perhaps suggesting that a non-party cannot appeal.[4] 17 C.F.R. § 171.23(a) (emphasis added). But CFTC regulations also define the term "party" as including "any person granted permission to participate as a party pursuant" to the CFTC's intervention rules, *see* 17 C.F.R. § 171.2(i), and detail how a person may intervene in a proceeding:

> (a) Upon motion of ***any interested person*** or, on its own motion, the Commission may permit, or

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order establish the procedure for submission of both the record of the proceeding and the briefs of the parties." *Id.* Accordingly, it does not appear that the regulations prohibit anyone from moving under 17 C.F.R. § 171.10(a) to ask the CFTC to review an NFA's action on the CFTC's own motion.

4. Plaintiffs also argue that the term "person aggrieved by the action" in § 21(h)(2) cannot encompass a nonparty to the underlying NFA action because the statute of limitations in that subsection does not commence until written notice is provided, and notice is provided only to participants in the underlying action. But the precise scope of the term need not be determined here because, as described below, even if the term does not encompass non-parties, the intervention mechanism allows a non-party to become a party.

> solicit, limited participation in the proceeding by such interested person. A motion for leave to participate in the proceeding shall be filed promptly, shall identify the interest of that person and shall show why participation in the proceeding by that person would serve the public interest. If the Commission determines that participation would serve the public interest, it shall by order establish a supplementary briefing schedule for the interested person and the parties to the proceeding.
>
> (b) For purposes of this subsection, ***interested person shall include*** parties and ***any other persons who might be adversely affected or aggrieved by the outcome of a proceeding***; their officers, agents, employees, associates, affiliates, attorneys, accountants or other representatives; and ***any other person having a direct or indirect pecuniary or other interest in the outcome of a proceeding***.

17 C.F.R. § 171.27 (emphasis added).

Furthermore, the CFTC's decision in *Paribas Futures, Inc. v. New York Mercantile Exchange*, No. 90-E-3, 1990 WL 282868 (C.F.T.C. Mar. 22, 1990), suggests that an aggrieved person may intervene in an appeal even if such person was not a party to the underlying disciplinary action to begin with. In particular, *Paribas* dealt with a late-delivery penalty imposed by the New York Mercantile Exchange's Petroleum Delivery Panel against a clearing

member. *Id.* *1. The clearing member appealed the Panel's decision to the Adjudication Committee, but the liability finding was affirmed (although the fine was reduced). *Id.* The clearing member paid the fine and did not pursue an appeal with the CFTC. *Id.* The clearing member's futures customer had to reimburse the clearing member for the fine due to the contractual obligation between them. *Id.* at *2. That customer, who was not a party to the underling action resulting in the fine, appealed to the CFTC. *Id.* at *1. The CFTC treated the customer's request as a motion to intervene. *Id.* at *1 & n. 3.[5] The CFTC found that "[i]ntervention after an initial decision for the purposes of taking an appeal is appropriate in some circumstances." *Id.* at *2. However, the party moving to intervene must have a protectable interest—that is, there must be a "direct, significant, legally protectable interest in the property or transaction that is the subject of the action," the interest requirement is not satisfied where a holding will not "directly alter contractual or other legally protectable rights of the proposed intervenors." *Id.* Thus, for the futures customer in *Paribas*, even though the underlying adverse decision ultimately resulted in a substantial financial expense, the intervention was improper because such expense was not compelled by the decision but rather arose out of separate contractual relations between the customer and the clearing member. *Id.* While the futures customer was unsuccessful in its

5. In particular, the CFTC treated the request as a motion to intervene under 17 C.F.R. § 9.5(a), which provides that "[a]n application for a form of relief not otherwise specifically provided for in this part must be made by a written motion." *Paribas Futures, Inc.*, 1990 WL 282868, at *1 & n.3.

attempt to intervene on appeal, *Paribas* suggests that, in general, someone who is not a party to the underlying disciplinary action may appeal to the CFTC. *Id.*

A third option that one might pursue to obtain a review by the CFTC is to ask the CFTC to waive its rules. The regulation dealing with waiver of rules provides that "[t]o prevent undue hardship on any party or ***for other good cause shown***, the Commission may waive any rule in this part in a particular case and may order proceedings in accordance with its direction." 17 C.F.R. § 171.14 (emphasis added). The regulation further provides that such an order must be based "upon a determination that no party will be prejudiced thereby and that the ends of justice will be served." *Id.* In short, under this regulation, the CFTC may waive its rules in extraordinary circumstances. *See id.*

The CFTC's decision in *In re Petition of Lake Shore Alternative Financial Asset Ltd.*, No. CRAA-07-03, 2007 WL 2751884 (C.F.T.C. Sept. 17, 2007), demonstrates how the waiver operates. In that case, the NFA issued a notice regarding a member responsibility action against Sentinel Management Group, Inc. ("Sentinel"), barring Sentinel from disposing of any assets held on behalf of certain accounts, including making disbursements to its existing customers, without prior approval. *Id.* at *1. Sentinel did not petition to stay the action. *Id.* However, another entity, Lake Shore Alternative Financial Asset Ltd. ("Lake Shore"), that was not subject to the member responsibility action by the NFA petitioned the CFTC for such a stay. *Id.* Lake Shore argued that the NFA's action amounted to an improper freezing of assets, as it effectively prevented

Lake Shore from accessing its own assets. *Id.* Under the pertinent CFTC regulation only a "***party*** aggrieved by the [NFA's] determination that the [member responsibility action] should be effective prior to the opportunity for a hearing" could petition to stay such an action. *Id.* at *2 (quoting 17 C.F.R. § 171.41(a)) (emphasis added). Because Lake Shore was not the subject of the NFA's action, the only avenue available for it to become a "party" was to intervene in the proceeding. *Id.* For reasons not germane to the present discussion, however, Lake Shore could not intervene in the action under § 171.27. *Id.* Yet the CFTC's analysis of Lake Shore's petition did not stop there—the CFTC proceeded to analyze whether Lake Shore's petition would warrant a waiver under § 171.14. *Id.* The CFTC held that a person requesting a waiver has a heavy burden. *Id.* Lake Shore failed to meet that burden because the lack of access to assets was contemplated by the member responsibility actions scheme and thus was not an undue hardship; allowing a stay at the request of Lake Shore was adverse to the NFA's and the public's interests as it created a possibility that the NFA action would be stayed indefinitely; and Lake Shore had not shown any other good cause to waive the rules. *Id.* at *2-3. Therefore, while Lake Shore was ultimately unsuccessful, the case demonstrates the availability of § 171.14 as an alternative option to seek CFTC review, even in the situations where intervention under § 171.27 is not available.

The CFTC not only reviews the NFA's actions in particular cases, it also oversees the NFA's rules.[6]

6. In their response to the motion to dismiss, Plaintiffs state that they are not arguing that the NFA's rules are inadequate and

For example, 7 U.S.C. § 21(a) states that to become a registered futures association, an association must file with the CFTC "for review and approval" a registration statement, which sets forth, among other things, the rules of the association. Furthermore, the provision governing standards for registration provides that "[a]n applicant association shall not be registered as a futures association unless the Commission finds, under standards established by the Commission," that "the rules of the association provide ***a fair and orderly procedure*** with respect to the disciplining of members and persons associated with members and the denial of membership to any person seeking membership therein or the barring of any person from being associated with a member." 7 U.S.C. § 21 (b)(9) (emphasis added). One of the ways the CFTC can enforce the fairness of the NFA's rules and procedures is provided in 7 U.S.C. § 21(i)(1), which states that in reviewing "a final disciplinary action taken by a registered futures association against a member thereof or a person associated with a member," the CFTC evaluates, among other things, whether the association rules "are, and were applied in a manner, consistent with the purposes" of the Commodity Exchange Act. *See* 7 U.S.C. § 21(i)(1)(A)(iii). If the CFTC does not make such a finding, the CFTC may set aside the sanction imposed by the association and, if

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should be changed. (*See* Pls.' Am. Resp. in Opp'n to Defs.' Mot. to Dismiss at 21 n.28, Dkt. No. 72.) However, in their complaint, Plaintiffs allege that "[i]n violation of the due process clause, NFA has failed to adopt notice and hearing provisions or procedures to intervene, and has failed to provide a post-deprivation remedy for non-members such as Effex and Dittami." (Am. Compl. ¶ 110, Dkt. No. 45.)

appropriate, remand the case to the association for further proceedings. 7 U.S.C. § 21(i)(1)(B).

Furthermore, 7 U.S.C. § 21(j) obligates every registered futures association to file with the CFTC copies of any changes in or additions to the rules of the association—the CFTC might disapprove such rules if they are inconsistent with the requirements governing registered futures associations. *Id.* The CFTC also has authority to abrogate any rule of the association if, "it appears to the Commission that such abrogation is necessary or appropriate to assure fair dealing by the members of such association, to assure a fair representation of its members in the administration of its affairs or effectuate the purposes of this section." 7 U.S.C. § 21(k)(1). The CFTC can also request that any registered futures association adopt any specified alteration or supplement to its rules; if the association fails to adopt such alteration or supplement within a reasonable time, the Commission is authorized to alter or supplement the rules by order. 7 U.S.C. § 21(k)(2). And under the Administrative Procedure Act, an agency has to "give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e).

Therefore, the statutes and the CFTC's regulations set out several potential avenues for Plaintiffs to pursue CFTC review of the NFA's action (and rules) here.[7] But

7. CFTC determinations regarding NFA actions are reviewable by a federal appellate court. *See* 7 U.S.C. § 21(i)(4) ("Any person aggrieved by a final order of the Commission entered under this subsection may file a petition for review with a United States court of appeals in the same manner as provided in section 9 of this title.").

Plaintiffs have not pursued any of those options. Instead, they offer the following reasons why their action should proceed in this Court.

First, Plaintiffs argue that there is no requirement for them to exhaust administrative remedies in the present case because they are not challenging the actual disciplinary action taken by the NFA—instead, they are challenging the NFA's dissemination of false and misleading information, which is outside of the CFTC's jurisdiction. For this argument, Plaintiffs rely on an unpublished decision from the Second Circuit, *Santos-Buch v. Financial Industry Regulatory Authority, Inc.*, 591 F. App'x 32 (2d Cir. 2015), which they view as holding that a party must challenge a disciplinary action to be eligible for review under the substantively identical provision of the Securities Exchange Act of 1934.

In *Santos-Buch*, the plaintiff resolved through a settlement the disciplinary proceedings against him initiated by a subsidiary of the National Association of Securities Dealers, Inc. ("NASD"), a self-regulatory organization under the Securities Exchange Act. *Id.* at 32. The settlement agreement contemplated a public notice of the disciplinary action, which was allegedly limited by then-existing rules that provided for only a one-time publication of the disciplinary action. *Id.* Sometime later, the Financial Industry Regulatory Authority Inc. ("FINRA") succeeded the NASD and assumed its self-regulatory functions; the Securities and Exchange Commission ("SEC") was charged with reviewing FINRA's actions and rules. *Id.* at 32-33.

FINRA published the plaintiff's disciplinary records in several internet databases, one of which was maintained without authorization by any rule. *Id.* at 33. The plaintiff brought an action arguing that such publication was done without authorization and in violation of the Due Process Clause of the Fifth Amendment. The Second Circuit held that the plaintiff's claims for injunctive and declaratory relief were not subject to the Securities Exchange Act's exhaustion requirement because they challenged neither the disciplinary action taken by FINRA nor a FINRA rule, although the claims still had to be dismissed because FINRA was not a state actor and so the plaintiff had failed to allege a claim for violation of his due process rights. *Id.* at 34.

Notably, *Santos-Buch* is an unpublished opinion from a different circuit—thus, it is not controlling authority for this Court. Moreover, the plaintiff in *Santos-Buch* simply challenged the act of publication of the disciplinary action itself, not the contents of the disciplinary action or anything else related to the substance of the action. Hence, in the Second Circuit's view, the plaintiff's challenge plainly fell outside of the SEC's authority to review FINRA's actions. *See, e.g.*, 15 U.S.C. § 78s(d)(2) (authorizing review of self-regulatory organizations' actions that require notice under § 78s(d)(1), including final disciplinary actions). But here, Plaintiffs' claims also touch on the contents of the NFA Publications—documents generated as a result of the NFA investigation relating to a disciplinary action. Moreover, in their complaint, Plaintiffs allege that "[i]n violation of the due process clause, ***NFA has failed to adopt notice and hearing provisions or procedures to***

intervene, and has failed to provide a post-deprivation remedy for non-members such as Effex and Dittami." (Am. Compl. ¶ 110 (emphasis added), Dkt. No. 45.) Thus, despite their protestations, it appears that Plaintiffs are in fact contesting both the underlying decision of a self-regulatory organization and its rules.

Second, Plaintiffs argue that they cannot pursue an appeal pursuant to 7 U.S.C. § 21(h)(2) because they are not "aggrieved persons" within the meaning of the statute, as "aggrieved persons" do not include non-parties and Plaintiffs cannot become parties by intervening on appeal without showing a public purpose.[8] Plaintiffs do not explain why their intervention would not serve a public purpose, however. (*See* Pls.' Am. Resp. in Opp'n to Defs.' Mot. to Dismiss at 20, Dkt. No. 72.) This argument is particularly surprising, considering that in their briefing for the motion for a preliminary injunction, Plaintiffs raise a variety of public purpose arguments. (*See* Pls.' Mem. of Law in Further Supp. of Its Application for Prelim. Inj. at 19, Dkt. No. 68.) Moreover, this argument does not account for the possibility of Plaintiffs seeking a waiver of CFTC rules under 17 C.F.R. § 171.14.

Third, Plaintiffs contend that any appeal would be futile. In particular, Plaintiffs claim that due process claims are beyond the scope of administrative review and therefore the administrative exhaustion requirement does not apply. Although due process claims do not usually

8. Plaintiffs appear to be referring to 17 C.F.R. § 171.27(a), which states that a motion to intervene has to show why participation in the proceeding "would serve the public interest."

require exhaustion because administrative agencies typically cannot adjudicate constitutional issues, the exhaustion requirement nonetheless applies when the claim involves procedural errors correctable by the administrative tribunal. *See Mojsilovic v. I.N.S.*, 156 F.3d 743, 748 (7th Cir. 1998). Moreover, a plaintiff "with a statutory argument that has a reasonable prospect of affording him relief may not skip the administrative process and go straight to federal court by simply reconstituting his claim as constitutional and claiming futility." *See Gonzalez v. O'Connell*, 355 F.3d 1010, 1018 (7th Cir. 2004).

Here, the statute governing registered futures associations requires that "the rules of the association provide a fair and orderly procedure with respect to the disciplining of members." 7 U.S.C. § 21(b)(9). Plaintiffs allege that they "were denied due process because they did not receive an opportunity to be heard at a post-deprivation name clearing hearing or any other type of hearing or appeal following the injury to the protected liberty and property interests" and ask for injunctive relief to remove the NFA Publications from the NFA's website or, in the alternative, to provide a name clearing hearing, or delete all references to Plaintiffs from the NFA Publications, and issue a new release clearing Plaintiffs' names.[9] (Am. Compl. ¶¶ 114, 117, Dkt. No. 45.) Yet Plaintiffs fail to explain why they should forgo the step of raising their claims based upon purportedly unfair

9. Plaintiffs also ask for monetary damages to redress the due process violation. (Am. Compl. ¶¶ 118-25, Dkt. No. 45.)

NFA procedures to the CFTC. *See, e.g., Presidential Futures, Inc. v. NFA*, No. CRAA-89-2, 1992 WL 15694, at *4, *9 (C.F.T.C. Jan. 23, 1992) (finding that the NFA failed to observe fundamental fairness by not providing the petitioning member with sufficient notice and a meaningful hearing). And Plaintiffs also fail to explain why the NFA's allegedly false findings as reflected in the NFA Publications, which were made in the course of an NFA disciplinary adjudication, could not be corrected via CFTC review before proceeding with the due process claims in a federal court.

Plaintiffs instead contend that such an appeal would be futile because the CFTC does not review NFA's settlements. But this does not seem to be the case—while there might not be many instances where settled actions reach the CFTC for review, the CFTC does not appear to have a categorical rule barring such review and indeed has reviewed such actions. *See, e.g., Grandview Holding Corp., et al. v. Nat'l Futures Ass'n*, No. CRAA-96-1, 1997 WL 119994 (C.F.T.C. 1997) (hearing an appeal on the issue of whether a settlement offer can be withdrawn). Plaintiffs cite no statutory provision or regulation for their position to the contrary but instead rely on *American Financial Trading Corp. v. National Futures Organization*, No. CRAA 06-01 (C.F.T.C. 2006). And it is unclear why Plaintiffs believe that the *American Financial* decision stands for the proposition that the CFTC does not review settlements. In that case, the CFTC simply held that a decision by the NFA to place an entity that had settled a disciplinary action on a list of disciplined firms was a ministerial action and not a "disciplinary action" or other

event that the CFTC has jurisdiction to review, and that such action did not warrant a waiver of CFTC rules under 17 C.F.R. § 171.14. *Id.*

Plaintiffs next argue that an appeal to the CFTC would be futile because "it is incomprehensible that [the] NFA, after failing to allow Plaintiffs to participate in the actual investigation . . . , would permit Plaintiffs to intervene post-settlement." (*See* Pls.' Am. Resp. in Opp'n to Defs.' Mot. to Dismiss at 22, Dkt. No. 72.) Plaintiffs fail to explain, however, why the NFA would have to permit them to intervene, as the CFTC is the decision-maker regarding intervention for purposes of an appeal. *See, e.g.*, 17 C.F.R. § 171.27(a).

Plaintiffs' final futility argument rests on the assertion that it would be impossible for them to adjudicate any appeal because they were not privy to any of the underlying documents or testimony and therefore do not possess the records necessary to file, much less to pursue, an appeal or review. But Plaintiffs' complaint mainly stems from the NFA Publications, which Plaintiffs already have. And Plaintiffs do not explain why the lack of other documents or testimony from the NFA's disciplinary proceedings would prevent them from asking for CFTC review. Furthermore, CFTC regulations governing appeals provide that "[w]ithin thirty days after service of a notice of appeal, the National Futures Association shall file with the Proceedings Clerk two copies of the record of the proceeding" and "shall serve on the party appealing, in lieu of the record, a copy of the index of the record and a copy of any document in the record not

previously served on the party appealing." 17 C.F.R. § 171.24. The regulations also provide that "[i]f the party appealing objects to the materials included or excluded in preparing the record, he shall file his objections with his brief on appeal" and the CFTC then "may, at any time, direct that an omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed." *Id.* Hence, the Court does not find this argument persuasive either.

CONCLUSION

In sum, the Court concludes that Plaintiffs should have exhausted their administrative remedies prior to filing this lawsuit. Having not done so, their case must be dismissed.[10] The dismissal is without prejudice to Plaintiffs pursuing their administrative remedies and then seeking review of their properly exhausted claims in the appropriate federal court. Accordingly, Defendants' motion to dismiss Plaintiffs' amended complaint (Dkt. No. 58) is granted and Plaintiff's motion for a preliminary injunction (Dkt. No. 7) is denied as moot.

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10. As indicated earlier, the exhaustion requirement here is likely jurisdictional and thus the Court does not have jurisdiction to rule on Plaintiffs' motion for preliminary injunction. But even if the exhaustion requirement were not jurisdictional, the existence of a meritorious defense would of course prevent Plaintiffs from demonstrating some likelihood of success on the merits, as required for preliminary injunctive relief. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008).

Appendix B

ENTERED:

/s/ Andrea R. Wood
Andrea R. Wood
United States District Judge

Dated: April 5, 2018

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED OCTOBER 2, 2019

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 18-1914

EFFEX CAPITAL, LLC, *et al.*,

Plaintiffs-Appellants,

v.

NATIONAL FUTURES ASSOCIATION, *et al.*,

Defendants-Appellees.

October 2, 2019

Before
JOEL M. FLAUM, *Circuit Judge*
KENNETH F. RIPPLE, *Circuit Judge*
DANIEL A. MANION, *Circuit Judge*

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 1:17-cv-04245
Andrea R. Wood, *Judge.*

Appendix C

ORDER

Upon consideration of Plaintiffs-Appellants' petition for rehearing *en banc* filed on September 17, 2019, no judge in active service has requested a vote thereon, and the judges on the original panel have voted to deny the petition.

IT IS ORDERED that the petition for rehearing *en banc* is hereby **DENIED**.