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

INTL FCSTONE FINANCIAL INC.,	)	
	)	
Plaintiff,	)	
	)	Case No. 1:19-cv-01438
v.	)	
	)	Honorable Joan H. Lefkow
DAVE AND LINDA JACOBSON, et al.,	)	
	)	
Defendants.	)	

BRIEF OF *AMICUS CURIAE* FUTURES INDUSTRY ASSOCIATION

THE INTEREST OF THE FIA

Amicus Curiae, the Futures Industry Association ("FIA"), is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry. FIA's members provide clearing and execution services for the participants in the futures markets, post the majority of funds that support clearinghouses, and commit a substantial amount of their own capital to safeguard customer transactions. The FIA and its members rely on the proper administration of the futures markets because, among other reasons, many members provide the clearing and execution services for the participants in these markets. As such, they play a critical role in managing systemic risk in the global financial markets.

In this case, the FIA is concerned about allowing individuals who traded only futures

products[1] through a Commodity Futures Trading Commission ("CFTC") registrant to bring arbitration claims to the Financial Industry Regulatory Authority ("FINRA"), a national securities association registered with the Securities and Exchange Commission ("SEC") pursuant to 15 U.S.C. § 78o-3. Defendants argue that they may arbitrate their claims arising from futures transactions at FINRA because the firm that cleared and executed their futures trades is dually registered with FINRA and the National Futures Association ("NFA").[2] Because defendants' argument, if accepted, would result in the very disruptions in the futures markets that Congress sought to avoid by granting the CFTC exclusive jurisdiction over those markets, the FIA has a substantial interest in this case.

SUMMARY OF ARGUMENT

When Congress established the CFTC in 1974, it granted the agency exclusive jurisdiction to regulate the futures markets. The text and legislative history of the exclusive jurisdiction provision, 7 U.S.C. § 2(a)(1)(A), confirm congressional intent to subject the futures markets to a uniform set of rules administered by the CFTC. This grant of exclusive authority has withstood numerous legal challenges over the decades, as the federal courts have uniformly rejected other government agencies' attempts to encroach on the CFTC's exclusive jurisdiction over the futures markets.

Pursuant to its exclusive authority to regulate the futures markets, the CFTC adopted Rule 166.5, 17 C.F.R. § 166.5, to govern the use of pre-dispute arbitration agreements with respect to claims, like those here, arising from transactions executed on a CFTC-approved

[1] Reference to futures products includes options on futures contracts that are at issue here.

[2] The NFA is a registered futures association pursuant to Section 17 of the Commodity Exchange Act (7 U.S.C. § 21). Both the NFA and FINRA are the only registered associations for their respective and distinct industries.

futures exchange, referred to in the statute as a designated contract market ("DCM")[3]. When entering into pre-dispute arbitration agreements, futures market participants must abide by Rule 166.5. Defendants argue that they can bring arbitration claims at FINRA even though the futures products they traded fall squarely within the CFTC's exclusive jurisdiction and, as such, are subject to CFTC Rule 166.5, which authorizes arbitration before (1) the DCM on which the disputed transactions were executed, (2) the NFA, and (3) a qualified forum selected by the CFTC registrant (such as INTL FCStone Financial Inc. ("FCStone")). Defendants' position, if accepted, would result in overlapping, duplicative, and inconsistent regulation in the futures markets that Congress sought to forestall by granting the CFTC exclusive jurisdiction over those markets.

For these reasons, this Court should reject defendants' untenable position by compelling arbitration in accordance with the CFTC's rules governing dispute resolution.

ARGUMENT

In the Commodity Exchange Act ("CEA"), Congress granted the CFTC "*exclusive jurisdiction*" to regulate "accounts, agreements . . . and transactions" involving futures contracts (such as the options-on-futures trades at issue here) executed on CFTC-regulated exchanges. 7 U.S.C. § 2(a)(1)(A) (emphasis added). The text and legislative history of the exclusive jurisdiction provision and decades of judicial precedent interpreting the provision all demonstrate that Congress intended to create a uniform regulatory scheme in the futures market under the sole supervision of the CFTC. The procedures the CFTC set out in its Rule 166.5 for the

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[3] A DCM is a board of trade or exchange designated by the CFTC to trade futures and swaps under the CEA. A DCM can allow both institutional and retail participants and can list for trading contracts on any commodity, provided that the contract is not readily susceptible to manipulation. *See Designated Contract Market (DCM)*, CFTC Glossary, https://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/index.htm#D (last visited May 17, 2019).

resolution of disputes arising from futures transactions executed on a DCM—like all other CFTC rules governing futures transactions—constitute an exercise of the agency's exclusive jurisdiction. This Court should accordingly compel arbitration in accordance with Rule 166.5 to prevent an encroachment on the CFTC's exclusive jurisdiction based on a reading of a FINRA rule that threatens substantial disruption to the efficient, uniform regulatory scheme that Congress established for the futures markets.

I. Congress Granted The CFTC Exclusive Jurisdiction To Regulate Transactions Involving Futures Contracts

A. The CEA Expressly Grants The CFTC Exclusive Jurisdiction Over Accounts, Agreements And Transactions Involving Futures Contracts

In 1974, Congress created the CFTC and amended the CEA to endow the new agency with exclusive authority to regulate the futures markets. *See generally Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 365–66, 382–7 (1982) (discussing legislative history of 1974 CEA amendments). The first sentence of the exclusive jurisdiction provision, CEA Section 2(a)(1)(A), provides:

> The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option" . . .), and transactions involving . . . contracts of sale of a commodity for future delivery . . ., traded or executed on a contract market designated pursuant to section 7 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.

7 U.S.C. § 2(a)(1)(A). This sentence unambiguously states that the CFTC has exclusive jurisdiction with respect to accounts, agreements and transactions involving futures contracts traded on a CFTC-regulated exchange, including options on natural gas futures at issue in this case.

The next sentence of CEA Section 2(a)(1)(A) states:

> *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.[4]

Id. (emphasis added). This sentence reinforces the idea articulated in the previous sentence: no other federal or state authorities, *including the SEC*, may interfere with the CFTC's regulation of accounts, agreements and transactions involving futures contracts.

The plain language of CEA Section 2(a)(1)(A) thus establishes that the CFTC is the sole regulator in the futures market. Indeed, relying on the unambiguous language of CEA Section 2(a)(1)(A), the Seventh Circuit has repeatedly rejected the SEC's assertions of jurisdiction over futures products as unlawful incursions on the CFTC's exclusive jurisdiction. *See Chi. Mercantile Exch. v. S.E.C.*, 883 F.2d 537 (7th Cir. 1989) (setting aside SEC orders approving applications to list and trade financial instruments that the court found to be futures contracts subject to the exclusive jurisdiction of the CFTC); *Bd. of Trade of City of Chi. v. S.E.C.*, 677 F.2d 1137 (7th Cir. 1982) (setting aside SEC order approving a securities exchange's listing of an options product because the CFTC had exclusive jurisdiction over that product), *vacated as moot sub nom. Chi. Bd. Options Exch., Inc. v. Bd. of Trade of City of Chi.*, 459 U.S. 1026 (1982). The D.C. Circuit has similarly rejected another regulator's attempt to encroach on the CFTC's exclusive jurisdiction over the futures markets. In *Hunter v. F.E.R.C.*, the Federal Energy Regulatory Commission argued that it had the authority to address manipulation of futures

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[4] CEA Section 2 contains exceptions from the CFTC's exclusive jurisdiction for certain types of transactions, such as non-exempt options on securities, as well as certain types of transactions in foreign currency. *See, e.g.*, 7 U.S.C. §§ 2(a)(1)(C), 2(c). None of these exceptions is relevant to this case, which involves trading in options on natural gas futures contracts. CEA Section 2(a)(1)(A) also states that the CFTC's exclusive jurisdiction does not "supersede or limit the jurisdiction conferred" on federal or state courts. *Id.* § 2(a)(1)(A). This proviso is also irrelevant here.

contracts in natural gas. 711 F.3d 155 (D.C. Cir. 2013). The D.C. Circuit disagreed, explaining that "Congress crafted CEA section 2(a)(1)(A) to give the CFTC exclusive jurisdiction over transactions conducted on futures markets[.]" *Id.* at 157.

B. The Legislative History Of The CEA's Exclusive Jurisdiction Provision Reinforces Congressional Intent To Create A Uniform Regulatory Scheme In The Futures Markets

While the text of CEA Section 2(a)(1)(A) leaves no doubt that Congress assigned the CFTC alone to regulate the futures markets, the legislative history of Section 2(a)(1)(A) further illustrates the congressional purpose behind the exclusive jurisdiction provision—to subject the futures markets to a single set of rules administered by a single federal regulator, the CFTC.

When Congress considered the 1974 legislation amending the CEA, one key question was which agency, or agencies, should regulate the rapidly growing futures markets. Initial legislative drafts contemplated various combinations, but Congress settled on what is now CEA Section 2(a)(1)(A), which vested exclusive jurisdiction over futures trading in the new CFTC. *See generally* Philip F. Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 Vand. L. Rev. 7–19 (1976). The Conference Report on the 1974 CEA amendments summed up the outcome of the deliberation process:

> The House bill provides for exclusive jurisdiction of the [CFTC] over all futures transactions. However, it is provided that such exclusive jurisdiction would not supersede or limit the jurisdiction of the Securities and Exchange Commission or other regulatory authorities.
>
> The Committee amendment retains the provision of the House bill but adds . . . clarifying amendments. The clarifying amendments make clear that (a) *the [CFTC's] jurisdiction over futures contract markets or other exchanges is exclusive and includes the regulation of commodity accounts, commodity trading agreements, and commodity options; [and] (b) the Commission's jurisdiction, where applicable, supersedes State as well as Federal agencies . . . .*

S. Rep. No. 93-1131, at 6 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 5843, 5848 (emphasis added). As one of the chief sponsors of the exclusive jurisdiction provision stated, the

aim of the provision was to "avoid unnecessary overlapping and duplicative regulation," especially as between the SEC and the new CFTC. 120 Cong. Rec. H34,736 (1974) (statement of Rep. Poage, Chairman, House Agric. Comm.).

The legislative history of CEA Section 2(a)(1)(A) thus confirms what is already apparent from the plain text of the provision: the CFTC exercises exclusive jurisdiction over the futures market to ensure uniform regulation not subject to overlapping, duplicative or conflicting rules of other government agencies.

II. To Effectuate The CFTC's Exclusive Jurisdiction Over The Futures Markets, CFTC Rule 166.5 Must Exclusively Govern Arbitration Of Disputes Over Transactions Involving Futures Trading

As explained above, the principal purpose of the CEA's exclusive jurisdiction provision is to subject futures market participants to a single set of statutory standards. A corollary to this congressional scheme is that the CFTC alone has the authority to adopt rules implementing the CEA. One area in which the CFTC has adopted rules concerns pre-dispute arbitration agreements with respect to accounts, agreements and transactions involving futures trading. Because the CFTC promulgated Rule 166.5 in the exercise of its exclusive jurisdiction, the procedures it established must exclusively govern the resolution of disputes in the futures market that, like this one, implicate an arbitration agreement.

A contrary ruling would vitiate the CFTC's exclusive jurisdiction and allow a FINRA arbitration panel to exercise authority where FINRA (or the SEC) itself has none. And defendants' rationale for FINRA arbitration—that FINRA rules require arbitration there because FCStone is a registered broker-dealer, *see* Amended Statement of Claim at 18, *Jacobson v. INTL FCStone Fin. Inc.*, FINRA Case No. 18-04113 (Jan. 21, 2019)—would mean that entities like FCStone that are dually registered with the CFTC and SEC are subject to FINRA regulation of *all aspects of their futures business*, not merely their securities brokerage activities.

A. Pursuant To Its Exclusive Jurisdiction Under The CEA, The CFTC Adopted Rules To Govern The Use Of Pre-Dispute Arbitration Agreements In The Futures Markets

The CEA provides three avenues for a private party claiming loss from alleged violations of the CEA by CFTC registrants: (1) civil litigation in federal court, (2) reparation proceedings before the CFTC, and (3) dispute resolution proceedings conducted by a registered exchange, a registered futures association (*i.e.*, NFA) or other private organization. *See* 7 U.S.C. §§ 7(d)(14), 18, 21(b)(10), 25(a)(2).

With respect to dispute resolution proceedings, the CFTC adopted Rule 166.5 to govern the use of pre-dispute arbitration agreements between a CFTC registrant (including futures commission merchants ("FCMs")[5] such as FCStone) and any person (except an "eligible contract participant[]"[6]) who executes transactions on a DCM through the CFTC registrant (such as defendants).[7] *See* 17 C.F.R. § 166.5. CFTC Rule 166.5 covers any dispute that:

> (A) Arises out of any transaction executed on or subject to the rules of a designated contract market;
> (B) Is executed or effected through a member of such facility, a participant transacting on or through such facility or an employee of such facility; and
> (C) Does not require for adjudication the presence of essential witnesses or third parties over whom the facility does not have jurisdiction and who are not otherwise available.

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[5] FCMs are individuals or entities that solicit or accept orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any exchange and that accept payment from or extend credit to those whose orders are accepted. *See* 7 U.S.C. § 1a(28). All FCMs must register with the CFTC through the NFA unless they qualify for an exemption. *See id.* § 6d(a); 17 C.F.R. § 3.10.

[6] The CEA defines eligible contract participants to include institutional investors, government entities and high net worth entities and individuals. *See* 7 U.S.C. § 1a(18). CFTC Rule 166.5 permits eligible contract participants to negotiate any terms of pre-arbitration agreements. *See* 17 C.F.R. § 166.5(g).

[7] The CFTC first promulgated rules governing dispute settlement procedures in the futures markets in 1976. *See* 17 C.F.R. pt. 180 (1976); 41 Fed. Reg. 42,942–47 (Sept. 29, 1976). The CFTC has since amended and incorporated these rules under CFTC Rule 166.5, 17 C.F.R. § 166.5.

Id. § 166.5(a)(1). CFTC Rule 166.5 prescribes minimum standards and procedures intended to strike a balance between protecting retail customers and encouraging the use of efficient dispute settlement procedures in the futures markets. Reflecting that balance, CFTC Rule 166.5 requires CFTC registrants to make certain disclosures regarding pre-dispute arbitration agreements and prohibits CFTC registrants from forcing retail customers to sign such an agreement as a condition to use the CFTC registrant's services. *See id.* § 166.5(b)–(c); *see also* 7 U.S.C. § 21(b)(10)(A).

If a customer voluntarily signs a pre-dispute arbitration agreement with a CFTC registrant, the agreement is subject to certain procedural requirements. Within 10 business days after either a CFTC registrant or its customer notifies the other of intent to submit a claim to arbitration, the CFTC registrant must provide the customer with a list of potential arbitral forums "whose procedures meet Acceptable Practices established by the Commission for dispute resolution." 17 C.F.R. § 166.5(c)(5)(i).[8] The list must include three options: (i) the DCM on which the transaction giving rise to the dispute was executed, (ii) the NFA, and (iii) at least one other organization that meets certain criteria. *Id.* The customer then must select one of the forums from the CFTC registrant's list within 45 days; otherwise, the CFTC registrant has the right to select the forum. *Id.* § 166.5(c)(5)(ii).

B. A CFTC Registrant's Choice Of Arbitration Forums Under CFTC Rule 166.5 Must Be Respected

For disputes involving futures products, the CFTC insisted upon arbitration before one of two self-regulatory organizations for the futures markets—the DCM on which the disputed transaction was executed and the NFA—or a third forum selected by the CFTC registrant. *See*

[8] For the details on Acceptable Practices, *see* 17 C.F.R. § 170.8 (for the NFA); 17 C.F.R. pt. 38, app. B (for DCMs).

17 C.F.R. § 166.5(c)(5); *id.* § 166.5(c)(5)(i) ("*[T]he Commission registrant* must provide the customer with a list of organizations whose procedures meet Acceptable Practices established by the Commission for dispute resolution . . . ." (emphasis added)). Conspicuously missing from the list of designated self-regulatory organizations is FINRA, whose arbitration rules are tailored to the requirements of the Securities Exchange Act of 1934. *See Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 238 (1987) (noting that the SEC oversees the rules of self-regulatory organizations registered with the SEC "to ensure that arbitration is adequate to vindicate *Exchange Act rights*" (emphasis added)); FINRA, Forum Selection Provisions Involving Customers, Associated Persons and Member Firms 4, FINRA Regulatory Notice 16-25 (2016), https://www.finra.org/sites/default/files/notice_other_file_ref/Regulatory-Notice-16-25.pdf ("[T]he SEC found that [FINRA's arbitration rules] were 'designed . . . in general, to protect investors and the public interest,' in compliance *with the requirements of . . . the Exchange Act*." (emphasis added)). As a result, a CFTC registrant's voluntary election of FINRA as the third forum would be *the only avenue* through which FINRA could arbitrate disputes over futures transactions consistent with CFTC Rule 166.5.

C. Bypassing Rule 166.5 Procedures For Settling Disputes Over Futures Trading Would Require A Repeal By Implication Of The CEA's Exclusive Jurisdiction Provision

Defendants have filed their arbitration claims with FINRA with respect to their trades in options on futures contracts—transactions that squarely fall within the CFTC's exclusive jurisdiction. If any futures customer of a CFTC registrant can initiate an independent arbitration process before a securities regulator, as defendants have done here, Rule 166.5—and the CFTC's statutory exclusive jurisdiction—would effectively be deemed repealed. But "[b]ecause any infringement of the CFTC's exclusive jurisdiction would effectively repeal CEA section 2(a)(1)(A)," *Hunter*, 711 F.3d at 159, CFTC Rule 166.5 must be followed unless Congress

intended a repeal of the CEA's exclusive jurisdiction provision by implication in the context of enforcing arbitration agreements.

It is well-established that "'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (alteration in original) (citation omitted). Moreover, courts "will not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Id.* (internal quotation marks and brackets and citations omitted).

Against this heavy burden, defendants have not pointed to any provision under the securities laws or other laws that could be read to repeal by implication the CFTC's exclusive jurisdiction with regard to dispute resolution procedures in the futures markets. Nor can they. As explained above in Section I.A., courts have uniformly upheld the CFTC's exclusive jurisdiction over futures trading. Instead, defendants argue that they are entitled to bring arbitration claims at FINRA because FCStone is registered with FINRA as a broker-dealer and, "[a]s a FINRA member, FCStone is bound to comply with FINRA's rules, including its Arbitration Rule 12200."[9] Brief in Opposition to Motion for Preliminary Injunction at 2, *INTL FCStone Fin. Inc. v. Jacobson*, No. 1:19-cv-01438 (N.D. Ill. Mar. 29, 2019), ECF No. 20. This

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[9] FINRA Rule 12200 provides the following:
Parties must arbitrate a dispute under the [FINRA's Code of Arbitration Procedure for Customer Disputes] if:

- Arbitration under the Code is either:
  - (1) Required by a written agreement, or
  - (2) Requested by the customer;
- The dispute is between a customer and a member or associated person of a member; and
- The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

novel position—that the rules of a self-regulatory organization for one market can supersede a federal agency's exclusive statutory authority to regulate another market—finds no support in the law. Accordingly, FINRA Rule 12200 cannot be read to cover disputes between customers of a dually registered FCM and broker-dealer arising, as here, from the dual registrant's exclusively CFTC-regulated futures market activities.

D. Allowing Deviation From CFTC Rule 166.5 For Arbitration Of Futures Transaction Disputes Would Undermine Congress's Regulatory Scheme And Result In Overlapping And Inconsistent Regulation Of The Futures Markets

Permitting arbitration of this futures transaction dispute in contravention of CFTC Rule 166.5 would result in the very overlapping, duplicative, and inconsistent regulation of the futures markets that Congress expressly sought to preclude by establishing the CFTC as the exclusive futures market regulator. Taken to its logical conclusion, defendants' position would require any entity dually registered with the NFA and FINRA to follow rules from both self-regulatory organizations for *all* of its business activities. If FINRA can arbitrate a dispute that solely involves futures trading because the intermediary happens to be also registered with FINRA for other aspects of its business, what is the limiting principle? Can FINRA impose securities market business conduct standards on the FCM's futures trading activities? Can FINRA bring an enforcement action against the FCM's activities in the futures markets? On the flip side, can the NFA regulate the securities businesses of brokers or dealers by virtue of their NFA membership for their futures market activities? In short, defendants' position would invite the entanglement of independent regulatory schemes for the securities and futures markets. And that entanglement—and the concomitant burdensome duplicative regulation—is precisely what Congress aimed to prevent in 1974 by enacting the CEA's exclusive jurisdiction provision, 7 U.S.C. § 2(a)(1)(A).

The problem with defendants' position does not end with duplicative and burdensome regulations on dual registrants, who would also face potentially conflicting demands from futures and securities regulators. For example, under defendants' position, any customer of an entity dually registered with the NFA and FINRA could be required to waive the customer's right to litigate disputes in court because the SEC allows that practice.[10] *See McMahon*, 482 U.S. at 238 (upholding pre-dispute arbitration agreement in the securities market that required the parties to arbitrate any dispute related to the customers' securities transactions). Such a waiver, however, would be in direct conflict with CFTC Rule 166.5, which provides that "[t]he use by customers of dispute settlement procedures shall be voluntary." 17 C.F.R. § 166.5(b); *see also* 7 U.S.C. § 21(b)(10)(A). Dual registrants could also be subject to conflicting rules on trading based on material, non-public information. Futures trading based on material, non-public information is generally not prohibited under the CEA or the rules of the CFTC, NFA or DCMs. *See* Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41,398, 41,403 (July 14, 2011) ("The [CFTC] recognizes that unlike securities markets, derivatives markets have long operated in a way that allows for market participants to trade on the basis of lawfully obtained material nonpublic information."); NFA, *Obligations To Customers And Other Market Participants*, at heading "Trading Based on Material, Non-Public Information", Interpretive Notice 9041 (Aug. 21, 2001, *revised* Sept. 10, 2001), https://www.nfa.futures.org/rulebook/rules.aspx?Section=9&

[10] Most broker-dealers require their customers to sign a binding arbitration agreement as a condition of opening securities accounts. *See* SEC, *Investor Bulletin: Broker-Dealer/Customer Arbitration*, at heading "Arbitration Clauses", https://www.sec.gov/oiea/investor-alerts-bulletins/ib_arbitration.html (last modified Feb. 10, 2017) ("Most, if not all, account agreements between broker-dealers and their customers have arbitration clauses. The arbitration clauses usually require customers to arbitrate any disputes with the broker-dealer. They also usually prevent customers from suing broker-dealers in court.").

RuleID=9041.[11] In contrast, the securities laws generally *do* prohibit trading on material, non-public information; as a result, FINRA rules prohibiting that practice, if applied to all aspects of a dual registrant's business activities, could impose untenable obligations on the dual registrant's futures trading.[12]

Conclusion

For the foregoing reasons, FIA respectfully requests that this Court compel arbitration in accordance with CFTC Rule 166.5.

Dated: May 17, 2019

Respectfully submitted,

/s/ Jonathan L. Marcus

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[11] There are some exceptions. For example, the CFTC has construed CEA Section 6(c)(1) and CFTC Rule 180.1 to prohibit trading on material, nonpublic information obtained in breach of a duty owed to the source of the information. *See* 7 U.S.C. § 9(1), 17 C.F.R. § 180.1; 76 Fed. Reg. at 41,403 ("Depending on the facts and circumstances, a person who engages in deceptive or manipulative conduct in connection with [certain derivative trades], for example by trading on the basis of material nonpublic information in breach of a pre-existing duty . . . or by trading on the basis of material nonpublic information that was obtained through fraud or deception, may be in violation of final Rule 180.1.").

[12] These problems with defendants' position would not arise if an SEC/CFTC dual registrant voluntarily elects FINRA as a forum to arbitrate futures disputes, consistent with CFTC Rule 166.5. In that case, it would be clear that FINRA's authority to arbitrate the dispute stems only from the CFTC registrant's (and customer's) consent, and FINRA thus could not exercise any general regulatory authority over the dual registrant's futures business merely by virtue of its FINRA membership.

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2019, I caused a true and correct copy of the foregoing Brief of *Amicus Curiae* to be filed by the Court's CM/ECF filing system, which will send electronic notification of such filing to all counsel of record.

/s/ Jonathan L. Marcus

Jonathan L. Marcus