

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 UNITED STATES COMMODITY FUTURES
5 TRADING COMMISSION,

6 Plaintiff,

7 v.

8 PARON CAPITAL MANAGEMENT, LLC,
9 and JAMES D. CROMBIE,

10 Defendants.

No. C 11-4577 CW

ORDER DENYING
DEFENDANT JAMES D.
CROMBIE'S MOTION
TO DISMISS AND TO
STRIKE
(Docket No. 17)

11 _____/
12 Defendant James D. Crombie moves to dismiss the complaint
13 filed against him by Plaintiff United States Commodity Futures
14 Trading Commission. Plaintiff opposes Defendant's motion.¹ The
15 Court has taken the motion under submission on the papers. Having
16 considered the papers filed by the papers, the Court DENIES
17 Defendant's motion.

18 BACKGROUND

19 Plaintiff is an independent federal regulatory agency charged
20 by Congress with the administration and enforcement of the
21 Commodity Exchange Act. Compl. ¶ 12.

22 The National Futures Association (NFA) is a private
23 corporation registered as a futures association with Plaintiff

24
25 _____
26 ¹ On December 1, 2011, Defendant Paron Capital Management,
27 LLC also filed an opposition to Mr. Crombie's motion to dismiss.
28 See Docket No. 39. This filing was filed after November 28, 2011,
the opposition deadline. The Court STRIKES the untimely filing
and deems Mr. Crombie's additional reply thereto to be moot.

1 pursuant to 7 U.S.C. § 21. Id. at 12. Pursuant to delegated
2 authority, NFA is responsible for some aspects of the regulation
3 of certain futures entities who are NFA members, including
4 commodity trading advisors (CTAs). Id.

5 Defendant Paron Capital Management is a Delaware corporation
6 that has been listed with Plaintiff as a CTA under an NFA
7 identification number since August 2, 2010. Id. at ¶ 14. Paron
8 Capital Management was originally founded in 2005 as JDC Ventures,
9 LLC, an entity solely owned and managed by Mr. Crombie. Id.
10 According to Paron Capital Management's June 2, 2010 Limited
11 Liability Company Agreement, Mr. Crombie was obliged to transfer
12 all rights, title and interest in the property and assets of JDC
13 Ventures, LLC to Paron Capital Management. Id. at ¶ 18. Mr.
14 Crombie possessed a seventy-five percent initial interest in Paron
15 Capital Management. Id. at ¶ 13. Paron Capital Management has
16 two other members, Peter J. McConnon and Timothy D. Lyons, who are
17 not named in the present action. Id. at ¶¶ 14, 16-17.

18
19 Plaintiff alleges that, between August 2010 and March 2011,
20 Defendants "used promotional materials" that "omitted material
21 information and contained material misrepresentations and
22 misstatements about the historical rate of return achieved by Mr.
23 Crombie and Paron Capital Management's predecessor-in-interest,
24 JDC Ventures, LLC," in order to "cheat or defraud clients by
25 soliciting customers to trade commodity futures with Paron."
26 Compl. ¶¶ 3, 22, 53. In March 2011, Mr. Crombie allegedly made
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1 repeated "false, fictitious, or fraudulent statements" to NFA
2 "during an NFA investigation and audit of Paron conducted pursuant
3 to NFA's official duties under the Commodity Exchange Act" in
4 order to prevent NFA from discovering these activities and to
5 "impede NFA's investigation and audit of Paron." Id. at ¶¶ 1-2,
6 23-39.

7
8 One specific alleged false statement concerns a \$50,000
9 payment from JDC Ventures, LLC to Mark Steele. Id. at ¶ 36.
10 Plaintiff alleges that Mr. Crombie told NFA that the payment was
11 for services that Mr. Steele and Mr. Steele's company had provided
12 to JDC Ventures, LLC, but that this statement was false and that
13 Mr. Steele stated "that the \$50,000 payment he had received from
14 JDC was repayment of a personal loan owed to him by Crombie." Id.

15
16 Based on the above allegations, Plaintiff filed a complaint
17 with this Court on September 15, 2011, alleging that Defendants
18 committed various violations of the Commodity Exchange Act.

19 Mr. Crombie moves to dismiss Plaintiff's complaint under
20 Federal Rule of Civil Procedure 12(b)(7) for failure to join Mr.
21 McConnon and Mr. Lyons as defendants to this action. Mr. Crombie
22 also moves to strike the allegations related to Mr. Steele from
23 Plaintiff's complaint.

24
25 DISCUSSION

26 I. Motion to Dismiss under Rule 12(b)(7)

27 Under Federal Rule of Civil Procedure 12(b)(7), a party may
28 bring a motion to dismiss if a plaintiff has failed "to join a

1 party under Rule 19." As the party moving for dismissal, Mr.
2 Crombie bears the burden of persuasion. Makah Indian Tribe v.
3 Verity, 910 F.2d 555, 558 (9th Cir. 1990). In the context of a
4 motion to dismiss an action under Rule 12(b)(7), a court accepts
5 "as true the allegations in Plaintiff's complaint and draw all
6 reasonable inferences in Plaintiff's favor." Paiute-Shoshone
7 Indians of the Bishop Cmty. v. City of Los Angeles, 637 F.3d 993,
8 996 n.1 (9th Cir. 2011).

9
10 "A Rule 19 motion poses three successive inquiries." EEOC v.
11 Peabody Western Coal Co., 610 F.3d 1070, 1078 (9th Cir. 2010)
12 (internal quotation marks and citations omitted). "First, the
13 court must determine whether a nonparty should be joined under
14 Rule 19(a)." Id. (internal quotation marks and citations
15 omitted). Under that rule, a party is required and must be joined
16 as a party if, among other things, that "person's absence may
17 . . . leave an existing party subject to a substantial risk of
18 incurring double, multiple, or otherwise inconsistent obligations
19 because of the interest." Fed. R. Civ. P. 19(a)(1). "If an
20 absentee meets the requirements of Rule 19(a), the second stage is
21 for the court to determine whether it is feasible to order that
22 the absentee be joined." EEOC v. Peabody Western Coal Co., 610
23 F.3d at 1078 (internal quotation marks and citations omitted).
24 "Finally, if joinder is not feasible, the court must determine at
25 the third stage whether the case can proceed without the absentee
26 or whether the action must be dismissed." Id.

1 In its complaint, Plaintiff alleges that Mr. Crombie directly
2 and individually committed the violations at issue in this
3 lawsuit. To the extent that Mr. Crombie argues that Plaintiff
4 will not be able ultimately to prove the allegations against him,
5 this argument is not appropriate for consideration under a Rule
6 12(b)(7) motion and will be more appropriately made in the context
7 of a motion for summary judgment.

8
9 Mr. Crombie argues that Plaintiff should have charged Mr.
10 McConnon and Mr. Lyons with violations of the Commodity Exchange
11 Act in addition to, or instead of, him. A federal "agency's
12 decision not to prosecute or enforce, whether through civil or
13 criminal process, is a decision generally committed to an agency's
14 absolute discretion," which courts lack jurisdiction to review.
15 Heckler v. Chaney, 470 U.S. 821, 831 (1985). See also SEC v.
16 Princeton Econ. Int'l Ltd., 2001 U.S. Dist. LEXIS 948, at *3
17 (S.D.N.Y. Feb. 5, 2001) ("The SEC and the CFTC are the sole
18 architects of their enforcement proceedings and [the defendant]
19 may not circumvent the exercise of agency discretion through
20 compulsory joinder rules."). Mr. Crombie makes no allegation that
21 Plaintiff has violated any Congressionally-mandated guidelines in
22 deciding not to charge Mr. McConnon and Mr. Lyons or that it has
23 abdicated its statutory enforcement responsibilities by doing so.
24 Mr. Crombie instead argues that leaving them out would subject him
25 to a substantial risk of incurring double, multiple, or otherwise
26 inconsistent obligations, because past investors or individuals
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1 like Mr. Steele may decide to file additional false lawsuits
2 against him. Reply at 6. "By 'inconsistent obligations' Rule
3 19(a) means 'inconsistent court orders such that compliance with
4 one might breach another.'" Creative Labs v. Cyrix Corp., 1997
5 U.S. Dist. LEXIS 15704, at *7 (N.D. Cal.) (quoting 4 Moore's
6 Federal Practice 3d § 19.03[4][d]). Mr. Crombie does not
7 establish that the mere possibility of future litigation meets
8 this burden or that adding Mr. McConnon and Mr. Lyons to this
9 action would affect Mr. Crombie's risk of future litigation.
10

11 Accordingly, the Court DENIES Mr. Crombie's motion to dismiss
12 under Federal Rule of Civil Procedure 12(b)(7).

13 II. Motion to Strike

14 Pursuant to Federal Rule of Civil Procedure 12(f), a "court
15 may strike from a pleading an insufficient defense or any
16 redundant, immaterial, impertinent, or scandalous matter." Fed.
17 R. Civ. P. 12(f). "The function of a 12(f) motion to strike is to
18 avoid the expenditure of time and money that must arise from
19 litigating spurious issues by dispensing with those issues prior
20 to trial." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th
21 Cir. 1993) (internal formatting, quotation marks and citations
22 omitted), rev'd on other grounds, 510 U.S. 517 (1994).
23

24 Mr. Crombie alleges that the statements related to Mr. Steele
25 are immaterial, impertinent and scandalous, because they are
26 irrelevant to the claims in the complaint and because they are
27 factually incorrect. Mot. at 6; Reply, at 6-7. A motion to
28

1 strike is not a proper vehicle through which to challenge the
2 ultimate merits of portions of the complaint. See Whittlestone,
3 Inc. v. Handi-Craft Co., 618 F.3d 970, 974 (9th Cir. 2010)
4 (stating that a Rule 12(f) motion to strike is not an appropriate
5 vehicle through which to seek dismissal of portions of a complaint
6 or summary judgment thereon). Plaintiff charges that Mr. Crombie
7 lied to NFA regarding the nature of an alleged payment from JDC
8 Ventures, LLC to Mr. Steele during the course of the NFA's
9 investigation of Paron Capital Management, the successor-in-
10 interest to JDC Ventures, LLC, and that this renders him liable
11 under 7 U.S.C. § 13(a)(4). Thus, the allegations related to Mr.
12 Steele are relevant to the claims against Mr. Crombie.

14 Accordingly, the Court DENIES Mr. Crombie's motion to strike.

16 CONCLUSION

17 For the reasons set forth above, Defendant Crombie's motion
18 to dismiss and to strike is DENIED (Docket No. 17). In so ruling,
19 the Court expresses no opinion regarding the ultimate merits of
20 any claims against any party or non-party.

21 IT IS SO ORDERED.

24 Dated: 12/20/2011

23 
24 CLAUDIA WILKEN
United States District Judge