

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

JEFFREY MOATS,
Plaintiff,

v.

NATIONAL CREDIT UNION
ADMINISTRATION BOARD,
a federal administrative agency;
TODD M. HARPER, KYLE S.
HAUPTMAN, AND RODNEY E.
HOOD, in their official capacity as
Members of the National Credit
Union Administration Board; and
JENNIFER WHANG, in her
official capacity as an
Administrative Law Judge and
Inferior Officer of the United
States,
Defendants.

Civil Action No. 3:23-cv-147

Assigned to:
Hon. Jeffrey V. Brown

**FIRST AMENDED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

1. Jeffrey Moats has been seeking his day in court against his former employer, the Edinburg Teachers Credit Union, and its conservator, the National Credit Union Administration Board (NCUA)—an Executive Branch agency of the United States—for two years.

2. Litigation between Mr. Moats and these parties began in earnest when, shortly after being terminated from his long-time employer the Edinburg Teachers Credit Union, Mr. Moats sued the Credit Union seeking

post-termination benefits. He then sued the NCUA, seeking return of personal property. Ultimately, the NCUA returned thousands of dollars' worth of property to Mr. Moats. And the Credit Union released over a million dollars in retirement benefits held in an account for his benefit. Most recently, Mr. Moats sued the Credit Union again seeking a jury trial of his breach of contract claims against his former employer in Texas state court.

3. The NCUA responded by subsequently and separately filing its own "administrative" claims against Mr. Moats in a tribunal it controls, seeking quintessentially judicial remedies of money and other damages but without the right of a jury he would receive in a judicial forum.

4. The NCUA's administrative action moreover seeks relief from, and is conducted by, a single Administrative Law Judge (ALJ) appointed by the NCUA itself. The ALJ is neither accountable to the NCUA Board nor removable (except for cause) by the President of the United States, whose power she intends to wield against Mr. Moats.

5. Mr. Moats seeks a declaration that the NCUA's self-administered tribunal is unconstitutional under controlling precedent, a declaration that Congress unconstitutionally delegated power to the NCUA to bring such in-house adjudications, and an injunction prohibiting the NCUA from depriving him of his constitutional rights.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to Article III of the United States Constitution and 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343 (civil rights). Venue is proper in the Southern District of Texas because the defendants are (1) officers or employees of an agency of the United States acting in an official capacity and (2) an agency of the United States, and this is the district in which the plaintiff resides and in which the events giving rise to this action occurred. *See* 28 U.S.C. § 1391(e)(1)(B) and (C).

7. In addition, under *Axon Enter., Inc. v. Fed. Trade Comm'n*, 143 S. Ct. 890, 903 (2023), this Court has jurisdiction to immediately review the constitutional challenges brought here because this Court's intervention is necessary to spare Mr. Moats the immediate injury of being "subject[ed] to an illegitimate proceeding, led by an illegitimate decision maker." Moreover, Congress has not divested this Court of its jurisdiction to address Mr. Moats's constitutional claims. *Cf. Burgess v. Fed. Deposit Ins. Corp.*, No. 7:22-CV-00100-O, 2022 WL 17173893, at *6 (N.D. Tex. Nov. 6, 2022) (finding federal court jurisdiction to review claims against the similarly-situated FDIC).

PARTIES

8. Plaintiff Jeffrey Moats resides within the Southern District of Texas.

9. Defendant National Credit Union Administration Board is an agency of the United States government with its headquarters in Alexandria, Virginia.

10. Todd M. Harper, Kyle S. Hauptman, and Rodney E. Hood are the members of the Board of the National Credit Union Administration, and Defendants in their official capacities.

11. Jennifer Whang is an Administrative Law Judge with the Office of Financial Institution Adjudication and a Defendant in her official capacity.

INTRODUCTION

12. Congress created the NCUA as an agency in the executive branch, and the agency exercises substantial power to regulate the operations of credit unions.

13. When the NCUA charges individuals or institutions with violating its regulations or the laws it is charged with enforcing, it adjudicates the matter in a forum controlled by the agency before an Administrative Law Judge (ALJ). In this case, the prosecution of Mr. Moats is taking place before ALJ Jennifer Whang. ALJ Whang enjoys multiple layers of protection from the

President's removal power, which is impermissible under Article II and the Take Care Clause of the Constitution.

14. Moreover, Congress purported to give the NCUA discretion to prosecute alleged violations of the law in either Article III courts or its own agency tribunal. However, Congress failed to provide an intelligible principle to guide the use of that discretion, even though the power to assign disputes to agency adjudication is peculiarly within the authority of the legislative branch. This delegation of power is in derogation of the Vesting Clause, the nondelegation doctrine, and prevailing Fifth Circuit precedent.

15. The delegation to the NCUA and the procedures it is using to prosecute Mr. Moats deprive him of fundamental constitutional rights, including his right to due process of law and his right to be judged by a jury of his peers. This suit for declaratory and injunctive relief seeks to safeguard those rights.

FACTS

16. Jeffrey Moats led the Edinburg Teachers Credit Union ("ETCU" or the "Credit Union"), a small credit union in south Texas, as its CEO for over 25 years. Under his leadership, the Credit Union was always at or near the top of performance metrics among credit unions of all sizes statewide. It more than passed every semi-annual state audit. The Credit Union's Board of Directors, and more importantly its members, praised Mr. Moats's management skills

and the Credit Union's resulting stellar performance. In March 2020, its financial condition was as it had historically been—excellent.

17. Notwithstanding the Credit Union's excellent financial condition, on March 26, 2021, the Texas Credit Union Department issued an order placing the Credit Union in conservatorship. The Department immediately appointed the NCUA Board as the Credit Union's conservator. Mr. Moats was immediately terminated as CEO and thrown out of the building with little more than the clothes he was wearing. The NCUA seized every piece of property in the building, including significant personal property and documents that were openly and obviously purely personal to Mr. Moats.

18. Unsurprisingly, Mr. Moats sued the Credit Union for post-termination benefits. He was also forced to sue for the return of his obviously personal property at the Credit Union that was being withheld from him.

19. After initially accusing Mr. Moats of comingling personal and Credit Union assets, the NCUA's investigation found absolutely no evidence supporting this allegation. Instead, the Credit Union returned over \$1 million in retirement benefits and the NCUA returned thousands of dollars in personal property to Mr. Moats—all of which had been unlawfully withheld.

20. In addition, without resolving Mr. Moats's claimed entitlement to over a million dollars in unpaid post-termination benefits, which are separate from the retirement benefits that the credit union returned, the NCUA and the

Texas Credit Union Department ended the Credit Union's conservatorship earlier this year, returning its management to its members and reinstalling a member-led board of directors.

21. Nonetheless, because Mr. Moats and the Credit Union still disagreed about his entitlement to those post-termination benefits, Mr. Moats sued the Credit Union in Texas state court in March of 2023 to obtain them.

22. On April 20, 2023—the day before the Credit Union answered Mr. Moats's lawsuit (and countersued him seeking essentially the same relief the NCUA now seeks administratively)—the NCUA served a “Notice of Charges” under 12 U.S.C. § 1786. The Notice of Charges is attached as Exhibit 1 to this Complaint. The claims asserted in the Notice of Charges include that Mr. Moats breached fiduciary duties to the Credit Union, unjustly enriching himself. The NCUA sought relief based upon allegations dating back more than ten years and based upon transactions that its own examiners had presumably reviewed multiple times. The Notice demands \$4 million in restitution, at least \$1 million in “civil penalties,” and an order prohibiting Mr. Moats for his lifetime from serving as a director, officer, or otherwise participating in the conduct of the affairs of any insured depository institution.

23. On April 26, 2023, ALJ Whang was designated as the ALJ presiding over the administrative action. The administrative matter is currently stayed pending this Court's final judgment. See Exhibit 2 attached

to this Complaint (Order No. 5 of ALJ Whang).

24. On May 15, 2023, Mr. Moats filed a complaint initiating this action (Doc. 1) challenging the NCUA's administrative adjudication proceedings because administratively proceeding against Mr. Moats is rife with constitutional problems.

25. The NCUA issued the Notice of Charges against Mr. Moats under 12 U.S.C. §§ 1786(e), (g), (k). But the power to issue a notice of charges pursuant to those sections is an unconstitutional delegation of power to the NCUA that violates the nondelegation doctrine and the Vesting Clauses of Articles I and II. *See* U.S. Const. art. I, § 1; art. II, § 1.

26. The NCUA assigned its Notice of Charges against Mr. Moats to an administrative law judge with the Office of Financial Institution Adjudication ("OFIA"), ALJ Whang. But she can only be removed for cause after a hearing before the Merit System Protection Board ("MSPB"). *See* 5 U.S.C. § 7521. Further, under the interagency Administrative Law Judge Agreement governing OFIA ALJs, "[a]ny change to the [OFIA staff, including ALJs,] shall be subject to the approval of all ... [the FDIC, Office of the Comptroller of Currency, the Board of Governors of the Federal Reserve, and the NCUA]." *See* Exh. A, attached to the Joint Stipulation of Facts (Doc. 22-1). The Agreement is also attached to this Complaint as Exhibit 3. Under controlling Fifth Circuit precedent, ALJ Whang's insulation from removal by the President with

multiple layers of removal protection violates Article II and the Take Care Clause of the United States Constitution. *See* U.S. CONST. art. II § 3; *Jarkesy v. SEC*, 34 F.4th 446, 463 (5th Cir. 2022).

27. The NCUA's Notice of Charges requires not just Mr. Moats's submission to but his active participation in the deprivation of his constitutional rights by unconstitutional actors in an unconstitutional adjudication. This inflicts immediate injury on Mr. Moats, entitling him to both declaratory and injunctive relief.

28. On August 3, 2023, Mr. Moats and the Defendants entered into a Joint Stipulation of Facts filed in this Court on August 4, 2023, as Document 22. In paragraphs 1 and 2 of that stipulation, the parties stipulated as follows: "(1) The Defendant members of the National Credit Union Administration (NCUA) Board of Directors are removable by the President at will despite the statutory six-year terms established by Section 102(c) of the Federal Credit Union Act, 12 U.S.C. § 1752a(c). (2) The NCUA Board members understood themselves to be removable at will at the time they made the decision to file the Notice of Charges, Notice of Assessment of Civil Money Penalty, and Notice of Hearing against Plaintiff Jeffrey Moats on April 20, 2023." Accordingly, Mr. Moats has filed the instant First Amended Complaint to remove a claim contained in the original complaint that the heads of NCUA are unconstitutionally protected from the President's removal power.

CAUSES OF ACTION

Count 1 (Declaratory and Injunctive Relief) ALJ Whang is unconstitutionally shielded from removal with multiple layers of removal protection.

29. Each preceding paragraph of this Complaint is incorporated by reference as if restated fully in connection with this Count.

30. ALJ Whang is an officer of the United States in the executive branch.

31. ALJ Whang is subject to the Constitution's mandate that the President shall take care that the laws are faithfully executed. U.S. Const. art. II, § 3. The Take Care Clause guarantees the President a certain degree of control over executive officers. The President must have adequate power over the appointment and removal of officers such as ALJ Whang.

32. ALJ Whang cannot be removed except for cause. Plus, ALJ Whang's removal requires, first, a hearing before the MSPB, and a unanimous agreement among the principals of multiple financial agencies. *See* 5 U.S.C. § 7521; Exhibit 3. As a result, the President lacks the control necessary to ensure that ALJ Whang is faithfully executing the laws on his behalf.

33. Statutorily conditioning ALJ Whang's removal upon both a finding of good cause established before the MSPB and unanimity among all parties to the interagency agreement regarding ALJs unconstitutionally prevents the President from taking care that the laws are faithfully executed.

34. Under controlling Fifth Circuit precedent, ALJ Whang's multi-layered insulation from the President's power to ensure she is faithfully executing the laws is unconstitutional under Article II and the Take Care Clause of the Constitution. *See Jarkesy*, 34 F.4th at 464–65.

35. ALJ Whang's multi-layered insulation from political accountability is harming Mr. Moats. ALJ Whang's multi-layered insulation from removal is imposing a here-and-now injury on Mr. Moats, requiring him to submit to the authority of an officer wielding executive power while shielded from any political accountability. ALJ Whang cannot both proceed and comply with controlling Fifth Circuit precedent.

36. For these reasons, Mr. Moats requests a declaration and an injunction that ALJ Whang's multi-layered insulation from removal creates a constitutional injury for Mr. Moats and that ALJ Whang lacks the authority both to convene a hearing on the charges asserted by the NCUA, or to order Mr. Moats to participate in any such hearing in any way.

**Count 2 (Declaratory and Injunctive Relief)
Administratively proceeding against Mr. Moats
deprives him of a jury trial.**

37. Each preceding paragraph of this Complaint is incorporated by reference as if restated fully in connection with this Count.

38. The Seventh Amendment to the United States Constitution requires that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” The NCUA seeks restitution and fines from Mr. Moats exceeding \$5 million for well-established common law causes of action like breach of fiduciary duty and fraud.

39. Indeed, Mr. Moats is currently being sued by the Credit Union in Texas state court based upon the exact same conduct for which the NCUA seeks restitution and penalties.

40. Instead of a jury, the NCUA offers a proceeding in which a bureaucrat employed by the NCUA, the same agency that investigated and charged him, is the finder of fact. This deprives Mr. Moats of his Seventh Amendment right to try the common law allegations made against him to a jury of his peers.

41. Neither the Seventh Amendment, nor the statutory scheme, nor OFIA’s rules permit impaneling a jury in administrative tribunals. Subjecting Mr. Moats to an unconstitutional administrative trial imposes the serious here-and-now injury upon him of forcing him to prepare for and submit to a tribunal that not only will not—but cannot—protect his constitutional rights.

42. For all of these reasons, Mr. Moats seeks a declaration and an injunction that the enforcement proceeding and hearing contemplated by the

NCUA and ALJ Whang violate the Seventh Amendment by depriving Mr. Moats of his right to a jury.

**Count 3 (Declaratory and Injunctive Relief)
Administratively proceeding against Mr. Moats
deprives him of the due process of law.**

43. Each preceding paragraph of this Complaint is incorporated by reference as if restated fully in connection with this Count.

44. The cumulative effect of the procedural defects inherent in administrative adjudication before the NCUA deprives Mr. Moats of the due process of law guaranteed by the Fifth Amendment. Even if the NCUA's claims could be heard by an ALJ, the Constitution requires an ALJ that does not enjoy multiple layers of removal protection. Also, the Constitution requires a jury. But no jury is available.

45. Neither the ALJ nor the NCUA board members are independent and impartial in the NCUA's pursuit of millions of dollars of fines against Mr. Moats. The overlapping functions performed by these Defendants of being the accuser, prosecutor, jury, judge, appellate court, executor of an award of monies payable by Mr. Moats to the NCUA, and judgment creditor, are incompatible with the Fifth Amendment's Due Process Clause.

46. Eventual appeal to a federal court after the NCUA concludes its trial and internal appeal to NCUA board members, where the federal court reviews both the ALJ's and the NCUA's findings of fact and conclusions of law

under deferential standards of review, cannot remedy the lack of due process of law afforded to Mr. Moats during administrative adjudication. Such eventual and cursory judicial review also violates the Fifth Amendment's Due Process Clause.

47. For these reasons, Mr. Moats seeks a declaration and an injunction that the enforcement proceeding and hearing contemplated by the NCUA and ALJ Whang violate his Due Process rights under the Fifth Amendment.

Count 4 (Declaratory and Injunctive Relief) Giving NCUA the power to bring in-house adjudicative actions against private parties such as Mr. Moats violates the nondelegation doctrine.

48. Each preceding paragraph of this Complaint is incorporated by reference as if restated fully in connection with this Count.

49. Congress gave the NCUA significant and unfettered power to choose whether to bring enforcement actions in Article III courts or within the agency. But Congress failed to provide the NCUA with an intelligible principle to guide its use of the delegated power. *See* 12 U.S.C. § 1786.

50. When the NCUA chose to bring an enforcement action against Mr. Moats to be adjudicated within the agency as opposed to in federal court, that choice had the purpose and effect of altering the legal rights, duties, and relations of the parties. Mr. Moats would be entitled to a jury trial in federal court but not in the administrative proceeding. Mr. Moats would be protected

by the due process of law guaranteed to him in federal court through the use of procedures such as the availability of a jury trial, use of federal rules of civil procedure and evidence, and a presiding independent and impartial Article III judge. Not so in administrative proceedings.

51. The power to assign disputes to agency adjudication is peculiarly within the authority of the legislative department. But delegating that power to the NCUA gives the NCUA the latitude to determine which subjects of its enforcement actions are entitled to Article III proceedings with a jury trial, and which are not. The NCUA exercised that power by assigning the enforcement action against Mr. Moats to agency adjudication in front of ALJ Whang.

52. Congress gave the NCUA exclusive authority and absolute discretion to decide whether to bring common law fraud and breach-of-duty enforcement actions within the agency instead of in an Article III court. But Congress gave no guidance as to how the agency should exercise that delegated power. Such absence of guidance is impermissible under the nondelegation doctrine and the Vesting Clauses of Articles I and II. U.S. Const. art. I, § 1; art. II, § 1. The NCUA's decision to sue Mr. Moats in its own administrative tribunal therefore violates the nondelegation doctrine and the Vesting Clauses. Controlling Fifth Circuit precedent holds that this choice may not be delegated in this manner by Congress to an agency. *See Jarkey*, 34 F.4th 446.

53. For these reasons, Mr. Moats seeks a declaration and an injunction that the NCUA's power to select where its case against Mr. Moats is litigated violates the nondelegation doctrine and the Vesting Clauses of Articles I and II of the Constitution.

ATTORNEYS' FEES

54. Pursuant to 42 U.S.C. § 1988, the Equal Access to Justice Act, 28 U.S.C. § 2412, and as appropriate under other authorities, Mr. Moats is entitled to recover attorneys' fees and costs, including expert fees.

DEMAND FOR TRIAL BY JURY

55. Plaintiff hereby demands a trial by jury on all claims for which the law provides a right to a jury trial. The jury fee is tendered herewith.

CONCLUSION AND PRAYER

56. Plaintiff respectfully prays that all Defendants be cited to appear and answer herein, and that Plaintiff have the declaratory judgments and injunctive relief against Defendants, as prayed for herein, and the Plaintiff recover his attorneys' fees and costs of court, including expert fees, and all further relief, both legal and equitable, as to which Plaintiff shows himself justly entitled.

DATED: August 11, 2023.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2023, a copy of the foregoing was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ Aditya Dynar
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**Pro Hac Vice*