IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KEVIN CLARKE, TREVOR BOECKMANN, HARRY CRANE, CORWIN SMIDT, PREDICT IT, INC., ARISTOTLE INTERNATIONAL, INC., MICHAEL BEELER, MARK BORGHI, RICHARD HANANIA, JAMES MILLER, JOSIAH NEELEY, GRANT SCHNEIDER, and WES SHEPHERD,

Plaintiffs,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Civil Docket No. 1:22-cv-00909-LY

The Honorable Lee Yeakel

REPLY IN SUPPORT OF DEFENDANT CFTC'S OPPOSED MOTION TO TRANSFER VENUE

The Parties' disagreement as to the proper 28 U.S.C. § 1404(a) analysis governing the CFTC's transfer motion of Plaintiffs' Administrative Procedure Act ("APA") claims is narrow. Indeed, it is worth briefly summarizing the common ground on which all Parties agree:

- First, the Parties agree that this Court, no less than any other, has the authority and ability to resolve APA claims. *See, e.g.*, Dkt. 13 at 8; Dkt. 8 at 11.
- Second, the Parties agree that 28 U.S.C. § 1391(e)(1)(C) controls and venue is available in the Western District of Texas only because certain Plaintiffs are Austin residents. *See, e.g.*, Dkt. 13 at 5; Dkt. 8 at 4.[1]
- Third, the Parties agree that this case could have been brought in the District of Columbia, where "the 'locus of operative facts'" occurred, such that a discretionary transfer to the D.C. District Court is available. *See* Dkt. 13 at 6, 12; Dkt. 8 at 5.
- Fourth, the parties agree that the APA's unique, appellate-style standard of review requires a specialized transfer analysis under Section 1404(a) as such cases are unlike traditional civil litigation. *See, e.g.*, Dkt. 13 at 1–2 (citing *Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020)); Dkt. 8 at 5 (same).
- Fifth and relatedly, because the unique nature of APA review "neutralizes many of the convenience factors" ordinarily considered, the Parties agree that weightiest part of the Section 1404(a) transfer analysis here is determining what, if any, deference to afford the Plaintiffs' choice of forum under the circumstances. *See* Dkt. 13 at 6–11; Dkt. 8 at 6–9.

[1] Plaintiffs conclusorily assert in their Amended Complaint (at ¶ 18) that "a substantial part of the events or omissions giving rise to the claims also occurred in this jurisdiction" based on downstream economic harms that the Austin-resident Plaintiffs would allegedly suffer were the PredictIt Market to shut down. But their opposition abandons any argument that 28 U.S.C. § 1391(e)(1)(B) is implicated here. For good reason. S*ee* Dkt. 8 at 6–9.

Notwithstanding that substantial agreement, Plaintiffs' opposition is wrong in certain critical respects. This Court should grant the CFTC's motion for the reasons below.

I. That Some of Nationwide Plaintiffs Happen to Reside in Austin and Allege Indirect Harms from D.C.-based Agency Conduct Directed to a Non-Party Based in New Zealand Does Not Warrant This Court's Retention of APA Litigation Lacking Any Other Connection to Texas or the Western District.

The Parties' central disagreement is whether, as Plaintiffs contend, this Court should simply accord the normally "'great deference to the plaintiff's choice of forum'" applicable to, say, Federal Arbitration Act claims. *See* Dkt. 13 at 5, 12 (citing *21st Century Fin. Servs., LLC v. Manchester Fin. Bank*, No. 10-CV-803-LY, 2012 WL 12883044, at *1 (W.D. Tex. June 29, 2012) (involving an "action to enforce a default arbitration award" under 9 U.S.C. § 9)). And despite agreeing that "the 'locus of operative facts'" is the District of Columbia, Plaintiffs further contend that this Court should ignore that reality based on the undisputed and unremarkable fact that Congress enacted 28 U.S.C. § 1391(e)(1) "to grant plaintiffs greater flexibility when suing federal agencies." *See* Dkt. 13 at 12.

Plaintiffs' preferred approach to balancing the choice-of-forum and locus-of-operative-facts factors—that is, disregarding the operative facts altogether and holding that the Plaintiff's choice of forum alone controls—is directly contrary to the case law addressing APA transfer motions both in this Court and every other of which undersigned counsel is aware. *See, e.g.*, *National Ass'n of Life Underwriters v. Clarke*, 761 F. Supp. 1285, 1293 (W.D. Tex. 1991) (giving prime consideration to "[t]he judicial district with the most significant ties to this litigation" and granting transfer because "the connection between the Plaintiffs' claims and this district "is 'minuscule'"); *Hight v. U.S. Dep't of Homeland Sec.*, 391 F. Supp. 3d 1178, 1185, 1187 (S.D. Fla. 2019) (holding that these factors "weigh heavily in favor of transfer" when "Plaintiff's only nexus to the Southern District of Florida is his residence"). Fundamentally,

"Plaintiffs discount the fact that there are times when this presumption's import is lessened, as when the original forum's connection to the matter is minimal and the operative facts arose elsewhere." *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, No. CV 12-4407-SC, 2013 WL 120185, at *4, *7 (N.D. Cal. Jan. 8, 2013) (holding that "Plaintiffs' choice of forum is entitled to minimal deference" when "most of the other Plaintiffs reside outside this district, and all of the operative facts arose elsewhere" and transferring APA claims to the Southern District of Florida because "[t]he locus of operative facts is there").

Plaintiffs have not cited any on-point authority suggesting that federal courts should retain jurisdiction when the only connection between the transferor district and APA claims is the residence of some named plaintiffs when all the relevant facts happened elsewhere. Attempting to muddy the waters, Plaintiffs repeatedly inject discussion of the supposedly "direct and immediate impact" on PredicitIt traders like "Plaintiffs Kevin Clarke and Trevor Boeckmann" that would be felt not only in Texas and New York, respectively, but also "nationwide." *See, e.g.*, Dkt. 13 at 2, 4, 9–12. But that focus on the indirect, downstream economic *harms* allegedly experienced by individual PredictIt traders in Texas (and New York and potentially every other U.S. jurisdiction) does not play into the transfer analysis at all. The relevant determination turns on the *Defendant's conduct* giving rise to the *claims* at issue. *See Gault v. Yamunaji, L.L.C.*, No. A-09-CA-078-SS, 2009 WL 10699952, at *5 (W.D. Tex. Apr. 17, 2009); *see also Hight*, 391 F. Supp. 3d at 1185 ("In APA cases, courts generally focus on where the [d]ecision making process occurred to determine where the claims arose." (quoting *Gulf Restoration Network v. Jewell*, 87 F. Supp. 3d 303, 313 (D.D.C. 2015)).

Nor have Plaintiffs successfully refuted any of the extensive, on-point authority that the CFTC cites. Most notably, Plaintiffs fail to meaningfully distinguish the reasoning employed by

the Southern District of Florida in *Hight v. U.S. Department of Homeland Security*. The *Hight* Court granted a transfer motion on a legally indistinguishable fact pattern involving a virtually identical residence-only venue theory. Plaintiffs briefly attempt to argue that "*Hight* is distinguishable on its facts" because unlike the pilot seeking a Coast Guard license in the St. Lawrence Seaway who was "literally on the other latitudinal side of the country from the Southern District of Florida," Plaintiff Kevin Clarke not only resides in Austin but he also "bought his PredictIt contracts in Austin" and "is having the economic value of those contracts destroyed" in Austin. *See* Dkt. 13 at 12–13. That is not materially different at all; the pilot in *Hight* likewise sought and was denied a license from his residence in the Southern District of Florida, and he undoubtedly felt the alleged economic consequence of that license denial there too. *See Hight*, 391 F. Supp. 3d at 1181–82. Indeed, because *Hight* involved an APA challenge to agency conduct directed specifically at the party bringing suit, those claims' meager "nexus" to the Southern District of Florida were, if anything, greater than Plaintiffs' are here.

Plaintiffs similarly fail to distinguish *Hight* on the law. Asserting that *Hight* is "legally inapposite," lacks citation to "appellate authority of any sort," and does not "control this case," Plaintiffs stress that *Hight*'s "general proclamation" about the appropriate weight given to the choice-of-venue and locus-of-operative-facts factors is "not binding" and inconsistent with Fifth Circuit precedent. *See* Dkt. 13 at 12–13 (citing *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 n.10 (5th Cir. 2008)). To start, Plaintiffs are simply wrong that *Hight* failed to cite "appellate authority of any sort."[2] And their assertion that "the Fifth Circuit has rejected" the Southern

[2] While it is unclear why Plaintiffs appear to believe only those district-court opinions citing "appellate authority" should be given weight in the transfer context, as district courts are the primary decisionmakers in the transfer context and entitled to wide discretion, *Hight* nevertheless cites such authority. *See, e.g.*, *Hight v. United States Dep't of Homeland Sec.*, 391 F. Supp. 3d 1178, 1184–85 (S.D. Fla. 2019) (citing, among other appellate cases, *Gulf Oil Corp. v. Gilbert*,

District of Florida's APA-specific transfer analysis is unsupported. Nor could the Fifth Circuit have rejected *Hight*'s APA-specific reasoning in *In re Volkswagen*, as that case did not involve APA claims. Similarly, the Fifth Circuit has not addressed that question in dicta, whether directly or otherwise. Plaintiffs cite nothing to support their bald assertion to the contrary besides an unrelated footnote addressing the difference between "burdens" and "factors" under Section 1404(a) and the common-law doctrine of *forum non conveniens*. *Cf. In re Volkswagen*, 545 F.3d at 315 n.10. Plaintiffs are, of course, correct that *Hight* is "not binding" on this Court. But Plaintiffs tellingly fail to engage with the actual substance of the *Hight* Court's reasoning or explain why this Court should chart a different course.

And while they maintain that the other authority cited by the CFTC is "readily distinguishable" based on other differences in procedural posture, Plaintiffs similarly fail to provide any on-point authority to the contrary. Nor do they otherwise raise doubts as to the generally agreed-upon focus given to APA claims' "nexus" to the forum that federal courts, both in this district and nationwide, employ when evaluating similar transfer motions—the proposition for which those cases were cited. *Compare* Dkt. 13 at 13–14, *with* Dkt. 8 at 8–9 (citing *National Ass'n of Life Underwriters v. Clarke*, 761 F. Supp. 1285 (W.D. Tex. 1991); *Munro v. U.S. Copyright Off.*, No. 6:21-CV-00666-ADA-JCM, 2022 WL 3566456, (W.D. Tex. May 24, 2022) (Manske, M.J); *Pulijala v. Cuccinelli*, No. 1:20-CV-00822-JPB, 2021 WL

330 U.S. 501 (1947), *In re Ricoh Corp.*, 870 F.2d 570 (11th Cir. 1989), and *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949 (9th Cir. 1968)). The authorities cited in *Hight* persuasively establish, among other things, that "where the operative facts have not occurred within the forum of original selection and that forum has no special interest in the parties or subject matter, the plaintiff's choice of venue merits less deference." *Animal Legal Def. Fund v. U.S. Dep't of Agric.,* No. CV 12-4407-SC, 2013 WL 120185, at *4 (N.D. Cal. Jan. 8, 2013) (citing *Pacific Car & Foundry*, 403 F.2d at 954)).

9385877 (N.D. Ga. Jan. 22, 2021); *Holovchak v. Cuccinelli*, No. 20-CV-210-KSM, 2020 WL 4530665 (E.D. Pa. Aug. 6, 2020); and *Center for Food Safety v. Vilsack*, No. C 11- 00831 JSW, 2011 WL 996343 (N.D. Cal. Mar. 17, 2011)).

Under the circumstances of this case, as there is no substantial connection between the challenged conduct and the Western District and all operative facts took place in the District of Columbia, transfer is warranted for that reason alone.

II. All Remaining Convenience Factors Are Either Neutral Or Favor Transfer.

For the reasons given in the CFTC's motion, all other public- and private-interest factors are neutral or favor transfer. *See* Dkt. 8 at 9–11. While Plaintiffs believe that balance is closer to neutral than does the CFTC, as discussed above both Parties agree that these traditional considerations are not entitled to great weight regardless. Notably, Plaintiffs have all but conceded that their decision to file in the Western District had nothing to do with convenience or efficiency. Indeed, the only reason that Plaintiffs even suggest as to why this Court would be the best forum to hear their dispute is that "Mr. Clarke" might prove to be "a key witness" and he, again, "resides in Austin." Dkt. 13 at 15. But that speculation contradicts the Parties' agreement that this case will proceed under the APA's appellate review standard. *See* Dkt. 13 at 14–15.

III. Nothing In Plaintiffs' Amended Complaint Changes That Balancing.

Having seen the writing on the wall, Plaintiffs—only after filing their opposition to the CFTC's transfer motion (Dkt. 12)—voluntarily amended their complaint in a transparent attempt to paper over the lack of any legally relevant nexus between their claims and the Western District of Texas. *See* Dkt. 15. Specifically, the Amended Complaint adds seven new named Plaintiffs, four of whom are individual PredictIt traders who, like original Plaintiff Kevin Clarke, reside in Austin. *See id.* ¶ 28 (Michael Beeler), ¶ 29 (Mark Borghi), ¶ 32 (Josiah Neeley), ¶ 34 (Wes

Shepherd). Two of the other newly added Plaintiffs, also individual PredictIt Traders, reside in Ohio and Massachusetts. *Id.* ¶ 31 (James Miller), ¶ 33 (Grant Schneider). And though the final newly named Plaintiff appears to be affiliated with the University of Texas and identifies as a "proponent of prediction markets" generally, there are no allegations disclosing his residence or claiming that he has any current or future interest in trading on PredictIt. *Id.* ¶ 30 (Richard Hanania); *see also id.* ¶¶ 18, 43 (declining to include Mr. Hanania in venue allegations). All of these newly added Plaintiffs' alleged downstream harms are legally identical to prior Plaintiffs', and the Amended Complaint contains no substantive changes to either the CFTC's conduct being challenged or to the merits of Plaintiffs' APA claims.

Nothing about the addition of duplicative Austin-based Plaintiffs changes the transfer analysis. As discussed above, where such downstream economic harms are felt is irrelevant to determining their claims' "locus of operative facts," which turns on where Defendant's challenged conduct occurred. More window dressing is window dressing all the same.

Even if Plaintiffs were correct that the location of these downstream harms matters, the harm declarations supporting their preliminary-injunction motion confirm that the District of Columbia is the appropriate venue regardless. As to the purely economic harms pressed in that motion, the D.C.-based corporate Aristotle Plaintiffs assert "compliance" costs totaling $250,000. *See* Dkt.12-2 at 5, ¶ 17; Am. Compl. ¶¶ 26–27. That is an order of magnitude greater than the $24,000 claimed by the next-highest Plaintiff, New York resident Trevor Boeckmann, Dkt. 12-2 at 33 ¶ 3, which itself is more than twice the $11,000 claimed by Austin resident Kevin

Clark, *id.* at 30 ¶ 4. So to the extent that any local jurisdiction may be the center of the diffuse, nationwide harms asserted, it is the District of Columbia. *Accord* Dkt. 8 at 11.

IV. Plaintiffs' Generalized Policy Concerns About Venue Under The Administrative Procedure Act Are Misplaced.

Finally, it is worth directly addressing a central flawed premise running throughout Plaintiff's opposition. Specifically, Plaintiffs' notion that they should not have to bring "their grievances to Washington" merely because "the Government made its decision in Washington, its officials and lawyers are in Washington, and it would be move convenient" to have their D.C.-centric claims decided in the District of Columbia, as doing so would be "contrary to the federal venue statute." *See* Dkt. 13 at 4. According to Plaintiffs' imagined parade of horribles, were this Court to grant the CFTC's transfer motion, the same result would be warranted in "any case challenging the behavior of a federal Government agency based in Washington, DC." *Id.* Essentially, Plaintiffs imply the CFTC is engaged in some kind of a jurisdictional power grab on behalf of the entire Federal Government.[3]

Wrong. The decision as to which district should decide APA claims that may be brought in one of several judicial districts under 28 U.S.C. § 1391(e)(1), just as with Section 1404(a)

[3] A corollary principle urged by Plaintiffs is that precedent "from the United States District Court for the District of Columbia" in the APA context should be doubted because that Court "perhaps unsurprisingly [has] held that any problem with the U.S. Government can be handled in the courts of our Nation's capital." *See, e.g.*, Dkt. 13 at 8, 13 (accusing the United States of seeking to use its "influence as a repeat player to develop precedent—favorable to the Government and protecting agency actions against judicial scrutiny—within a single, special forum"). That attempt to denigrate both the United States generally and a single federal district court in particular is highly inappropriate. It also badly misstates the substance of the D.C. District Court's case law. As that court has been clear, while it "receives more APA claims than its western colleagues given the number of federal agencies and officials located in Washington, D.C." that alone is not a relevant transfer consideration in APA cases as all federal district courts "are presumed to be equally able to handle federal claims." *See, e.g.*, *Tuttle v. Jewell*, 952 F. Supp. 2d 203, 208 (D.D.C. 2013) (citation omitted).

transfer motions in other legal contexts, depends on the specific circumstances presented and requires the exercise of individualized, fact-specific judgment. When appropriate, APA challenges to federal agency conduct may be, and are, transferred not only from non-D.C.-based courts to a D.C.-based court, *see, e.g.*, *National Ass'n of Life Underwriters v. Clarke*, 761 F. Supp. 1285 (W.D. Tex. 1991), but also from a D.C.-based court to non-D.C.-based courts. *See, e.g.*, *W. Watersheds Project v. Tidwell*, 306 F. Supp. 3d 350, 357, 364–365 (D.D.C. 2017) (transferring APA claims to the District of Wyoming because the underlying claims challenge the denial of a Forest Service land-use permit by "Wyoming-based agency personnel," "the locus of the instant permit dispute is in the state of Wyoming," and "there are no significant ties between the instant dispute and the District of Columbia"); *M & N Plastics, Inc. v. Sebelius*, 997 F. Supp. 2d 19, 27 (D.D.C. 2013) (transferring APA claims to the Eastern District of Michigan "where venue is indisputably proper and more convenient"). Non-D.C.-based courts are equally empowered to, and do, transfer APA claims to other non-D.C.-based court when the transferee would be the more appropriate forum. *See, e.g.*, *Animal Legal Def. Fund*, 2013 WL 120185, at *7 (transferring APA claims from the Northern District of California to the Southern District of Florida). Nothing about that unremarkable reality calls the federal venue statute into question.

By contrast, if Plaintiffs' wholly unsupported theory that their choice of forum alone defeats any Section 1404(a) motion were correct then no federal court would *ever* be able to transfer APA claims brought under 28 U.S.C. § 1391(e)(1)(c). So long as at least one challenger alleging indirect harms from regulatory conduct with nationwide effect, no matter how attenuated, happens to reside in that district then the chosen district would be bound to keep those claims. *Cf., e.g.*, Dkt. 13 at 9 ("Congress's decision to give U.S. citizens the option to bring their grievances against the Government in the place of their residence should be the

beginning and the end of the transfer analysis."). Plaintiffs' theory would mean that no matter where they had chosen to file suit—whether that might have been in Delaware, the District of Columbia, Massachusetts, Michigan, New Jersey, New York, Ohio, or Texas, Am. Compl. ¶¶ 22, 23, 24, 26, 27, 31, 33, or in any of remaining 94 districts in which the "thousands" of PredictIt traders reside, *id.* ¶ 39—their initial choice of forum alone would then dictate the transfer analysis. To be sure, Congress theoretically could have allowed for such limitless forum selection in challenges to federal agency conduct by carving APA claims out from Section 1404(a). But Congress did no such thing in enacting 28 U.S.C. § 1391(e)(1).

This Court should not be the first to conclude otherwise.

CONCLUSION

For these reasons and those already given, the Court should grant the CFTC's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing Reply In Support of Defendant CFTC's Opposed Motion to Transfer Venue to be served on the Clerk of the Court using the Court's CM/ECF system, which will send notice to all counsel of record in this case.

/s/ *Kyle M. Druding*
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