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

DEFENDANT CFTC'S MOTION TO DISMISS

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INTRODUCTION

Plaintiffs bring a pair of Administrative Procedure Act ("APA") claims challenging an August 4, 2022 letter written by divisional staff of Defendant the United States Commodity Futures Trading Commission ("CFTC" or "Commission") to non-party Victoria University of Wellington, New Zealand ("Victoria University" or "the University"). That 2022 letter withdrew a "no-action letter" sent in 2014 by the same staff to the University, at the University's request, relating to the operation of an online event-contracts market known as "PredictIt." Plaintiffs ostensibly seek to have that 2014 staff no-action letter resurrected.

But no-action letters, and withdrawals thereof, are not "final agency action" under the APA. No-action letters are informal, staff-level statements that the issuing staff, as an exercise of their discretion, will refrain from recommending that the Commission take an enforcement action so long as certain conditions are met. Under CFTC regulations, a no-action letter does not bind the Commission or any staff division but the one that issues it, and the Commission itself does not vote on or issue them. By their very terms, no-action letters (and letters withdrawing them) carry no legal consequences for their beneficiaries or anyone else, and that is what the University chose. As every court to address directly analogous agency staff no-action letters has held, those letters are not subject to judicial review under 5 U.S.C. § 704. *See, e.g.*, *Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989); *Kixmiller v. SEC*, 492 F.2d 641, 646 (D.C. Cir. 1974) (per curiam). That alone dooms Plaintiffs' claims.

Plaintiffs' claims suffer from two other threshold failures: CFTC no-action letters are exercises of prosecutorial discretion unreviewable as a matter of law, 5 U.S.C. § 701(a)(2); and Plaintiffs, who allege only indirect harms in the University's stead, lack Article III standing. Indeed, CFTC regulations provide that "only the Beneficiary may rely upon" a no-action letter,

17 C.F.R. § 140.99(a)(2), and the beneficiary here—the University—is not a party to this case. Should this Court reach those alternative grounds they, too, warrant dismissal.

BACKGROUND[1]

A. The Commission, the Commodity Exchange Act, and Event Contracts.

The CFTC is the federal agency tasked with administering and enforcing the Commodity Exchange Act ("CEA" or "the Act"), 7 U.S.C. §§ 1–26, and does so in part through promulgating regulations, 17 C.F.R. pts. 1–190. The CEA governs markets for commodity derivatives, including futures contracts and swaps, and to a lesser extent, the commodities that underlie them. *See* 7 U.S.C. § 2(a)(1)(A). A derivative is a financial instrument, such as a future, option, or swap, whose price is directly dependent upon—that is, "derived from"—the value of something else, such as a commodity, debt instrument, or pricing index.[2]

Relevant here are a class of derivate products known as "event contracts." Event contracts**,** also known as prediction or information contracts, are derivative contracts whose payoff is based on a specified event, occurrence, or value such as, for example, the value of a macroeconomic indicator, corporate earnings, level of snowfall, or dollar value of damages caused by a hurricane.[3] Under the CEA and CFTC regulations, those seeking to offer certain event contracts generally must do so as a "registered entity," 17 C.F.R. § 40.11(a)–(c), including

[1] Some of this background was already included in the CFTC's Opposition to Motion for Preliminary Injunction. We include it again here to provide context about the CFTC and its functions.

[2] CFTC, *Glossary: A Guide to the Language of the Futures Industry*, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm (last visited Oct. 28, 2022).

[3] CFTC, *Contracts & Products: Event Contracts*, https://www.cftc.gov/IndustryOversight/ContractsProducts/index.htm (last visited Oct. 28, 2022).

as a qualifying designated contract market ("DCM") or swap execution facility ("SEF"), 7 U.S.C. § 7a-2(c)(5)(C)(i). Registration enables the CFTC to supervise DCMs and SEFs so that the Commission can make sure that they conform their operations to core principles designed to prevent market abuse, ensure financial stability, protect information security, and safeguard systems in the event of a disaster, *id.* §§ 7(d)(12)(A), 7(d)(21), 7b-3(f)(2)(B), 7b-3(f)(13); 17 C.F.R. §§ 37.1401(a), 38.1051(a); ensure that contracts offered for trade are "not readily susceptible to manipulation," 7 U.S.C. §§ 7(d)(3), 7(d)(4), 7b-3(f)(3), 7b-3(f)(4)(B); and ensure position limits are imposed, conflict-of-interest rules are established and enforced, and records are kept and maintained, *id.* §§ 7(d)(5), 7(d)(16), 7(d)(18), 7b-3(f)(6), 7b-3(f)(10)–(12).

Registration thus plays a key role in furthering the CFTC's mission. Should a covered entity fail to register, or otherwise violate the CEA or CFTC regulations, the CFTC can bring suit in federal court to redress the violation and enforce compliance. *Id.* § 13a-1(a). The CEA grants district courts broad remedial authority, including the power to enjoin wrongdoing, order restitution and disgorgement, and assess civil monetary penalties. *Id.* § 13a-1(a)–(d).

B. The Division of Authority between the Commission and its Staff.

The CFTC exercises only that authority delegated by Congress and employs various staff to assist the Commission's mission promoting the integrity, resilience, and vibrancy of U.S. derivatives markets. The CFTC is composed of five Commissioners, each appointed by the President with the advice and consent of the Senate. 7 U.S.C. § 2(a)(2)(A); 17 C.F.R. § 140.10. The CFTC acts only when its five Commissioners vote to do so, and all votes are recorded by the Secretary of the Commission. *See, e.g.*, 17 C.F.R. § 140.12. Plaintiffs cannot and do not allege that this happened here. The CFTC employs staff across thirteen operating divisions and multiple offices nationwide. *See id.* §§ 140.1, 140.2.

CFTC staff in the Division of Market Oversight ("DMO" or the "Division"), among other things, review new applications for exchanges such as DCMs and SEFs and examine existing exchanges to ensure their regulatory compliance.[4] Another division, the Division of Enforcement, investigates and, if and only if authorized by vote of the Commission, civilly prosecutes violations. While staff may make recommendations, only the Commission itself—acting by recorded vote—can determine whether to grant DCM and SEF applications, *see* 7 U.S.C. § 8(a), or whether to bring an enforcement action. *See* 7 U.S.C. §§ 9(4)(A), 13a-1(a)–(d).

C. DCM and SEF Registration, Section 4(c) Exemptions, and Staff No-Action Letters.

Broadly speaking, there are three distinct categories of Commission- and staff-level conduct relevant here. They are briefly summarized below.

DCM and SEF Registration. An entity that wishes to operate a derivatives exchange in the United States must apply to be registered with the Commission as either a DCM or as a SEF. As mentioned above, a key prerequisite to offering event contracts in compliance with the CEA is that the offeror be a registered DCM or SEF. 7 U.S.C. § 7a-2(c)(5)(C)(i) (specifying that event contracts are listed "by a designated contract market or swap execution facility"); *see also id.* § 6(b)(1)(A). A DCM is a board of trade or an exchange that has been designated by the CFTC as allowing institutional and retail participants to list and trade various derivatives products including futures, swaps, and options. A SEF is a trading system or platform that allows multiple participants to execute or trade swaps by accepting other participants' bids and offers through that trading system or platform. To operate lawfully in the United States, DCMs and SEFs must first register with the Commission. *See, e.g., id.* §§ 7(a), 7b-3(a)(1); 17 C.F.R.

[4] *See generally* CFTC, *About the CFTC: CFTC Organization*, https://www.cftc.gov/About/CFTCOrganization/index.htm (last visited Oct. 28, 2022).

§§ 37.3, 38.3. If the Commission grants registration, the Commission can later revoke registration only by following statutory procedures that are expressly made subject to "judicial review." *See* 7 U.S.C. §§ 7b, 8(b).

Section 4(c) Exemptions. The Commission has statutory authority to exempt certain transactions or instruments from the CEA. CEA Section 4(c) establishes an exemption process that provides the Commission "may," at its discretion, "exempt any agreement, contract, or transaction (or class thereof)" from certain otherwise-applicable CEA requirements "by rule, regulation, or order" if, "after notice and opportunity for hearing" in accordance with the APA, the Commission makes certain required findings. *See* 7 U.S.C. § 6(c)(1)–(2). The Commission can grant Section 4(c) exemptions "either unconditionally or on stated terms or conditions." *Id.* § 6(c)(1). After a Section 4(c) exemption issues, the Commission retains the authority "to conduct investigations" and, if there has been a failure to comply with those conditions, "to take enforcement action for any violation" of the CEA or CFTC regulations. *Id.* § 6(d).

No-action letters. CFTC regulations provide for staff-level no-action letters, which the University chose here to pursue. These letters do not issue from and expressly do not bind the Commission. Nor are do they reflect delegated authority. Rather, CFTC Rule 140.99(a)(2) codifies a preexisting staff practice of answering inquiries about what staff would "recommend … to the Commission" concerning proposed activities. *Requests for Exemptive, No-Action and Interpretive Letters*, 63 Fed. Reg. 3285, 3285 (Jan. 22, 1998). Under Rule 140.99(a)(2), a no-action letter is "a written statement issued by the staff" that addresses "a proposed transaction" or "a proposed activity." 17 C.F.R. § 140.99(a)(2). No-action letters can be "issued by the staff of a Division of the Commission or of the Office of the General Counsel." No-action letters state only that the issuing Division "will not recommend enforcement action to the Commission for

failure to comply with a specific provision of the Act or of a Commission rule, regulation or order." *Id.* If issued, "[o]nly the Beneficiary may rely" on the letter. *Id.* The decision whether to grant a no-action letter and in what form "is entirely within the discretion of Commission staff." *See id.* § 140.99(b)(1), (e). A no-action letter "represents the position only of the Division that issued it" and "binds only the issuing Division" and—explicitly—"not the Commission or other Commission staff." *Id.* § 140.99(a)(2).

D. The PredictIt Market and the Withdrawal of No-Action Letter 14-130.

PredictIt is "an online market for political-event contracts," allegedly operated by Victoria University of Wellington. Am. Compl. ¶ 1. According to the Amended Complaint, PredictIt is "[e]ssentially a stock exchange for political events" that offers tradable binary options, in the form of "'yes' or 'no' contracts in an event market" with "prices ranging from 1 to 99 cents" per contract. *See* Am. Compl. ¶ 2. The "primary purpose" of PredictIt allegedly is to "be a small-scale market" for "academic" research, enabling the production of "market-generated trading/pricing information regarding what informed investors believe the outcome is going to be, reinforced by a relatively small financial investment." Am. Compl. ¶ 3.

Despite offering event contracts in the United States, neither Victoria University nor PredictIt has ever been registered with the CFTC in any capacity, including as either "a designated contract market or swap-execution facility." *See, e.g.*, Am. Compl. ¶¶ 7, 59. Nor do Plaintiffs allege that Victoria University ever attempted to secure relief under CEA Section 4(c) to exempt transactions from provisions in the CEA that require certain event-contract trading to be conducted on a CFTC-registered exchange. Instead, Victoria University sought and received only the 2014 staff no-action letter. *See, e.g.*, Am. Compl. ¶¶ 7, 25, 58–63 & Exs. 1, 3. The University's decision to go the less formal staff no-action route rather than apply for registration

or seek a Section 4(c) exemption from the Commission itself necessarily limited the applicable procedures and what they ultimately received.[5]

That 2014 no-action letter (No. 14-130), after summarizing Victoria University's request, concluded that "DMO will not recommend that the Commission take any enforcement action in connection with the operation of your proposed market for event contracts" were PredictIt to operate as proposed. *See* Am. Compl. Ex. 1 at 5. That conclusion was "based upon" the University's "representations" in both its original letter and telephone calls with DMO staff. *Id.* at 2, 5. In its request for no-action relief, Victoria University represented, among other things, that PredictIt "has been designed to serve academic purposes and the operators will receive no compensation," and that only certain categories of event contracts concerning specified "political elections and economic indicators" would be offered subject to certain caps both on the number of allowable traders per contract and total amount that may be spent per contract. *See id.* at 2–5.

On its face, the 2014 no-action letter is clear as to the limits of both its scope and effect. That letter, which uses the term "no-action" thirteen times, including both in the address block and in the subject line, is on DMO letterhead and signed by the Division's Director. The no-action letter explicitly states, per 17 C.F.R. § 140.99(a)(2):

> Consequently, based upon your representations, DMO will not recommend that the Commission take any enforcement action in connection with the operation of your proposed market for event contracts based upon the operators' not seeking designation as a contract market, registering under the Act or otherwise complying with the Act or Commission regulations.
>
> ….

[5] Plaintiff Aristotle International, Inc. has stated in an unrelated administrative proceeding that it previously submitted both an application for registration as a DCM and a petition for a Rule 4(c) order, requesting the Commission undertake notice-and-comment rulemaking addressing various aspects of the Commission's regulation of event contracts. *See generally* Letter from John A. Phillips, Chairman and CEO, Aristotle International, Inc. to the Secretary of the Commission regarding CFTC Release No. 8578-22, at 2 (Sept. 23, 2022), https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7311.

> This letter, and the no-action position taken herein, represents the views of DMO only, and does not necessarily represent the positions or views of the Commission or of any other division or office of the Commission. As with all no-action letters, DMO retains the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

Am. Compl. Ex. 1, at 5–6. At no point does that letter ever refer to a "license," "permission," or "approval" of any sort.

On August 4, 2022, DMO staff issued a second letter to Victoria University (No. 22-08) withdrawing its 2014 no-action letter. Am. Compl. ¶ 8 & Ex. 2. That withdrawal summarized the Division's 2014 position "to not recommend enforcement action (*i.e.*, 'no-action' relief)" and reiterated the nine limitations that the University had originally proposed operating under. Am. Compl. Ex. 2 at 1–2. Concluding that "[t]he University has not operated its market in compliance with the terms of Letter 14-130," DMO stated that "Letter 14-130 is hereby withdrawn." Am. Compl. Ex. 2 at 2. As to any then-existing contracts that had been operated "in a manner consistent with each of the terms and conditions provided in Letter 14-130," DMO advised that they "should be closed out and/or liquidated no later than 11:59 p.m. eastern on February 15, 2023." *Id.* However, Plaintiffs do not allege that PredictIt currently offers any contract in a manner consistent with each of those terms and conditions.

Indeed, Plaintiffs do not directly challenge DMO's conclusion that "[t]he University has not operated its market in compliance with the terms of Letter 14-130," and even the small sample of documents they have submitted to the Court shows that they are in no position to do so. *Compare, e.g.*, Am. Compl. Ex. 2 at 1–2 (summarizing nine enumerated conditions that the University agreed to observe), *with* Dkt. 12-2 Ex. 4 (November 24, 2014 email from DMO's Chief Counsel questioning as inconsistent with the 2014 no-action letter the University's "indiscriminate advertising" and listing of contracts with "no relationship to elections or any other meaningful political question.").

E. Procedural History.

Plaintiffs filed suit on September 9, 2022, then filed the operative Amended Complaint on October 6, 2022. Plaintiffs can be divided into three groups. First, Plaintiffs Aristotle International, Inc., and Predict It, Inc., allegedly are private corporations that collectively "service[]" various aspects of PredictIt pursuant to an undisclosed "marketing servicing agreement." Am. Compl. ¶¶ 1, 26–27. Second, Plaintiffs Harry Crane, Corwin Smidt, Richard Hanania, and James Miller are academics who allege they use PredictIt data for "teaching and research" purposes. *See* Am. Compl. ¶¶ 23, 24, 30, 31. Third, Plaintiffs Trevor Boeckmann, Kevin Clarke, Michael Beeler, Mark Borghi, Josiah Neeley, Grant Schneider, and Wes Shepherd are individual PredictIt customers who allegedly made various "purchases and trades" on PredictIt. *See* Am. Compl. ¶¶ 22, 21, 28, 29, 32, 33, 34. Notably absent from Plainitffs' ranks: Victoria University, the sole beneficiary of the 2014 no-action letter. Am. Compl. ¶ 25.

Plaintiffs raise two APA counts challenging the 2022 withdrawal of the 2014 no-action letter. Am. Compl. ¶¶ 75–81, 82–89 & Ex. 2. Plaintiffs' first count claims that the withdrawal is arbitrary and capricious because that letter lacked sufficient "reasoned decisionmaking," both as to the ultimate decision to withdraw the 2014 no-action letter and the timing for doing so. Am. Compl. ¶¶ 75–81 (citing 5 U.S.C. § 706(2)(A)). Plaintiffs' second count claims that the withdrawal failed to give sufficient due process to revoke a "license" under 5 U.S.C. § 558(c). *See* Am. Compl. ¶¶ 82–89; 5 U.S.C. § 551(8). Neither count states a cognizable claim.

ARGUMENT

An APA complaint must be dismissed if it fails to allege "final agency action." While some courts treat this as failure to state a claim under Rule 12(b)(6), *see, e.g.*, *Trudeau v. FTC*, 456 F.3d 178, 188–189 (D.C. Cir. 2006); Fed. R. Civ. P. 12(b)(6), the Fifth Circuit holds that this

defect is jurisdictional, *see, e.g.*, *Sierra Club v. Peterson*, 228 F.3d 559, 565 (5th Cir. 2000); *see also Walmart Inc. v. U.S. Dep't of Justice*, 21 F.4th 300, 307–308 (5th Cir. 2021) (discussing circuit split over sovereign-immunity waiver in 5 U.S.C. § 702). Because Plaintiffs do not challenge "final agency action" here, this Court lacks jurisdiction to hear their claims.

"Federal courts have an independent obligation to ensure that subject-matter jurisdiction exists before reaching the merits of a dispute." *Miller v. Hughs*, 471 F. Supp. 3d 768, 775 (W.D. Tex. 2020). When subject-matter jurisdiction is lacking, such as when Plaintiffs lack Article III standing, Rule 12(b)(1) is the proper vehicle for defendants to move to dismiss. And because the CFTC is challenging the Plaintiffs' Amended Complaint on its face, the dismissal analysis under both Rule 12(b)(1) and Rule 12(b)(6) is identical here. *See Miller*, 471 F. Supp. 3d at 774 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

I. Plaintiffs Do Not Challenge "Final Agency Action."

The APA waives the United States' sovereign immunity for qualifying claims seeking non-monetary and injunctive relief against federal agencies, but subject to the limitation (among others) that the conduct challenged must be "final agency action." 5 U.S.C. § 704. Naturally, to be "final agency action" the challenged conduct must be both "agency action" and "final." The 2022 withdrawal of the 2014 no-action letter was neither.

a. The August 4, 2022 withdrawal is not "agency action."

Plaintiffs' claims fail out of the gate because they are not challenging "agency action." "Under the APA, 'agency action' is a defined term, limited to an '*agency* rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.'" *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (quoting 5 U.S.C. § 551(13)) (emphasis added). While that definition is framed broadly "to cover comprehensively every manner in

which an agency may exercise its power," the term "agency action" is "not so all-encompassing" to provide for "judicial review over everything done by an administrative agency," *Fund for Animals v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19 (D.C. Cir. 2006) (quotation marks omitted), let alone by its staff. In assessing whether the challenged conduct qualifies as "agency action" at all, courts look to "common sense, basic precepts of administrative law, and the Administrative Procedure Act itself." *See, e.g.*, *Indep. Equip. Dealers Ass'n*, 372 F.3d at 427 (concluding that "workaday advice letter" sent by EPA staff that "imposed no obligations and denied no relief" without any "binding effect whatsoever" was not agency action).

Plaintiffs' theory of "agency action" is that the 2014 no-action letter was a "license" under the APA's definitional catchall for "other form[s] of permission." *See* Am. Compl. ¶¶ 66, 77, 84–85; 5 U.S.C. § 551(8) (defining "license" to include "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission"). That theory is wrong. The fatal flaw in Plaintiffs' reasoning is that DMO's 2014 no-action letter—indeed, any staff no-action letter issued pursuant to 17 C.F.R. § 140.99(a)(2)—grants no affirmative entitlement to anyone to do anything. CFTC "no-action letters" are nothing more than statements that, while such a letter is in effect, "staff" will "not recommend enforcement action to the Commission for failure to comply with a specific provision of the Act or of a Commission rule" if the "proposed activity is conducted by the Beneficiary." 17 C.F.R. § 140.99(a)(2). As alleged in the Amended Complaint, the limited effect of staff no-action letters and the fact that they are not issued by the Commission itself was clearly and repeatedly explained in DMO's correspondence with Victoria University. *See* Am. Compl. Ex. 1 at 5–6 (stating that "DMO will not recommend that the Commission take any enforcement action in connection with the operation of your proposed market" but cautioning

that "[t]his letter, and the no-action position taken herein, represents the views of DMO only"); Am. Compl. Ex. 2 at 1–2 & n.4. And that limited scope stands in sharp contrast to DCM or SEF registration and Section 4(c) exemptions issued by the Commission itself that Victoria University could have pursued—but chose not to. *Cf., e.g.*, 7 U.S.C. §§ 6(c)(1)–(2) (specifying action by "the Commission"), 7(a) (same), 8(a) (same); 17 C.F.R. § 37.3 (same).

If accepted, Plaintiffs' theory that the 2014 staff no-action letter is nevertheless a "license" would eviscerate any reasonable limits on the scope of staff actions potentially subject to judicial review, and would undermine the public interest in allowing those less-formal interactions. *See Taylor-Callahan-Coleman Cntys. Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991) (citing *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 699 (D.C. Cir. 1971)). This Court should reject that untenable reading, just as have other Courts faced with similarly sweeping interpretations.[6] *See, e.g.*, *Sheridan Kalorama Hist. Ass'n v. Christopher*, 49 F.3d 750, 756 (D.C. Cir. 1995) (explaining that courts have "never found" the term "license" to be "so broad as to encompass failure to disapprove a proposal").

b. Nor is the August 4, 2022 withdrawal "final."

Plaintiffs' APA claims independently fail because they challenge conduct that is not "final." *See, e.g.*, *DTCC Data Repository (U.S.) LLC v. CFTC*, 25 F. Supp. 3d 9, 14 (D.D.C. 2014) (questioning whether "withdrawal" of interpretive guidance in staff-level "FAQs" that "plainly state that they reflect the views of Commission staff, not of the Commission itself" could "constitute[] 'agency action' at all" but declining to decide that threshold issue because there was no "'final' action" (citing *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992)).

[6] Because DMO's August 4, 2022 letter does not withdraw or revoke a "license," Plaintiffs' Second Count for supposed "license"-specific procedural violations under 5 U.S.C. § 558(c) fails to state a claim. *See* Am Compl. ¶¶ 82–89; Fed. R. Civ. P. 12(b)(6).

Under the two-step analysis for establishing "final" agency action, the challenged conduct must both (1) "mark the 'consummation' of the agency's decisionmaking process" rather than being "merely tentative or interlocutory"; and (2) "be one by which 'rights or obligations have been determined," or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–178 (1997); *see also, e.g.*, *Gerber Prod. Co. v. Perdue*, 254 F. Supp. 3d 74, 84 (D.D.C. 2017) ("Guidance supplied by a lower-level official generally does not qualify as a 'final' agency action, even if it proves influential.").

The withdrawal of discretionary no-action relief issued by CFTC staff meets neither *Bennett* prong. *See, e.g.*, *Luminant Generation Co. v. EPA*, 757 F.3d 439, 441, 444 (5th Cir. 2014) (concluding that an EPA "notice of violation" is not "final" agency action because "[i]ssuing a notice of violation does not create any legal obligation, alter any rights, or result in any legal consequences and does not mark the end of the EPA's decisionmaking process"). First, the act of issuing or withdrawing a no-action letter is inherently interlocutory: Under the CFTC's regulations, the issue is simply whether a subset of staff will "recommend enforcement action" to the body with the authority to decide, the five-member Commission. *See* 17 C.F.R. § 140.99(a)(2); Am. Compl. Ex. 2 at 1–2 (explaining that "Letter 14-130 is hereby withdrawn" and noting that the "'no-action' relief" previously provided by "the Division of Market Oversight" had been "that the Division not recommend enforcement action"); Am. Compl. Ex. 1 at 5–6 (providing that "DMO will not recommend that the Commission take any enforcement action" while cautioning that "[t]his letter, and the no-action position taken herein, represents the views of DMO only"). Taken together, DMO could not and did not bind the Commission in its no-action letter. Regardless of the no-action letter, the Commission has at all relevant times had the authority to initiate enforcement proceedings—following a vote—against the University or

anyone else, should the Commission determine that there are actionable CEA or rules violations. Thus, DMO's 2022 withdrawal "does not constitute the consummation of the Commission's decisionmaking process by its own terms and under the [CFTC']s regulations." *See, e.g.*, *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1263 (D.C. Cir. 2018).

Second, it is equally clear that DMO's 2022 withdrawal does not determine any rights or obligations from which legal consequences would flow. To the extent that PredictIt's operations comply with the CEA and CFTC regulations, it is free to continue unabated with or without any staff no-action relief. To the extent that Victoria University decides to continue operating PredictIt, the Commission is fully empowered to bring an enforcement action at its discretion—again, with or without any staff no-action relief. *See* 7 U.S.C. § 9(4)(A) (vesting enforcement authority in "the Commission"). Thus, while the withdrawal of the 2014 no-action letter means that DMO may choose to recommend enforcement proceedings to the Commission, that withdrawal "compels action by neither the recipient nor the agency" and lacks any direct legal effect on any regulated entity. *See, e.g.*, *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944–945 & n.6 (D.C. Cir. 2012) (collecting cases and holding that "like other agency advice letters that we have reviewed over the years, FDA warning letters do not represent final agency action subject to judicial review").

Although DMO's withdrawal letter states that any contracts within the scope of the no-action letter "should be closed out and/or liquidated no later than 11:59 p.m. eastern on February 15, 2023," Am. Compl. Ex. 2 at 2, the use of "should" rather than mandatory language further confirms that "there has been no order compelling [the non-party University] to do anything." *See, e.g.*, *Holistic Candlers*., 664 F.3d at 944. The statement reflects nothing more than a staff-specific grace period—that staff were under no obligation to grant—by which, were

those contracts still active, DMO staff might recommend an enforcement action. That is, after all, the limit of the no-action letter's terms, and staff lack the authority to bring an enforcement action or otherwise "force the premature liquidation of up to 75 contracts." *See, e.g.*, Dkt. 12-1 at 6. Plaintiffs have already conceded as much in their preliminary-injunction motion, as they admit that the withdrawal "does not itself impose sanctions on anyone." *Id.* at 20.

The legal basis for dismissal of the Amended Complaint is neither novel nor complex. Longstanding case law involving directly analogous no-action letters issued by Securities and Exchange Commission staff unanimously and persuasively confirms the lack of "final" agency action here. *See, e.g., Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989) (holding SEC no-action letter is not "final" agency action for APA purposes because the underlying staff position "by its terms is tentative" when either the relevant division director "could change his mind tomorrow, or the Commissioners might elect to proceed no matter what the Director recommends"); *Kixmiller v. SEC*, 492 F.2d 641, 646 (D.C. Cir. 1974) (per curiam) (holding non-justiciable "no-action position" in letter issued by Securities and Exchange Commission staff explaining that the SEC's Division of Corporate Finance "would not recommend that the Commission take enforcement action"); *see also New York City Empls.' Ret. Sys. v. SEC*, 45 F.3d 7, 12 (2d Cir. 1995) (holding that SEC no-action letters are non-binding "interpretive" policy statements that do not require notice-and-comment rulemaking); *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723, 735 (S.D. Tex. 2010) (Rosenthal, J.) (holding that legal positions taken in SEC no-action letters "are nonbinding, persuasive authority" only).

II. Plaintiffs' Claims Challenge A Classic Exercise Of Prosecutorial Discretion That Is Unreviewable As "Committed To Agency Discretion By Law."

Plaintiffs' claims additionally fail because the challenged conduct is unreviewable as "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Under settled administrative-

law principles "an agency's decision not to prosecute or enforce," which necessarily "involves a complicated balancing of a number of factors" such as "the agency's overall policies" and "whether agency resources are best spent on this violation or another," reflects a "general unsuitability for judicial review." *Heckler v. Chaney*, 470 U.S. 821, 831–832 (1985). Such decisions are thus "generally committed to an agency's absolute discretion." *Id.* at 831. And that principle applies with equal force in the context of civil-enforcement proceedings. *See, e.g.*, *Citizens for Resp. & Ethics in Washington v. FEC*, 993 F.3d 880, 888 (D.C. Cir. 2021).

Here, Plaintiffs challenge the withdrawal of a statement that DMO staff will not recommend to the Commission that the Commission bring a civil-enforcement action. As the Seventh Circuit has recognized, such statements are independently unreviewable under 5 U.S.C. § 701(a)(2). *See Chicago Bd. of Trade*, 883 F.2d at 530 (holding that SEC no-action letter "is a classic illustration of a decision committed to agency discretion"). Indeed, the unique circumstances of Plaintiffs' challenge—in which the no-action beneficiary is not even a party—render their challenge even further attenuated from those that would otherwise be held unreviewable. *See also Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 37 (1976) (noting "the settled doctrine that the exercise of prosecutorial discretion cannot be challenged by one who is himself neither prosecuted nor threatened with prosecution").

III. The Various Named Plaintiffs, None Of Whom Is The Beneficiary Of The Challenged No-Action Correspondence, Lack Article III Standing.

Article III standing entails a three-part showing: (1) an injury-in-fact that is "concrete, particularized, and actual or imminent"; (2) that the injury be "fairly traceable to the challenged action"; and (3) that the injury be "redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Because they seek to invoke this Court's jurisdiction, Plaintiffs

bear the burden of establishing each element. *See, e.g.*, *Shrimpers & Fishermen of RGV v. Texas Comm'n on Env't Quality*, 968 F.3d 419, 423 (5th Cir. 2020) (per curiam).

a. Plaintiffs must make a heightened showing because their asserted injuries hinge on the independent decisionmaking of non-party Victoria University.

Plaintiffs broadly allege three types of injury from the end of PredictIt: (1) the corporate "services provider" Plaintiffs allege that they "will be forced to incur massive administrative, labor, time, and other costs"; (2) the academic Plaintiffs allege the loss of a "pedagogical tool" and research "data"; and (2) the individual trader Plaintiffs allege the loss of "economic value" from their supposedly curtailed "ability to trade contracts." *See* Am. Compl. ¶¶ 76.a–c; *id.* ¶¶ 26–27; *id.* ¶¶ 23–24, 30–31; *id.* ¶¶ 21–22, 28–29, 32–34; *accord* Dkt. 12-2 at 1–6 (Declaration of Dean Phillips), *id.* at 29–32 (Declaration of Kevin A. Clarke), *id.* at 33–35 (Declaration of Trevor Boeckmann), *id.* at 36–38 (Declaration of Harry Crane), *id.* at 62–64 (Declaration of Corwin Smidt). All Plaintiffs' alleged injuries share a critical characteristic: Each reflects a downstream harm flowing directly from Victoria University's hypothetical decision to cease operating PredictIt, or to continue to do so, depending on the outcome of these proceedings.

Plaintiffs' harm theories run headlong into "two overarching principles" of Article III standing. First, indirect-only harm theories like Plaintiffs' are unlikely to succeed because "courts only occasionally find the elements of standing to be satisfied in cases challenging government action on the basis of third-party conduct." *Bloomberg L.P. v. CFTC*, 949 F. Supp. 2d 91, 115 (D.D.C. 2013) (alteration omitted) (dismissing APA claims by swap execution facility alleging potential harm from new CFTC regulation of clearinghouses that plaintiff alleged would affect individual traders' market behavior). Second and relatedly, Plaintiffs must make a heightened showing as to their claimed harms because when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone

else, much more is needed." *Id.* (emphasis omitted) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992)). As such, Plaintiffs' theory here is "'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quotation omitted).

b. Plaintiffs' speculative and unsupported theories of causation and redressability fail.

Plaintiffs fail to make that heightened showing. This case is not the first time that third parties feeling the downstream effects of government conduct have tried to press their claims when the directly regulated entity declines to do so on its own behalf. The leading case on point is *National Wrestling Coaches Association v. Department of Education*. 366 F.3d 930, 944 (D.C. Cir. 2004). *See also, e.g.*, *Nat'l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 52 (D.D.C. 2018) (collecting cases applying "the reasoning at the heart of *National Wrestling*").

In *National Wrestling*, several membership organizations representing "the interests of collegiate men's wrestling coaches, athletes, and alumni"—but not the universities and colleges who operated collegiate men's wrestling programs—sought to challenge a 1979 policy interpretation of Title IX issued by what is now the Department of Education that had been clarified by the Department in 1996. *National Wrestling*, 366 F.3d at 934–936. The plaintiffs in that case sought to bring various APA challenges to that now-clarified policy statement asserting "injuries arising from decisions by educational institutions to eliminate or reduce the size of men's wrestling programs to comply with the Department's interpretive rules." *Id.* at 935. The district court dismissed the case for lack of standing, and the D.C. Circuit affirmed. *Id.* at 949.

As the D.C. Circuit explained, the plaintiffs had failed to show standing for two reasons. First, plaintiffs had failed to sufficiently allege causation, as there was no "clear showing" that the "third parties whose conduct injured the plaintiffs" had decided to eliminate their men's wrestling programs in response to the challenged Title IX guidance, as Plaintiffs had failed to

allege that those decisions "would be illegal in the absence of the challenged enforcement policies." *See id.* at 938–945. Second, the plaintiffs had failed to sufficiently allege redressability, as it was "purely speculative that a requested change in government policy will alter the behavior of regulated third parties that are the direct cause of the plaintiff's injuries" when "appellants offer[ed] nothing to substantiate their assertion that" a vacatur of the challenged agency conduct would "alter[] schools' independent decisions whether to eliminate or retain their men's wrestling programs." *Id.* at 938–939. The *National Wrestling* Court rejected as "unadorned speculation" various allegations that the "schools' independent decisions" would turn on a favorable outcome should plaintiffs' claims succeed. *Id.* at 937–938, 943.

The same is true here. As in *National Wrestling*, Plaintiffs repeatedly—but without support—allege that the 2022 withdrawal of DMO's 2014 no-action letter will "effectively" lead to the end of PredictIt. *See, e.g.*, Am. Compl. ¶¶ 12, 62. Although the Amended Complaint fails to spell out the precise chain of causation, Plaintiffs recognize that non-party Victoria University's decision to continue operating PredictIt (or not) constitutes an indispensable link. *See, e.g.*, Am. Compl. ¶¶ 25, 76.c. Plaintiffs further imply that Victoria University's decision to cease PredictIt operations was contingent on DMO's 2022 withdrawal. *See id.* ("Victoria University intends to comply with the terms of the CFTC's Revocation and therefore close the 2024 contracts in advance of their maturity unless the Revocation is abrogated, amended, or suspended."). Critically, however, Plaintiffs have failed to adequately allege facts plausibly showing that how DMO's no-action letter, which expressly disclaims any legally binding effect, compels that result; or that a vacatur order rescinding that withdrawal "will alter the behavior of regulated third parties" when the Commission is free to enforce the CEA against all relevant parties either way, and DMO has already stated its own view that the University has not adhered

to the letter's terms. *See National Wrestling*, 366 F.3d at 938–945; 17 C.F.R. § 140.99(a)(2). While Plaintiffs imply that the University would simply resume PredictIt's previous operations in full were the 2014 no-action letter to be reinstated, notwithstanding the fact that nothing in that letter prevents the Commission from authorizing an enforcement action,[7] that allegation is not "plausible on its face." *Arnold v. Williams*, 979 F.3d 262, 266 (5th Cir. 2020). Indeed, willful violation of the CEA or CFTC regulations is a felony. 7 U.S.C. § 13(5). And that allegation is all the more implausible since Plaintiffs have not alleged facts showing that the University has operated PredictIt under the terms enumerated in the 2014 no-action letter at any time, meaning that, as DMO has already concluded, that letter would be irrelevant regardless. *Compare, e.g.*, Am. Compl. Ex. 2 at 1–2, *with* Dkt. 12-2 Ex. 4.

CONCLUSION

For these reasons, Plaintiffs have failed to establish that any of their claims are reviewable. This Court should grant the CFTC's motion and dismiss this case with prejudice.

[7] In their preliminary-injunction reply, Plaintiffs included an unsworn letter from the University's Vice-Provost of Research, purporting to "confirm" that the University "had no intention of ending the PredictIt market prior to the CFTC's withdrawal of the NAL" and "intend[s] to comply with the terms of the CFTC's withdrawal letter …unless the withdrawal letter is amended, abrogated, or suspended." Dkt. 18-2 Ex. B; *accord* Am. Compl. ¶¶ 25, 67. Critically, however, the letter does not state that the University will continue to operate PredictIt if Plaintiffs are successful here and the 2014 no-action letter is restored—which is implausible for the reasons stated above. In any event, an unsworn letter from a "witness" who has not been questioned to test her implausible statement does not comply with 28 U.S.C. § 1746(1) and, accordingly, may not be relied upon by Plaintiffs or credited by the Court. *See, e.g.*, *Miller v. Fed. Home Loan Mortg. Corp.*, No. 4:12CV746, 2013 WL 6172542, at *1 (E.D. Tex. Nov. 22, 2013); *see also Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing Defendant CFTC's Motion to Dismiss 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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