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 D. MILLER, JOSIAH NEELEY, GRANT SCHNEIDER, and WES SHEPHERD,

Plaintiffs,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Case No. 1:22-cv-00909

The Honorable Lee Yeakel

REPLY IN SUPPORT OF MOTION TO EXPEDITE HEARING AND RESOLUTION OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Commodities Futures Trading Commission, yet again, offers no substantive justification for its mandate that all PredictIt Market contracts be liquidated by midnight on February 15, 2023. That means that tens of thousands of traders—who invested in reliance on the agency's long-standing permission for the Market to offer political event contracts—will have their investments crash landed by an arbitrary date specified in CFTC Letter 22-08.

Eight private citizen investors who hold these contracts, three academics whose work relies on the data generated by the trading of these contracts, and two corporations operating the market have asked the Court to hear and decide their pending motion for a preliminary injunction before the end of the year. They make this request to apprise the Court of significant irreparable harm that will accelerate in December because of the agency's arbitrary liquidation mandate. This

includes the market distortions that have trapped investors in losing event contracts and that will become substantially worse in December 2022. It also includes the operator Plaintiffs pouring hundreds of thousands of dollars into compliance with the CFTC's arbitrary liquidation date starting in mid-December. The agency summarily gives these entirely unnecessary injuries the back of its hand, suggesting they are not "the sort of 'irreparable harm'" that warrant the Court's attention in December. Doc. 26 at 2. This is precisely the type of callous disregard to innocent traders, and to the consequences of not letting PredictIt contracts trade until their natural conclusion, that led the agency to pull from thin air the February 15 liquidation date and cause this entire mess. A mess for which the agency still has not offered a reason. It is a position also at odds with the law, as these are precisely the sort of irreparable harms that merit preliminary relief. *See, e.g.*, *Wages and White Lions Invs., LLC v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021) (noting that, as a general rule, "complying with an agency order later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs . . . because federal agencies generally enjoy sovereign immunity from any monetary damages").

We see again a phalanx of technical arguments seeking to insulate a substantively undefended, and apparently indefensible, agency decision from any judicial scrutiny. Doc. 26 at 1–2. These agency arguments are wrong. *See* Doc. 18, Reply in Supp. of Plaintiffs' Prelim. Inj., at 3–6, 8–9; Doc. 21, Plaintiffs' Opp. to Mot. to Dismiss, at 7–15.

Among them is the agency's new "we didn't really mean it" argument—that its command to liquidate all Market contracts at a precise time on February 15 was really just a suggestion. Doc. 26 at 1–2. Not only is this alleged wiggle room nowhere to be found in the agency's August 4 letter, but also the Supreme Court long has rejected assertions that regulated entities need to wait

for an agency to impose a penalty before challenging detailed instructions coupled with threats of enforcement. *U.S. Army Corps of Engineers v. Hawkes Co*., 578 U.S. 590, 600 (2016).

Particularly flawed is the CFTC's suggestion that "decades of settled case law" establish that revocation of no-action relief is not final agency action. Doc. 26 at 1. The agency has leaned hard on two cases for that proposition. *See* Doc. 19, Defendant's Mot. to Dismiss, at 1 (citing *Board of Trade of the 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)). But both of those cases involved private citizens seeking to force the agency to take up its prosecutorial sword and enforce penalties against recipients of no-action letters. Such cases have long been dead on arrival in the courts, as litigants and courts cannot force an agency to take up an enforcement action against another. The Supreme Court made this clear in *Heckler v. Chaney*, 470 U.S. 821 (1985), a case that came after *Kixmiller* and on which the Seventh Circuit in *Board of Trade* heavily relied. *See* 883 F.2d at 530.

That critical feature, however, is entirely absent here. Plaintiffs nowhere seek to superintend the agency's allocation of resources or prosecutorial choices. They seek only to forestall an unexplained administrative dictate that applies *directly to them*—putting them "under the gun" and placing hundreds of thousands of dollars "in jeopardy." *Id.* at 529–30. When an agency does *that*—whether through its subordinate staff or otherwise and without providing any chance for further review—courts have unanimously held the action final. *See, e.g.*, *Sackett v. EPA*, 566 U.S. 120, 127 (2012); *Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cnty. Tex.*, 6 F.4th 633, 642 (5th Cir. 2021); *W. Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 662–63 (7th Cir. 1998).

Plaintiffs respectfully request that the Court grant the motion to expedite and set the Motion for Preliminary Injunction for a hearing and resolution during December 2022.

Respectfully submitted,

/s/ Michael J. Edney
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to counsel of record for all Parties.

/s/ Michael J. Edney
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