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

PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S DECEMBER 12, 2022 REPORT AND RECOMMENDATION (ORAL ARGUMENT REQUESTED)

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Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, Plaintiffs 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") respectfully submit these Objections to the Report and Recommendation (the "Report") issued by Magistrate Judge Mark Lane on December 12, 2022 on Defendant Commodity Futures Trading Commission's Motion to Transfer Venue. Plaintiffs respectfully request an oral argument on these Objections.

INTRODUCTION

This lawsuit was filed by six plaintiffs who live in Austin, work in Austin, and have been harmed by the conduct of the Commodity Futures Trading Commission ("CFTC" or "Commission") in Austin. The reason that this lawsuit was filed in Austin is that the lead Plaintiff Kevin Clarke—who identified the unfairness and financial harm of the CFTC's actions in the days following its abrupt and unexplained mandate to close the PredictIt Market ("Market")—decided to bring this lawsuit in the jurisdiction in which he resides, invested in the Market, and experienced harm because of the CFTC's actions.

This Court has recognized, as has the Fifth Circuit, that the plaintiff's choice of forum "should be respected" and should not be disrupted unless the defendant "demonstrate[s] that the transferee venue is clearly more convenient." *Absolute Software, Inc. v. World Computer Sec. Corp.*, No. A-09-CA-142-LY, 2009 WL 10678335, at *7 (W.D. Tex. Dec. 2, 2009) (Yeakel, J.) (quoting *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 314 (5th Cir. 2008)). In this case, the CFTC has not come close to showing that its preferred venue in the District of Columbia is clearly more convenient than this Court. This is because this case is an Administrative Procedure Act ("APA") case that will be decided on a record that will be emailed to court. To the extent that any live testimony will be offered in this case, it will be to demonstrate injury for standing or for the key

element of irreparable harm supporting an injunction, and it will predominantly be from Mr. Clarke who resides in Austin.

The Magistrate Judge gave little weight to these aspects of this case in the Report. The Report, instead, focuses on three issues that, according to the Magistrate Judge, show that the District of Columbia is clearly more convenient.

The first issue is the locus of the CFTC's decisionmaking and the location of certain parties in this action. The Report notes that the federal government agency's decisionmaking occurred in the District of Columbia and that two Plaintiffs—Predict It, Inc. and Aristotle International Inc. (the "Market Operators")—of the thirteen Plaintiffs are located in the District of Columbia and concludes that this weighs in favor of transfer. In doing so, the Report misconstrues the relevance of determining the locus of operative facts and the location of parties. Courts engage in these analyses as a proxy for determining the location of evidence that will be presented in the case. The parties agree that, because this case is an APA case, the merits will be determined on the record and will not involve live testimony from agency officials. The key live evidence that will be presented in this case—which will be used to support standing and the irreparable harm necessary for an injunction—comes, in large part, from Mr. Clarke, who is based here in Austin. Neither the CFTC nor the Magistrate Judge identified any evidence located in the District of Columbia that makes that location a clearly more convenient forum.

The second issue that the Report concludes weighs in favor of transferring this case is relative congestion of the courts in this district versus the courts in the District of Columbia. Courts in this district repeatedly have concluded that relative court congestion should not alone be grounds for transferring a case. If it were, any case that could be transferred to a less busy court, would be. But, even if relative court congestion were grounds for transfer, the Report focuses on the wrong

statistic. The key statistic is not the number of cases on the court dockets but the speed with which a case can come to trial and be resolved. The same statistics cited in the Report show that, despite this district's larger caseload, its courts bring civil cases to trial almost twice as fast as the courts in the District of Columbia. As a result and contrary to the Report's conclusion, the relative congestion of the courts either weighs in favor of keeping this case in Austin or is neutral in the transfer analysis.

The third and final issue that the Report concludes weighs in favor of transferring this case to the District of Columbia is the supposed lack of local interest in this case. This conclusion is surprising to the Plaintiffs. The Plaintiffs include six individuals who reside in Austin who have been harmed by the CFTC's actions in Austin. The courts in Austin should have an interest in redressing the harm to its residents. While the Plaintiffs recognize that the CFTC's actions harmed individuals nationwide, the fact that the CFTC's actions harmed numerous individuals in Austin weighs in favor of retaining jurisdiction in Austin.

There simply are no facts that demonstrate that the District of Columbia is a *clearly* more convenient venue for this case. The choice of the Plaintiffs to sue in the venue where six Plaintiffs live and were harmed should be respected. This Court should refuse the CFTC's attempt to move this case to the District of Columbia. After all, Congress explicitly authorized plaintiffs to sue a government agency in the location in which a plaintiff resides and decided they should not be forced to bring any claims against a government agency in its hometown. 28 U.S.C. § 1391(e)(1)(C)

BACKGROUND

The below provides a brief background on this lawsuit and the grounds for venue in this district. The Plaintiffs incorporate the facts from their First Amended Complaint and motion to transfer briefing.

A. The PredictIt Market Generates Academically Valuable Prediction Data Correlating to Real-World Events Through the Participation of Its Traders

For over eight years, the PredictIt Market has been a government-authorized forum for individual investors to trade contracts based on their predictions on outcomes of future elections or other significant political events. Dkt. No. 15, First Am. Compl. ("FAC") at ¶¶ 7, 58, 64.[1] The CFTC authorized the establishment of the Market through a decision issued in 2014, granting the Market so-called "no-action relief." *Id.* at ¶ 7; Dkt. No. 12-2 at 16–21, No-Action Relief. Victoria University of Wellington, New Zealand sought the authorization to open the Market, and the CFTC's decision recognized the academic benefit of the Market and explicitly permitted its establishment and operation. FAC at ¶ 39; Dkt. No. 12-2, No-Action Relief at 16–21. In reliance on the decision, the entities operating the Market plunged millions of dollars into establishing the infrastructure and systems that make the Market run and traders collectively invested tens of millions of dollars in contracts offered by the Market. FAC at ¶ 76; Dkt. No. 12-2, Dec. of Dean Phillips at 2.

The Market was carefully designed based on the long-operated Iowa Electronic Markets to generate academically valuable data "for educational and research purposes." Dkt. No. 12-2, No-Action Relief at 17. The Market and the parameters in which it operates were specifically crafted to strike a balance between generating reliable predictive data while disincentivizing traders from engaging in market manipulation. FAC at ¶ 60. To that end, no trader may invest more than $850 in any one contract, and each contract is limited to 5000 traders. *Id.*; Dkt. No. 12-2, No-Action Relief at 18–19. While traders in the Market do make investments based on their beliefs about the

[1] The mechanics of the Market's operation is described in detail in the Declaration of Dean Phillips, President and Co-Founder of Aristotle International, Inc ("Aristotle"). Dkt. No. 12-2, Dec. of Dean Phillips at 2–3 at ¶¶ 6-9.

probability of various political outcomes, the limits on the Market prevent it from becoming a for-profit betting website. FAC at ¶ 60; Dkt. No. 12-2, No-Action Relief at 18–20. The result of setting the Market up in this way was to generate eight years of reliable data that were used by hundreds of academics and universities around the world, including in Austin. FAC at ¶¶ 4, 39-44.

This data provided by the Market could not exist without the thousands of traders, who were contemplated in and beneficiaries of the No-Action Relief. Dkt. No. 12-2, No-Action Relief at 16–17 (noting the Market would offer thousands of event contracts to "U.S. persons"); *see also* 17 C.F.R. § 140.99(a)(2) (stating that any "Beneficiary" of No-Action Relief "may rely" on a decision issued as such relief).

B. The CFTC Ends the Market and Mandates the Liquidation of all Market Contracts by February 15, 2023, Without Explanation or the Consideration of Less Disruptive Alternatives

After nearly eight years of operation, the CFTC abruptly revoked its authorization for the Market to operate. FAC at ¶ 8; Dkt. No. 12-2, CFTC Letter No. 22-08 (Aug. 4, 2022) at 23–24. The only explanation was that the Market has not been "operated . . . in compliance with the terms of" the agency decision greenlighting the Market's opening. FAC at ¶ 9; Dkt. No. 12-2, Revocation at 24. The decision contained no hint or detail of how the Market's operations violated those terms or why revocation of the CFTC's license for the Market to operate is the appropriate remedy for those violations. Dkt. No. 12-2, Revocation at 24.

The decision included a command to immediately cease "listing or operation of any new or related contracts" and to close the Market and liquidate all existing contracts by "11:59 p.m. eastern on February 15, 2023." FAC at ¶ 10; Dkt. No. 12-2, Revocation at 24. Beyond failing to explain why the Market must close, the decision said not one word about why it must close in the manner and at the time specified. In particular, the decision did not explain why contract markets

already in existence could not continue to trade until the events they predict—in particular, the 2024 elections—occur. Instead, the Commission mandates crash landing investor contracts purchased before the agency ever publicly hinted that it had lost interest in the Market. In this way, the most unfair component of the Commission's decision hits the traders, as Kevin Clarke explains in detail in evidence placed before this Court. Dkt. No. 12-2, Dec. of Kevin Clarke at 29–32.

C. The CFTC's Revocation Harms Traders in Austin, and the Plaintiffs Initiate this Lawsuit

The abrupt decision to close the Market has caused and will continue to cause all sorts of unnecessary harm to the Plaintiffs, who were beneficiaries of the 2014 agency decision authorizing the Market's opening. FAC at ¶¶ 13-14, 76. The decision's liquidation mandate deprives 14,478 traders of the opportunity to see their contracts on post-February 2023 events to their natural conclusion. FAC at ¶¶ 13-14, 39-57, 76; Dkt. No. 12-2, Dec. of Dean Philips at 5 at ¶¶ 15-16; Dec. of Kevin Clarke at 31–32 at ¶¶ 8, 11; Dec. of Trevor Boeckmann at 34–35 at ¶¶ 8-10; Dec. of Harry Crane at 37–38 at ¶ 9.

The Plaintiffs—who are nine traders who participate in the Market, four academics who use Market data in their teaching or research, and the two entities that operate the Market on Victoria University's behalf—filed this lawsuit asserting claims under the APA to redress the harm caused by the CFTC. FAC at ¶¶ 75-89. While PredictIt Market traders and academics reside and have been harmed in districts around the country, six of these traders and academics reside in Austin, purchased their contracts from Austin, have been harmed in Austin, and have chosen to dedicate the time necessary to litigate this action. FAC at ¶¶ 20-34. The lead Plaintiff Kevin Clarke, who has been with this lawsuit since the beginning, has traded on the Market for more than two years and currently has investments in every contract that will be prematurely terminated by

the Commission's arbitrary liquidation date. *Id.* at ¶¶ 21, 47; Dkt. No. 12-2, Dec. of Kevin Clarke at 29–32.

Kevin Clarke is the primary witness establishing the irreparable harm necessary for a injunction in this matter, the primary evidentiary issue before the Court. FAC at Prayer; *see also* Dkt. No. 12, Mot. for Preliminary Injunction.[2] Mr. Clarke has fully analyzed trends in trading activity, noting the departure of key trading volume, creating a distorted, inefficient, and illiquid market for those who remain. Dkt. No. 12-2, Dec. of Kevin Clarke, at 31–32; Dkt. No. 23-2, Dec. of Kevin Clarke, at 2–4. He also projected the acceleration of these distortions in the month of December. Dkt. No. 23-2, Dec. of Kevin Clarke, at 3.

D. The CFTC Files a Motion to Transfer Venue, and the Magistrate Judge Issues the Report

Despite the lead plaintiff's residence and choice to seek redress against the federal Government in his home district, the CFTC moved to transfer this case to its backyard in the District of Columbia. Dkt. No. 8, Mot. to Transfer. The primary arguments that the CFTC made in support of its motion to transfer were that the locus of the CFTC's decisionmaking at issue in this case was in the District of Columbia and that the courts are less congested in the District of Columbia than in this district. *Id.*

The Plaintiffs opposed the CFTC's motion. Dkt. No. 13, Opp. to Mot. to Transfer. In that opposition, the Plaintiffs demonstrated that the CFTC had not established that the District of

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[2] The Plaintiffs' Motion for Preliminary Injunction was fully briefed on October 20, 2022. *See* Dkt. No. 18. On November 18, the Plaintiffs filed a Motion to Expedite the Hearing and Resolution of the Plaintiffs' Motion for Preliminary Injunction, explaining that if the Motion for Preliminary Injunction were not resolved before Christmas, the objective of the preliminary injunction would be substantially eroded. Dkt. No. 23, Mot. to Expedite. The Court has effectively denied both the Motion to Expedite and the Motion for Preliminary Injunction by not taking up those motions. The Plaintiffs now have filed an appeal to the Fifth Circuit based on that effective denial. Dkt. No. 32, Notice of Appeal.

Columbia is a clearly more convenient venue, as required by Fifth Circuit precedent. *Id.* This is primarily because this case is an APA case that will be heard on summary judgment on the administrative record, and to the extent any additional evidence is necessary, it will, in large measure, come from Mr. Clarke, an Austin resident. *Id.*

The Magistrate Judge held a hearing on December 1, 2022. Therein, the Magistrate Judge asserted that the PredictIt Market has descended into an online gambling operation, an assertion not made by the CFTC in its decision to end the Market or in its briefing. Ex. A, Hr'g Tr. at 28, 48, 69–72.

On December 12, 2022, the Magistrate Judge issued his Report. Dkt. No. 31. In the Report, the Magistrate Judge recommends transfer of this case to the District of Columbia. *Id.* In doing so, the Magistrate Judge improperly alleviates the CFTC from meeting its burden to demonstrate that the District of Columbia is clearly more convenient and misapplies the private and public interest factors in the transfer analysis. As a result, the Plaintiffs now file these Objections.

OBJECTIONS[3]

I. The Report Fails to Give Appropriate Deference to Plaintiffs' Choice of Forum

The Fifth Circuit long has held that deference must be given to a plaintiff's choice of forum. *See In re Volkswagen*, 545 F.3d at 315 ("[T]he plaintiff's choice [of forum] should be respected."); *Peteet v. Dow Chem Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989) (affirming denial of motion to transfer and stating that "the plaintiff is generally entitled to choose the forum"); *Tenneco Oil Co. v. EPA*, 592 F.2d 897, 900 (5th Cir. 1979) ("[I]n the absence of unusual circumstances compelling

[3] The Report makes certain statements in *dicta* about the CFTC's Motion to Dismiss but does not make any findings on the Motion to Dismiss. *See, e.g.*, Dkt. No. 31, Report at 7 & n.4. Because the Report does not make any findings on the Motion to Dismiss, Plaintiffs do not address those statements in these Objections.

transfer, courts have not exercised their inherent power to transfer to disturb a party's choice of forum."); *Menendez Rodriguez v. Pan Am. Life Ins. Co.*, 311 F.2d 429, 434 (5th Cir. 1962) ("[T]he plaintiffs' privilege to choose, or not be ousted from, his chosen forum is highly esteemed."); *see also 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) (Yeakel, J.) ("Courts generally give great deference to the plaintiff's choice of forum."). In line with that deference, the Fifth Circuit has instructed the district courts to respect the plaintiff's chosen forum unless the party seeking a change of venue can demonstrate that the transferee venue is "clearly more convenient." *Def. Distributed v. Bruck*, 30 F.4th 414, 433 (5th Cir. 2022); *see also In re Volkswagen*, 545 F.3d at 315. When a district court fails to afford proper deference to a plaintiff's choice of forum and transfers without the other court being demonstrated as clearly more convenient, the Fifth Circuit has not hesitated to grant writs of mandamus reversing the transfer, including once this year. *See, e.g.*, *Def. Distributed*, 30 F.4th at 433–43.

In this case, the lead Plaintiff chose to file this lawsuit in Austin, where he and five other Plaintiffs reside.

The Report does not find that the filing of this lawsuit in this district was improper, nor could it have found. This is because Congress specifically authorized plaintiffs—like Kevin Clarke—to challenge an action or omission of a federal agency in the jurisdiction in which he resides. 28 U.S.C. § 1391(e)(1)(C); *see also* Charles A. Wright & Arthur R. Miller, 14D Fed. Prac. and Proc. § 3815 (4th ed. 2022) (noting that Congress found the idea of forcing all claims against D.C.-based federal agencies into D.C. District Court to be "quite unsatisfactory" and explicitly authorized plaintiffs to sue federal agencies in the jurisdiction in which they live).

The Report, instead, improperly gives little (if any) deference to the Plaintiffs' chosen forum and states the following:

> Plaintiffs argue the court should give deference to their forum choice and that under the CFTC's arguments any administrative case could be transferred to D.C. The court notes this is not just any administrative case. The CFTC's No Action Letter and its withdrawal were not directed to Plaintiffs, but to a third-party New Zealand university.

Dkt. No. 31, Report at 5. The Report does not, however, explain why this case is supposedly "not just any administrative case" or why the fact that the decision authorizing the Market's opening was addressed to Victoria University matters in the transfer analysis or is grounds for according no deference to the Plaintiffs' chosen forum.

Contrary to the Report's implication, not just Victoria University could rely on the agency's decision to authorize the PredictIt Market's opening. The only restriction on who may rely on the decision arises from the regulation governing the relief granted. That regulation states that "beneficiar[ies]" of the relief "may rely" on the decision. 17 C.F.R. § 140.99(a)(2). This provision clearly was meant to prevent a would-be PredictIt Market competitor from citing PredictIt's grant of formal no-action relief as authority to set up a similar market. It was not meant to prevent the traders who invested in the PredictIt Market and the academics who used the data from the Market—both of whom were acknowledged in the Market opening decision itself as benefitting from the Market—from relying on the relief granted. Each of these traders and academics—as well as the companies operating the Market—clearly qualifies as a "beneficiary" of the No-Action Relief establishing the Market. Section 140.99 elsewhere refers to the "person on whose behalf the [no-action relief] is sought" and the "recipient" of the no-action relief, *id.* at §§ 140.99(c), (e), but the regulations use neither of those terms to restrict who may rely on the no-action relief. Instead, they use the broader term "beneficiary," which clearly encompasses the Plaintiffs.

Moreover, the Administrative Procedure Act does not somehow limit challenges to agency behavior to those on the address line of an agency letter. The APA, instead, permits any person "adversely affected or aggrieved by agency action" to petition a court for judicial review of the action. 5 U.S.C. § 702. There can be no doubt that the Plaintiffs were "adversely affected" by the CFTC's decision to close the Market and to require liquidation of all its contracts a minute before midnight on the Ides of February. This case is no different than scores of other administrative cases across the country in which aggrieved parties seek judicial review of an arbitrary agency decision involving a regulated entity that affects them.

Nor should observations about an absent plaintiff drive any analysis of where parties who actually chose to litigate the case may do so. The transfer analysis is not about the location of the most aggrieved party (which the Magistrate Judge apparently thinks is New Zealand). It is about whether the proposed transferee court is clearly more convenient based on the location of evidence and witnesses and other factors. As discussed below, there are no facts that demonstrate that the District of Columbia is clearly more convenient, so the Plaintiffs' chosen forum should be respected. *See Def. Distributed*, 30 F.4th at 433–43 (granting writ of mandamus because defendant had not shown that transferee venue was clearly more convenient than the plaintiffs' chosen forum).

II. The Report Misapplies the Private and Public Interest Factors

The Report correctly notes that this Court must consider "four public and private interest factors" when deciding whether the CFTC has demonstrated that the District of Columbia is clearly more convenient. Dkt. No. 31, Report at 3 (citing *In re Volkswagen*, 545 F.3d at 315). But the Report misapplies those factors.

A. The Report Misapplies the Private Interest Factors

As the Report correctly notes, the private interest factors are: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *In re Planned Parenthood Federation of America, Inc.*, 52 F.4th 625, 630 (5th Cir. 2022). The analysis under the private interest factors should be straightforward and point squarely to keeping this case in Austin.

This case is an APA case. As the Report correctly observes, the merits of the APA claims will be decided based solely on the administrative record, which will be produced electronically. Dkt. No. 31, Report at 4. APA cases do not involve the testimony of agency officials seeking to explain themselves after the fact. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909 (2020) ("An agency must defend its actions based on the reasons it gave when it acted."). Instead, they rise or fall based on the record compiled by the agency before its decision. And, importantly, the CFTC has effectively conceded that its decision cannot be defended substantively, if it is subject to judicial review. The CFTC, including in its opposition to the Motion for Preliminary Injunction, makes *no effort whatsoever* to contend its decision was adequately explained or the product of reasoned decisionmaking, as the APA substantively requires.

In this way, what happened in our Nation's capital is even more irrelevant to transfer in this case than in most APA cases. But, in APA cases generally speaking, the law is clear: That the federal Government decision challenged was one made in the Nation's capital is irrelevant to the transfer analysis. *See Permian Basin Petroleum Ass'n v. Dep't of the Interior*, No. MO-14-CV-050, 2015 WL 11622492, at *2 (W.D. Tex. Feb. 26, 2015) (finding that private interest factors . . . [were] neutral" when case would be "decided on the administrative record and cross-summary

judgment motions"); *Ron Peterson Firearms LLC v. Jones*, No. 11-CV-678, 2012 WL 12863342, at *3 (D.N.M. Feb. 16, 2012) (same).

If there is any evidence relevant to the transfer analysis to be offered, much of it is in Austin. The Plaintiffs have sought preliminary and permanent injunctions in this case. And the primary factual development comes in the form of establishing otherwise irreparable injury and standing, both of which has been challenged by the agency. That evidence, today, comes primarily from lead Plaintiff and Austin-resident Kevin Clarke who has been studying the distortions in the marketplace due to the agency's decision to require premature liquidation of contracts and who chronicles the injuries to traders from the agency's decision. Dkt. No. 12-2, Dec. of Kevin Clarke, at 31–32; Dkt. No. 23-2, Dec. of Kevin Clarke, at 2–4; Dkt. No. 30-3, Dec. of Kevin Clarke, at 2–3. The evidentiary action in this case is not in Washington, D.C., and the private evidentiary factors counsel retaining the case in Austin, where it was filed.

The Report disregards all of this and concludes that the District of Columbia is a better forum because the Market Operators are located there and the locus of the CFTC's decisionmaking occurred there. Dkt. No. 31 at 5–7. Neither of these facts weighs in favor of transfer.

The location of the Market Operators does not favor transfer. The Market Operators are only two of thirteen Plaintiffs in this lawsuit, six of whom are from Austin. The Report speculates that the location of the Market Operators is important because they "would seem to have the greater insight into whether the Market failed to comply with the terms of the No-Action Letter." Dkt. No. 31, Report at 6. The Report does not explain why that issue is relevant to this case, nor could it. This case is not about whether the Market operated within the parameters of the No-Action Relief. It is about whether the CFTC engaged in reasoned decisionmaking and whether it provided a reasoned explanation for its decisionmaking and failure to adopt less disruptive alternatives.

There cannot be any trial in this case about the last eight years of the Market's operation. There will be judicial testing in this case about whether the agency adequately explained itself, and the agency effectively concedes that it did not.

The Market Operators have provided and will provide evidence of the harm the decision closing the Market is causing them, including the compliance costs occurring now that could be avoided pending resolution of this case by the entry of a preliminary injunction. But that some of the evidence of injury comes from an Austin-based lead plaintiff trader, and other of it comes from corporations and their employees located elsewhere, does not merit a transfer. *See Planned Parenthood*, 52 F.4th at 630–31 (finding that the convenience factors were neutral when the parties and witnesses reside in various parts of the country necessitating some of them to travel for the purpose of the litigation). Moreover, the CFTC has not demonstrated that critical evidence will come from the District of Columbia, making it clearly more convenient, which means that the Report's statements are based on improper speculation. *See Def. Distributed*, 30 F.4th at 434 (stating that "the movant has the burden to establish good cause, which requires an *actual showing* of the existence of relevant sources of proof, *not merely an expression that some sources likely exist in the prospective forum*" (emphasis added)).

The locus of the CFTC's decisionmaking also does not favor transfer. As it relates to the private interest factors, the locus of the operative facts is not an independent factor to be considered as part of the transfer analysis. It is only relevant in so far as it is a proxy for determining the location of the witnesses and evidence. *See UniFirst Corp. v. Protein Prods., Inc.*, No. 4:13CV114, 2014 WL 1225657, at *2 (N.D. Miss. Mar. 25, 2014) (finding assertions about locus of operative facts irrelevant when defendant did not identify any evidence in proposed transferee

forum). For the reasons explained above, the location of the witnesses and the evidence favor Austin.[4] The private interest factors do not favor transfer to the District of Columbia.

B. The Report Misapplies the Public Interest Factors

The public interest factors are: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law." *Planned Parenthood*, 52 F.4th 625 at 630. The Report correctly finds that the third and fourth public interest factors do not compel transfer.[5] But the Report incorrectly concludes that the first and second public interest factors—which it labelled the "most compelling"—favor transfer to the District of Columbia. Dkt. No. 31, Report at 4–5.

1. The Report Incorrectly Concludes that Court Congestion Favors Transfer

The Report's lead finding in favor of transfer is that the courts in the District of Columbia are less congested than the courts in this district. Dkt. No 31, Report at 4–5. This finding is neither sufficient to justify transfer nor correct.

As Texas courts repeatedly have found, court congestion alone is not grounds for transfer. *See, e.g.*, *Koss Corp. v. Apple Inc.*, No. 6-20-00665-ADA, 2021 WL 5316453, at *12 (W.D. Tex. Apr. 22, 2021) (stating that court congestion "should not alone outweigh all th[e] other factors"); *Gentex Corp. v. Meta Platforms, Inc.*, No. 6:21-cv-00755-ADA, 2022 WL 2654986, at *9 (W.D.

[4] The evidence on harm experienced by the CFTC's arbitrary decisionmaking also demonstrates that the locus of operative facts is not limited to the District of Columbia. The operative facts also occurred in this district.

[5] The Report does not make a specific finding on these factors, because the parties agreed that they are neutral in this analysis.

Tex. July 8, 2022) (same); *see also Def. Distributed*, 30 F.4th at 433 ("[T]he fact that litigating would be more convenient for the defendant elsewhere is not enough to justify transfer.").

In any event, the Report incorrectly analyzed the court congestion factor. The Report concludes that the District of Columbia needs to serve as a relief valve for this Court, because the statistics show that there are 845 weighted filings per judge in this district versus 286 in the District of Columbia. Dkt. No. 31, Report at 4 (citing *U.S. District Courts: Combined Civil and Criminal Federal Court Management Statistics*, Administrative Office of the U.S. Courts (June 30, 2022)). But weighted filings is not the relevant statistic in determining court congestion. The key statistic is the "speed with which a case can come to trial and be resolved." *EcoFactor, Inc. v. Resideo Techs., Inc.*, No. W-22-CV-00069-ADA, 2022 WL 13973997, at *9 (W.D. Tex. Oct. 21, 2022); *see also Koss Corp.*, 2021 WL 5316453 at *12 (same). The same source cited in the Report shows that this statistic weighs against transferring from this district to Washington: The courts in this district bring civil cases to trial in approximately 28 months on average, whereas the courts in the District of Columbia bring civil cases to trial in approximately 56 months on average. *U.S. District Courts: Combined Civil and Criminal Federal Court Management Statistics*, Administrative Office of the U.S. Courts (June 30, 2022). The relative court congestion when measured by the appropriate statistic shows that this case should stay in Austin. But even assuming both caseload and speed were relevant to the court congestion analysis, this factor would be neutral. *See Permian Basin*, 2015 WL 11622492 at *2 (finding the court-congestion neutral when plaintiffs' chosen forum resolved cases faster than proposed transferee venue despite larger caseload).

2. The Report Incorrectly Concludes That This District Has Less of a Local Interest in This Matter Than the District of Columbia

The CFTC's actions have harmed many traders and academics in this district, including six of the Plaintiffs who live and work in Austin. Despite this harm, the Report concludes that "Austin

has relatively little local interest in this matter." Dkt. No. 31, Report at 5. Elaborating on this point during the hearing, the Magistrate Judge observed that traders are all over the country and trader plaintiffs in any of the other 94 judicial districts could have been found to initiate this lawsuit. Ex. A, Hr'g Tr. at 23.

The Magistrate Judge's observations are at odds with Fifth Circuit precedent. The Fifth Circuit specifically has concluded that when a government actor, as here, projects itself across state lines into Texas and causes harm to individuals in Texas, Texas courts have a significant interest in assessing and redressing the impacts of the action. *See Def. Distributed*, 30 F.4th at 435–36 (finding that Texas courts had significant local interest in addressing actions of New Jersey Attorney General that affected Texas citizens). That effects of the CFTC's decisionmaking were experienced by traders nationwide does not weigh in favor of transfer because the trader and academic Plaintiffs were harmed in Austin. *See Planned Parenthood*, 52 F.4th at 631 (finding that one Texas district did not have more of an interest than another Texas district when impacts of defendants' alleged actions were experienced statewide).

Discounting the importance of the traders injured in this matter, the Report concludes that the District of Columbia has a greater interest in this case because the Market Operators, "who face the greatest economic harm," are headquartered there. Dkt. No. 31, Report at 5. The Report's conclusion is based on nothing more than speculation. The CFTC, which carries the burden of demonstrating that the District of Columbia is clearly more convenient, did not do a comparative analysis of the harms on the various traders and academics in Austin versus the harms on the Market Operators. *See Def. Distributed*, 30 F.4th at 434 (noting the burden on the movant to bring forward actual evidence support transfer).

The Magistrate Judge appears to pooh-pooh the magnitude of the economic harms befalling each individual trader, in comparison to the stake the Market Operators have in the Market. Dkt. No. 31, Report at 5. At the same time, however, the CFTC has been denigrating economic losses by the Market Operators arising from its abrupt change of direction as just the risks of participating in a highly regulated industry. *See* Dkt. No. 17, Opp. to Mot. for Prelim. Inj. at 14–15. No one can say the same, however, about the traders. They purchased the offered contracts in good faith and reliance on the CFTC permitting those offerings and allowing them to trade to their conclusion. And, while this case does challenge the decision to close the Market at all, the preliminary injunction is focused on the liquidation mandate. This liquidation mandate *is a harm that uniquely befalls the traders*. It is undisputed that the Plaintiffs who are based in Austin experienced harm, demonstrating a local interest in this case. *Def. Distributed*, 30 F.4th at 435 (noting that the location of the injury, the witnesses, and the plaintiff's residence are the important factors in determining localized interest). Any competing local interest in the District of Columbia would only make this factor neutral and not support transfer.

III. The Report Inappropriately Relies on a Southern District of Florida Opinion

The above demonstrates that none of the private- or public-interest factors make the District of Columbia a clearly more convenient forum than this district. Indeed, the most important factor in that analysis—the location of witnesses and evidence—weighs in favor of Austin because of the evidence that will be necessary to support the Plaintiffs' request for an injunction is predominately in Austin.

In an attempt to bolster its conclusion that transfer is warranted, the Report relies heavily on a case that was issued by a district court outside of the Fifth Circuit, *Hight v. United States Department of Homeland Security*, 391 F. Supp. 3d 1178 (S.D. Fla. 2019). Dkt. No. 31, Report at 6–7. *Hight*, however, is distinguishable on its facts and is legally inapposite.

In that case, the plaintiff's *only* connection to the Southern District of Florida was his residence. 391 F. Supp. 3d at 1185. The federal licensing action at issue concerned the plaintiff's "work as a pilot on Lake Ontario and the St. Lawrence Seaway," quite literally on the other latitudinal side of the country from the Southern District of Florida. *Id.* Not so here. Plaintiffs Kevin Clarke, Michael Beeler, Mark Borghi, Josiah Neeley, and Wes Shepherd live in Austin, invested in contracts on the PredictIt Market in Austin, and are seeing the economic value of those contracts destroyed by the CFTC's revocation in Austin. FAC ¶¶ 21, 28-29, 32, 34.

Moreover, *Hight*'s assessment of the locus of decisionmaking and the Report's reliance on it was flawed. As explained above, the locus of operative facts is assessed to determine where the relevant witnesses and evidence may be located. It is not some paramount transfer factor that dictates transfer of every case when the decisionmaking occurs outside of the plaintiff's chosen forum. If it were, almost every APA case would have to be decided in the District of Columbia, but that is not the case. *See Behring Regional Ctr LLC v. Wolf*, No. 20-cv-09263-JSC, 2021 WL 1164839, at *3 (N.D. Cal. Mar. 26, 2021) (rejecting defendants' argument that because the agency decisionmaking occurred in the District of Columbia the case should be transferred there and stating "[b]y [d]efendants' reasoning nearly all APA action[s] should be decided in the District of Columbia, but there is no such rule"). Congress explicitly authorized aggrieved plaintiffs to sue federal agencies in the location where they reside. 28 U.S.C. § 1391(e)(1)(C). The reasoning in *Hight* is flawed and should be rejected by this Court.

This Court should instead follow the analysis in *Anunciato v. Trump*, No. 20-CV-07869-RS, 2020 WL 13547186 (N.D. Cal. Dec. 23, 2020), issued by the Northern District of California. Similar to here, that case involved a challenge to a government decision made in the District of Columbia that had nationwide effects. *Id.* at *2. The government moved to transfer the case to

the District of Columbia, arguing that only four of the more than two hundred plaintiffs resided in the Northern District of California and that the decisionmaking occurred in the District of Columbia. *Id.* at *3. The Court rejected that argument and denied the motion to transfer. *Id.* Because the case involved government decisionmaking that had nationwide impacts including on plaintiffs in the plaintiffs' chosen forum and involved resolution on the administrative record, there was no reason to disturb the plaintiffs' selected forum. *Id.* So too here. This case involves agency decisionmaking that had impacts in Austin and the merits will be decided on the administrative record. There is no reason to disturb the Plaintiffs' chosen forum.

CONCLUSION

For the above reasons, the Plaintiffs ask the Court to reject the Report and Recommendation of the United States Magistrate Judge and deny the CFTC's Motion to Transfer Venue.

Dated: December 27, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2022, a copy of the foregoing was filed electronically and was served on counsel of record through the Court's electronic case filing/case management (ECF/CM) system.

/s/ Michael J. Edney
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