

No. 22-51124

IN THE
**United States Court Of Appeals
For The Fifth Circuit**

KEVIN CLARKE; TREVOR BOECKMANN; HARRY CRANE; CORWIN SMIDT; ARISTOTLE
INTERNATIONAL, INCORPORATED; PREDICT IT, INCORPORATED; MICHAEL BEELER;
MARK BORGHI; RICHARD HANANIA; JAMES D. MILLER; JOSIAH NEELEY; GRANT
SCHNEIDER; WES SHEPHERD,
Plaintiffs-Appellants,

v.

COMMODITY FUTURES TRADING COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the
Western District of Texas, No. 1:22-cv-00909-LY

**MOTION TO SEAL EXHIBIT 1 TO THE
CFTC'S SUGGESTION OF MOOTNESS**

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March 3, 2023

CERTIFICATE OF INTERESTED PERSONS

No. 22-51124

KEVIN CLARKE, ET AL.,
Plaintiffs-Appellants,

v.

COMMODITY FUTURES TRADING COMMISSION
Defendant-Appellee.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants:

Kevin Clarke
Trevor Boeckmann
Harry Crane
Corwin Smidt
Aristotle International, Inc.
Predict It, Inc.
Michael Beeler
Mark Borghi
Richard Hanania
James D. Miller
Josiah Neeley
Grant Schneider
Wes Shepherd

Counsel:

For Plaintiffs-Appellants:

Michael J. Edney
Shannen Coffin
John J. Byron

For Defendant-Appellee:

Robert A. Schwartz
Anne W. Stukes
Kyle M. Druding

Defendant-Appellee:

United States Commodity Futures
Trading Commission

/s/ Kyle M. Druding

Kyle M. Druding

Counsel of Record for Defendant-Appellee

The United States Commodity Futures Trading Commission (“CFTC”) respectfully requests that the Court temporarily seal the nonpublic version of Exhibit 1 to the CFTC’s Suggestion of Mootness, which was filed today. Exhibit 1 is a true and correct copy of CFTC Letter No. 22-03, which was sent by Division of Market Oversight (“DMO”) staff to non-party Victoria University of Wellington, New Zealand (“the University”) on March 2, 2023. Currently, the public version of Exhibit 1 redacts certain information that was included in a document sent to DMO staff by the University, for which the University had sought confidential treatment under 17 C.F.R. § 145.9. As noted in the public version of Exhibit 1 (at 1 n.+), the basis for which the University sought confidential treatment is unclear but the University will be given notice and the opportunity to respond before that document or its contents is made public, in whole or in part.

Out of an abundance of caution and to allow the non-party University the opportunity to substantiate its confidentiality request should the University choose to do so, the CFTC requests that this Court allow the nonpublic version of Exhibit 1 to remain under seal temporarily. *See Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997) (“Bartholdi chastises the Commission for failing to articulate these rationales in its order. But a more explicit discussion in the Commission’s order would have risked disclosure of the information Bartholdi

was attempting to keep confidential. We cannot fault the Commission for attempting to maintain the confidentiality of Bartholdi's submissions pending judicial review."). Should it be determined that confidential treatment is either not warranted or otherwise not in the public interest, Exhibit 1 can and should be made public at that time.

The undersigned has reached out to counsel for Plaintiffs-Appellants, who indicated that they opposed the underlying Suggestion of Mootness but did not separately confirm their position as to this Motion to Seal.

Dated: March 3, 2023

Respectfully submitted,

/s/ Kyle M. Druding

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General Counsel

Anne W. Stukes

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Kyle M. Druding

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2023, I caused the foregoing Motion to Seal to be filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit and served on Plaintiffs-Appellants, using the Court's CM/ECF system, as all participants in this case are registered CM/ECF users.

/s/ Kyle M. Druding
Kyle M. Druding

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Motion to Seal complies with the type-volume limits of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f), it contains 323 words.

2. I hereby certify that this Motion to Seal complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman.

/s/ Kyle M. Druding
Kyle M. Druding

Dated: March 3, 2023