

**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-DAE

The Honorable David Alan Ezra

**DEFENDANT CFTC'S OPPOSED MOTION TO AMEND PRELIMINARY
INJUNCTION ORDER**

Defendant Commodity Futures Trading Commission (CFTC) moves to amend the preliminary injunction order (“Order”), Dkt. 45, issued by the Court on September 25, 2023, pursuant to Fed. R. Civ. P. 59(e) and 60(b)(6).¹ *See generally Financial Services Corporation of the Midwest v. Weindruch*, 764 F.2d 197, 198 (7th Cir. 1985) (holding motion to amend preliminary injunction is brought under Fed. R. Civ. P. 59(e)). Counsel for Plaintiffs have advised counsel for the CFTC that Plaintiffs oppose this motion. The CFTC respectfully submits that the Order should be modified in two respects.

First, the Order specifies that the preliminary injunction remains in effect “until 90 days after a final, not appealable, judgment is entered in this matter” Order at 2. The Order would thus remain in effect until at least 150 days after entry of judgment by this Court. *See* Fed. R. App. P. 4(a)(1)(B)(ii) (allowing 60 days from entry of judgment to file notice of appeal in case where U.S. agency is a party).² This duration is inconsistent with established law regarding the duration of preliminary injunctions.

The “purpose of a preliminary injunction is merely to preserve the relative positions of the parties *until a trial on the merits can be held.*” *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (emphasis added); *see also, e.g., Clarke v. Commodity Futures Trading Comm’n*, 74 F.4th 627, 644 (5th Cir. 2023) (Ho, J., concurring) (same); *City of Dallas v. Delta Air Lines*, 847 F.3d 279, 285 (5th Cir. 2017) (approvingly quoting similar statement). Thus, once this Court decides

¹ The CFTC was not able to address the issues raised by Plaintiffs’ proposed preliminary injunction order before the Court’s similar Order was entered because the proposed order was filed on Friday, September 22, 2023, and the Court’s order was entered on Monday, September 25, 2023. This was particularly so because lead CFTC counsel was on sick leave; and two of the three CFTC attorneys on this case were not working on September 25, 2023, because of the Yom Kippur Jewish holiday.

² There is some ambiguity in the time period implied by the phrase “not appealable,” *e.g.*, if an “appeal” were deemed to include a petition for rehearing en banc or a petition for a writ of certiorari.

the issues in the case and enters final judgment, the purpose of the preliminary injunction is exhausted. As a result, “A preliminary injunction remains in effect *until a final judgment is rendered.*” *SEC v. First Financial Group*, 645 F.2d 429, 433 (5th Cir. 1981) (emphasis added). In other words, a preliminary injunction lasts until the district court enters its final judgment in the case. *See* Fed. R. Civ. P. 54(a) (defining “judgment” to mean an order from which an appeal lies); 58(c) (defining time of entry of judgment); *Askanase v. Livingwell*, 981 F.2d 807, 810 (5th Cir. 1993) (stating that a district court decision is “final” if it ends the litigation on the merits). *See also, e.g., U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1093 (9th Cir. 2010) (“A preliminary injunction ... dissolves *ipso facto* when a final judgment is entered in the cause.”); *Texas v. United States*, No. 7:15-cv-00056-O (N.D. Tex. Feb. 2, 2016), 2016 WL 3636072 at *2 (“With the entry of final judgment the life of the preliminary injunction [comes] to an end....”) quoting *Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141, 144 (2d Cir. 1977); Wright, Miller, & Kane, Federal Practice and Procedure § 2947 (3d ed.) (“A preliminary injunction remains in effect until a final judgment is rendered or the complaint is dismissed, unless it expires earlier by its own terms or is modified, stayed, or reversed.”).

The duration language in the Order thus conflicts with applicable law—and the purpose of a preliminary injunction—in two ways: First, it extends the injunction beyond the date this Court “renders judgment”—*SEC*, 645 F.2d at 433—to a later date at which the judgment becomes “not appealable.” Second, it then adds an additional 90 days, contradicting the purpose of a preliminary injunction to preserve the status quo while this Court makes its decision.

To be sure, Plaintiffs may feel that their interests require some form of injunctive protection after judgment is issued. But the proper vehicle for any such protection is a permanent injunction issued as part of the Court’s final judgment. Consideration of final

injunctive relief is obviously premature since, at this point in the district court proceedings, there has been no briefing or ruling on the merits and no briefing on what relief, if any, those merits justify. *See generally* Dkt. 38 (order denying without prejudice CFTC motions subject to reurging). Similarly, Plaintiffs may decide to appeal this Court’s final judgment and want injunctive protection during the appeal. If so, the appropriate vehicle would be to petition for a stay or injunction pending appeal at that time. Fed. R. App. P. 8. There is thus no need for a preliminary injunction whose duration violates the legal norms for such injunctions.

The Court of Appeals’ May 1, 2023 order enjoins certain conduct by the CFTC “until 60 days after a final judgment in this matter.” *Clarke*, No. 22-51124, Dkt. 107-2 (5th Cir. May 1, 2023). But no lengthier preliminary injunction by this Court can be justified.

Second, certain language in the Order appears to inadvertently commit the Court to a factual conclusion that cannot be decided at this point; and that the Court may never need to decide, depending on the course of the proceedings. On page 2, lines 7-9, the Order states, “The Circuit Court found it unlikely that the agency did—or *frankly could*—reconcile closing the Market with the ‘significant reliance interest at play.’ *Id.* at 641.” (emphasis added) The unitalicized portion of the sentence is unobjectionable since it describes the Circuit Court’s observations regarding certain documents issued in the past by CFTC staff. By contrast, the phrase “or frankly could” appears to add a predictive finding or ruling regarding what the CFTC “could” prove in the future. The Court of Appeals made no such prediction and properly confined itself to what the CFTC staff *did* say (or not say) in past documents. 74 F.4th at 641-42. Similarly, this Court should not express an opinion on what the CFTC “could” prove in future judicial or administrative proceedings. This is particularly true because (a) in the current procedural posture of this case no administrative record has yet been submitted to the Court; and

(b) a possible outcome of this case is that there will be further administrative proceedings and factfinding. *See, e.g., University of Texas M.D. Anderson Cancer Center v. U.S. Dept. of Health and Human Services*, 985 F.3d 472, 481 (5th Cir. 2021) (responding to arbitrary and capricious agency action by vacating order and remanding for further proceedings consistent with opinion); *Langford v. Huerta*, No. MO:16-CV-00006-RAJ (W.D. Tex. August 9, 2016), 2016 WL 8674388 at *13 (similar remedy in context of arbitrary and capricious license suspension). The CFTC therefore respectfully requests that the “or frankly could” language be deleted.

Looking forward, the CFTC is hopeful that many or all of the outstanding issues before the Court can be resolved by stipulation or agreement of the parties. But, in the interim, the CFTC requests that the preliminary injunction order be amended as stated above.

Respectfully submitted,

/s/ Martin B. White

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CERTIFICATE OF SERVICE

I certify that on September 28, 2023, I caused the foregoing Defendant CFTC's Motion to Amend Preliminary Injunction Order 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/ Martin B. White