IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KEVIN CLARK, 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 Ezra

DEFENDANT CFTC'S REPLY IN SUPPORT OF MOTION TO TRANSFER VENUE

INTRODUCTION

In its motion to transfer venue, the CFTC demonstrated that all of the factors that this Court must consider under 28 U.S.C. § 1404(a) are either neutral or support transfer to the District of Columbia. In response, Plaintiffs accuse the CFTC of merely trying to escape the effects of the interlocutory decision of the Fifth Circuit ordering entry of a preliminary injunction. *See Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023). However, Plaintiffs' reliance on this decision does not alter the overall balance of factors favoring transfer, for at least three reasons:

1. The CFTC originally moved for transfer based on the connections of this case to the District of Columbia eleven days after suit was filed, before there was any appeal, much less a ruling in Plaintiffs' favor. Dkt. 8. The local connections to the District of Columbia—including the location of the two most significant plaintiffs—remain equally strong today. And, despite the passage of time since suit was filed, this Court has made only limited rulings.

2. As Plaintiffs acknowledge, law of the case principles apply when a case is transferred from one district to another. *E.g.*, *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988); *Crews & Assocs., Inc. v. United States*, 458 F.3d 674, 677 n.2 (7th Cir. 2006). Plaintiffs will thus get the benefit of the Fifth Circuit's preliminary injunction opinion and rulings by this Court implementing the decision regardless of whether venue is transferred. Federal courts in the District of Columbia are competent to interpret and apply Fifth Circuit precedent just as courts in this district are competent to interpret and apply precedent from other circuits. *See*, *e.g.*, *Grace v. Barr*, 965 F.3d 883, 896 (D.C. Cir. 2020) (relying, in part, on Fifth Cir. precedent); *Bradley v. IRS.*, 2019 WL 4980459 (W.D. Tex. Aug. 5, 2019 (relying on Fifth and D.C. Cir. precedent). For the same reason, judicial time and effort put into the Fifth Circuit

decision and other rulings in this case will not be wasted as a result of transfer.

3. Going beyond law of the case principles, Plaintiffs argue, in essence, that they are now entitled to have *future* interpretations of the preliminary injunction decision and other future issues decided in a judicial circuit that they believe has shown itself to be sympathetic to their position. *See* Op. at 18 (asserting that "the courts of this region have a significant local interest in ensuring that the law of the Fifth Circuit" is applied in the remainder of the case).[1] No such legal principle exists. To the contrary, "A difference in law between the circuits is not a valid reason to transfer or not transfer a case." *Johnson v. Russell Invs. Tr. Co.*, 2022 WL 782425 at *4 (W.D. Wash. March 15, 2022). As a result, "A plaintiff may not resist the transfer of his action to another district court on the ground that the transferee court will or may interpret federal law in a manner less favorable to him." *H.L. Green Co. v. MacMahon,* 312 F.2d 650, 652 (2d Cir. 1962). These principles are implicitly reflected in the Fifth Circuit's standards for transfer under 28 U.S.C. § 1404(a), which list numerous factors to be considered—including the localized interests of citizens and businesses—but pointedly do not refer to favorability of local judicial precedent as either a positive or negative factor. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008).

To be sure, as a practical matter, when precedent differs in different circuits, litigation counsel for both plaintiffs and defendants are likely to take into consideration circuit precedent, along with other factors, in making decisions about where to file suit and whether to move for a transfer. In ruling on section 1404(a) motions, it is precisely the task of the Court to filter out such considerations and decide the motion based on the factors that have been identified as

[1] References to "Op." are to Plaintiffs' Memorandum in Opposition to Motion to Transfer Venue, Dkt. 52.

relevant by the Court of Appeals. In this case, those factors clearly favor transfer.

ARGUMENT

I. All of the relevant *In re Volkswagen* factors favor transfer of venue in this case.

A. Introduction

Where venue is available in more than one district, the Fifth Circuit has identified eight factors to be considered when a defendant moves for a discretionary transfer of venue under 28 U.S.C. § 1404(a). *In re Volkswagen of Am., Inc.*, 545 F.3d at 315. Transfer is appropriate if it is clearly supported by the balance of the relevant factors. *Id*. Because this case involves an Administrative Procedure Act challenge to agency action, two factors, the local interest in having localized interests decided at home, and court congestion, are particularly pertinent. Mot. at 8. [2] District courts review agency action based on the record before the agency, using summary judgment rather than trial procedures. *See*, *e.g.*, *Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020). As a result, the "private" interest *Volkswagen* factors, which relate to the conduct of trials, are of limited or no relevance.[3] And, because all federal courts are competent to address issues of federal statutory law, familiarity with the law that will govern the case is a neutral factor. *See*, *e.g.*, *City of West Palm Beach v. U.S. Army Corps of Eng'rs*, 317 F. Supp. 3d 150, 157 (D.D.C. 2018). Issues of conflict of laws or foreign law are also absent.

Thus, localized interest and court congestion are the factors relevant to the Court's

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[2] References to Mot. are to Defendant CFTC's Opposed Motion to Transfer Venue, Dkt. 50.

[3] Because there is no significant likelihood of a trial in this case, Plaintiffs' discussion of the location of possible in-person witnesses at pages a 12-13 of its Opposition is of little or no relevance to the decision before the Court. In its Motion at 12, the CFTC pointed out that counsel for all parties are located in Washington, D.C., thereby affecting the expense of litigation if travel to Austin is required for hearings. However, Fifth Circuit precedent has held that location of counsel is not a relevant factor under 28 U.S.C. § 1404(a). *E.g.*, *In re Volkswagen AG*, 371 F.3d 201, 206 (5th Cir. 2004).

transfer decision. Both strongly favor the CFTC.

B. Plaintiffs improperly disregard the local interest of the District of Columbia.

As explained in the CFTC's transfer motion, the District of Columbia has a greater local interest in this case than the Western District of Texas because the defendant, the alleged unlawful conduct, and the two most directly and significantly affected plaintiffs, Aristotle International, Inc. ("Aristotle") and Predict It, Inc. ("Predict It") are all located in the District of Columbia. Mot. at 1-2. Plaintiffs respond that six users of the PredictIt market are located in Austin and allegedly were harmed by CFTC staff conduct. Op. at 18. But Plaintiffs' argument is tellingly silent as to the role of Aristotle and Predict It. Op. at 8-20. Aristotle and Predict It operated the PredictIt market that is the subject of this case. Mot. at 1, 3; *see* First Amended Complaint ("FAC") at ¶¶ 26-27. Through their business in the District of Columbia, they provide services to thousands of market users beyond the half-dozen Austin-based users noted by Plaintiffs. *See* FAC at ¶ 64. Thus, while the Austin plaintiffs establish possible venue in the Western District of Texas, they do not defeat the conclusion that the District of Columbia has a substantially *greater* interest in this case. *See*, *e.g.*, *Chase v. Andeavor Logistics, L.P.*, 2019 WL 5847879 (W.D. Tex. July 7, 2019) (stating focus of local interest inquiry is "the relative connection of the localities to the events giving rise to [the] suit").

The greater local interest of the District of Columbia is further supported by *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022), a case repeatedly cited by Plaintiffs. As relevant here, *Defense Distributed* concerned an Austin, Texas company, Defense Distributed, that produced computer files for the manufacture of guns using 3D printers, and distributed them over the internet. 30 F.4th at 422. The attorney general of New Jersey took regulatory actions to block distribution of the files. *Id.* at 422-23. Defense Distributed sued the attorney general in

the Western District of Texas but the Court transferred the case, in relevant part, to the District of New Jersey. *Id.* at 422-23. The Court of Appeals held that the transfer was an abuse of discretion. *Id*. at 436-37.

A key consideration in the Court of Appeals's analysis was the location of the injury caused by the regulatory actions. 30 F.4th at 435. The Court found that the location of the injury was the location of the company that produced and distributed the computer files—the entity directly regulated by the New Jersey actions. *Id*. at 435-36. The Court did so even though potential users of the files, who would be injured if the New Jersey regulations prevented them from making guns, were located in New Jersey and elsewhere since the files were posted on the internet. *Id*. *Defense Distributed* thus supports venue in the District of Columbia, since the Plaintiffs who operate the PredictIt market—Aristotle International, Inc. and Predict It Inc.—are located in the District of Columbia even if some users of market services are located in Austin.

Other grounds for denying transfer in *Defense Distributed* are not present in this case, contrary to Plaintiffs' suggestion. *See* Op. at 18. *Defense Distributed* expressed concern about the New Jersey attorney general improperly asserting "a pseudo-national executive authority" across state lines into Texas. 30 F.4th at 435. That consideration is not present here since Congress granted the CFTC authority to regulate options exchanges nationally, including in both Texas and the District of Columbia. 7 U.S.C. §§ 2(a)(1), 6c(b). *Defense Distributed* also found that New Jersey had a limited interest in that case because a decision would not necessarily prevent the New Jersey attorney general from enforcing the law in New Jersey. 30 F.4th at 435. Plaintiffs here seek relief directly affecting businesses located in the District of Columbia. Finally, Plaintiffs cite *Defense Distributed* for the proposition that the CFTC had to identify "specific evidence" that is more convenient to put on in Washington. Op. at 2. But *Defense*

Distributed discussed "specific evidence" only in the context of the first "private" *Volkswagen* factor, ease of access to sources of proof, which is not relevant because this is an Administrative Procedure Act case and therefore unlikely to go to trial. *See* 30 F.4th at 434.

Thus, the localized interest factor strongly supports venue in the District of Columbia.

C. Relative court congestion supports transfer to the District of Columbia.

In its motion, the CFTC showed that the Western District of Texas is considerably more congested than the D.C. District Court based on median time from case filing to disposition, number of pending cases per judge, and number of weighted filings per judge. Mot. at 13-14. Plaintiffs suggest that congestion is merely a matter of judicial "envy," Op. at 3, but the Fifth Circuit disagrees since it continues to list congestion as a relevant factor under § 1404(a). *E.g., Def. Distributed*, 30 F.4th at 435. Plaintiffs also cite authority suggesting that court congestion may sometimes be less important than other *Volkswagen* factors, such as localized interest. Op. at 16. But none of this precedent holds that congestion can be ignored where facts show meaningful differences between districts. *See*, *e.g.*, *Healthpoint, Ltd. v. Derma Scis.*, 939 F. Supp. 2d 680, 693 (W.D. Tex. 2013) (carefully evaluating congestion evidence before concluding the factor was neutral in that case). Nor could it under Fifth Circuit precedent.

Plaintiffs argue that the relevant statistic for evaluating court congestion is time to bring cases to trial rather than time to final disposition or workload per judge. Op. at 16-17. While that may be true in some cases, it is not true in this case because, as noted above, this is an Administrative Procedure Act case that is unlikely to go to trial. *See* FAC at Counts I and II. Plaintiffs acknowledge that such cases are generally decided based on the record before the agency. Op. at 12. They suggest that one plaintiff, Kevin Clarke, might need to testify in-person on standing and injury, Op. at 13, but this is implausible. Courts in Administrative Procedure

Act cases routinely decide standing and similar issues on summary judgment, relying on declarations. *See*, *e.g.*, *Securities Industry and Financial Markets Ass'n v. United States Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 401-12 (D.D.C. 2014). Mr. Clarke has already filed multiple declarations regarding standing and injury with the Court in this case. *See* Op. at 13. Thus, the congestion factor should be decided based on statistics other than time to trial, and those statistics support transfer to the District of Columbia.

II. Transfer will not result in an inefficient use of judicial resources.

Contrary to Plaintiffs' assertions, transfer of this case will not result in a wasteful use of judicial resources. Although this case was filed in 2022, the only major substantive rulings have been the Court of Appeals's preliminary injunction decision and this Court's rulings implementing that decision. As noted above, these rulings have the same effectiveness whether or not there is a transfer. Whatever court handles the case will have the benefit of the Fifth Circuit's rulings and analysis and Plaintiffs will be protected by the preliminary injunction. Plaintiffs may have preferences as to what court decides future issues in the case, but such preferences are not a relevant factor under *In re Volkswagen*. Beyond the rulings on the preliminary injunction, this Court has not substantively addressed any dispositive motions or engaged with a factual record.

Plaintiffs' primary argument regarding efficient use of judicial resources is based on a claim that, if there is no transfer and there is a future appeal, the case will be assigned to the same panel that decided the preliminary injunction appeal and therefore go to judges already familiar with the case. Op. at 15. According to Plaintiffs, such repeat panel assignments are a "common practice" in the Fifth Circuit. *Id.* This argument is entitled to no weight in the transfer determination.

First, the argument is speculative since there is no certainty that there will be another appeal.[4] More fundamentally, Plaintiffs cite no court rule, operating procedure, data, or even anecdotes documenting the alleged "common practice" of repeating panels. To the contrary, the Fifth Circuit's Internal Operating Procedures appear designed to minimize repeat panels. *See* Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit (April 2023) at 31 (I.O.P. regarding "Judge Assignments" in I.O.P.s following Fifth Cir. R. 34.13 stating "The judges are scheduled to avoid repetitive scheduling of panels composed of the same members." and "To insure complete objectivity in the assignment of judges and the calendaring of cases, the two functions of (1) judge assignments to panels and (2) calendaring of cases are carefully separated.").

Plaintiffs cite to two isolated Fifth Circuit cases where there were repeat panels in successive appeals. Op. at 8-9, 15. Neither case supports the claim that repeat panels are common, except in special circumstance not present here. In *Defense Distributed*, a panel reversed a district court decision on jurisdiction—*see Defense Distributed v. Grewal*, 971 F.3d 485 (5th Cir. 2020)—and later heard a mandamus petition regarding venue. *Def. Distributed*, 30 F.4th 414. But the next appeal in the case, involving closely related issues, was heard by a different panel. *Def. Distributed v. Platkin*, 55 F.4th 486 (5th Cir. 2022). So this case demonstrates no "common practice."

The other cited case, *M. D. by next friend Stukenberg v. Abbott*, 929 F.3d 272, 275 (5th Cir. 2019) exemplifies the procedure followed by the Fifth Circuit when repeat panels are

[4] For example, if the CFTC were to lose before the district court, in whatever venue, it might determine that it is a better use of resources not to appeal.

intended—a procedure that was *not* followed in the preliminary injunction appeal here. In a previous appeal in *M. D.*, the Fifth Circuit ordered a "limited remand" to modify an injunction and specified explicitly that a future appeal "will be assigned to this panel." *M. D. by next friend Stukenberg v. Abbott*, 907 F.3d 237, 288 (5th Cir. 2018). *See also*, *e.g.*, *Chamber of Commerce of the United States v. United States Securities and Exchange Comm'n*, No. 23-60255, 2023 WL 7147273 at *13 (5th Cir. Oct. 31, 2023) (stating "This is a limited remand. This panel retains jurisdiction to consider the decision that is made on remand."); *M. D. by next friend Stukenberg v. Abbott*, 977 F.3d 479, 481 (5th Cir. 2020) (later appeal in *M. D.* not heard by same panel in absence of specific instruction); *Petition of Geisser*, 627 F.2d 745, 749 (5th Cir. 1980) (stating that "retention of jurisdiction by a particular panel must be specific"). In the appellate decision in this case, there is no language directing a return to the same panel, which strongly suggests that no such return is contemplated.[5]

III. Plaintiffs' remaining arguments lack merit.

Plaintiffs cite *Healthpoint, Ltd. v. Derma Sciences, Inc.*, 939 F. Supp. 2d 680, 694-95 (W.D. Tex. 2013) to illustrate the point that a district's greater familiarity with applicable law can be a factor supporting denial of a transfer. Op. at 15. But the familiarity that was relevant in *Healthpoint* went far beyond the general familiarity with Fifth Circuit law on which Plaintiffs rely. *Healthpoint* concerned pharmaceutical advertising claims under the Lanham Act and the Court noted that the Western District of Texas had recently heard five pharmaceutical

[5] Plaintiffs interpret the sentence, "That said, we need not reach a definitive conclusion on this issue [of the reviewability of no-action letters] at this time." in Judge Ho's concurring opinion as expressing an intent that any future appeal be heard in the Fifth Circuit or by the same panel. Op. at 7-8. That is a distortion of the language. In context, the sentence merely expresses the difference between the standard for issuing a preliminary injunction and the standard for a ruling on the merits. *See Clarke*, 74 F.4th at 644.

advertising cases involving the *Healthpoint* plaintiff, including cases considered leading authority on Lanham Act issues. 939 F. Supp. 2d at 694-95. The case also involved Texas law issues. *Id*. at 695. *Healthpoint* therefore is clearly distinguishable.

Plaintiffs cite *Betts v. Atwood Equity Co-operative Exchange, Inc.*, 1990 WL 92495 at *1 (D. Kan. June 13, 1990) for the proposition that the purpose § 1404(a) is not to allow judge-shopping by litigants. Op. at 9. However, *Betts* is distinguishable because, in *Betts*, the sole stated reason for transfer was the plaintiff's belief that he had been treated unfairly by the Court. 1990 WL 92495 at *1. By contrast, in this case there are reasons to transfer, including local connections to the District of Columbia and relative court congestion, that are independent of either party's subjective preferences.

Finally, Plaintiffs argue that the fact that the relevant CFTC staff decisions were made in Washington does not, by itself, automatically justify transferring venue to the District of Columbia. Op. at 18-20. This argument disregards the fact that two of the primary plaintiffs in the case—the entities responsible for the operation of the PredictIt market and therefore for any of the trading or market analysis engaged in by other plaintiffs—are located in the District of Columbia. This fact, in combination with the location of the defendant and the alleged wrongful conduct, establishes that the District of Columbia has the primary local interest in this case. *See also* Mot. at 14-15, Argument IV.D.

CONCLUSION

For these reasons, the Court should grant the CFTC's motion and transfer this case to the United States District Court for the District of Columbia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 3, 2023, I caused the foregoing Reply 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*
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