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

PLAINTIFFS' MOTION TO STAY TRANSFER ORDER

The Plaintiffs respectfully request that the Court stay its Order Granting Motion to Transfer Venue, entered on the docket on January 17, 2024 (Dkt. 61), to accommodate the Fifth Circuit's review of that order pursuant to a forthcoming petition for a writ of mandamus. Specifically, the Plaintiffs ask that the Court stay transfer for the greater of fourteen (14) days or the period of time that the Plaintiffs' forthcoming mandamus petition is pending. Plaintiffs further request expedited briefing on and treatment of the instant stay motion, with the Court ordering a response from the CFTC no later than Wednesday, January 24, 2024. Counsel for the Plaintiffs has sought the position of the Defendant Commodity Futures Trading Commission ("CFTC") on their stay request and will provide the Court with the CFTC's position as soon as it is received.

This Court has legal authority to stay the transfer order and effectively to stay proceedings pending the Fifth Circuit's review of that order on mandamus. As part of its power to control its

docket, a district court has the inherent power to stay proceedings. *See Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Landis v. N Am. Co.*, 299 U.S. 248, 254–55 (1936); *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 545 (5th Cir. 1983); *Soverain Software LLC v. Amazon.com, Inc.*, 356 F. Supp. 2d 660, 662 (E.D. Tex. 2005) ("The district court has the inherent power to control its own docket, including the power to stay proceedings."). Courts have frequently and correctly exercised this authority to stay an order transferring a case pursuant to 28 U.S.C. § 1404(a) during the pendency of appellate proceedings. *See Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 922 F. Supp. 1334, 1385 (N.D. Iowa 1996), *aff'd*, 119 F.3d 688 (8th Cir. 1997); *see also Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1517 (10th Cir. 1991) ("[T]he preferred approach is to delay physical transfer of the papers in the transferred case for a long enough time to allow the aggrieved party to file a mandamus petition."); *In re Warrick*, 70 F.3d 736, 739–40 (2d Cir. 1995) (acknowledging that district courts can and, in many cases, should stay a transfer order when review by mandamus is forthcoming or pending).

As the Eighth Circuit explained in detail: "In order to permit adequate and orderly review of one federal district court's decision to transfer a case to another federal district court, physical transfer of the file should be delayed for a period of time after entry of the transfer order so that review may be sought in the transferor circuit." *In re Nine Mile Ltd.*, 673 F.2d 242, 243 (8th Cir. 1982). In the days following the transfer order, the sequence of events in *Nine Mile* was identical to that here: The district court granted a motion to transfer, actions were immediately taken by clerk officials to transfer the files to the new court, and the party opposing transfer sought a stay of the order three days after the transfer order. *Id.* The Eighth Circuit held that stay motion should have been granted as matter of course. And the instant stay motion should similarly be granted without further inquiry.

If there is to be further inquiry, there are ample reasons in this particular case to stay the transfer order while the Fifth Circuit reviews. The Fifth Circuit regularly reviews transfer orders through petitions for mandamus and has not hesitated to reverse them. *Def. Distributed v. Bruck*, 30 F.4th 414, 421 (5th Cir. 2022); *In re TikTok, Inc.*, 85 F.4th 352, 356 (5th Cir. 2023); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 307 (5th Cir. 2008) (en banc). The transfer order in this case is far from routine given the Fifth Circuit's significant investment in injunction proceedings. Seamlessly accommodating the Fifth Circuit's appellate review of the transfer order is particularly appropriate for three reasons.

First, the transfer order is unprecedented. The Court ordered transfer after the appellate court substantially resolved nearly every threshold and merits issue in the case. *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627, 635–40 (5th Cir. 2023). That included substantive rulings bearing on: (a) whether the case is challenging final agency action by the CFTC, (b) whether the Plaintiffs have standing, (c) whether the CFTC decisions to open and close the market are so committed to agency discretion that they are judicially unreviewable, (d) whether the challenge to the CFTC's actions was mooted by intervening CFTC efforts to issue a new decision turning off the PredictIt Market's authority to proceed, (e) whether the CFTC had acted arbitrarily and capriciously in attempting to close the PredictIt Market, (f) whether the PredictIt Market had been issued a "license" to operate as that term is contemplated in the Administrative Procedure Act, (g) whether the CFTC followed the required procedures for terminating that license, and (h) whether the CFTC had violated the Fifth Circuit's injunction pending appeal. *Id.* The opinion was a thorough, comprehensive review of the important issues in this case. A very busy appellate court did not hesitate to grapple with them and to provide prompt relief. The Plaintiffs are unaware of any other instance of a district court transferring a case after such

extensive proceedings before a panel of the Circuit Court. In short, this is not a run-of-the-mill transfer decision that deserves no moment of pause.

Second, the Fifth Circuit is the court with the largest substantive stake so far in this case. At stake in the decision to transfer the case out of the Fifth Circuit is the continued efficacy of the Fifth Circuit's substantive legal effort to resolve this matter and the Fifth Circuit's interest in enforcing its rulings on the legal principles at issue. As such, the Fifth Circuit should have an opportunity to evaluate the appropriateness of a transfer. And the Fifth Circuit should be able to undertake this review without clerk- or administrative-driven actions effectuating the transfer that would consume the time of the parties or the court systems in question.

Third, the transfer order raises serious issues regarding this Court's compliance with the Fifth Circuit's mandate. The Fifth Circuit was very specific about what should happen next in this case. It remanded the case "for the district court to enter a preliminary injunction while ***it*** considers Appellants' challenge to the CFTC's actions." *Id.* at 633 (emphasis added); *see also id.* at 644 ("We REVERSE the district court's effective denial of a preliminary injunction and REMAND with instructions that the district court enter a preliminary injunction *pending its consideration* of Appellants' claims.") (italic emphasis added). The concurring opinion expressly contemplated that the case would return to the Fifth Circuit, even to the same particular panel of the Fifth Circuit, to potentially reach a "definitive conclusion" on some of the questions at issue in the Court's opinion. *Id.* (Ho, J., concurring). The transfer order countermands the Fifth Circuit's clear instruction that further proceedings should occur in the district court to which it remanded the case, subject to continued supervision by the Fifth Circuit.

That the transfer order implicates important issues regarding the meaning of the Fifth Circuit's mandate demands that the Fifth Circuit should have an unimpeded opportunity to review

the order. The enforcement and interpretation of an appellate mandate are commended to the Fifth Circuit panel that issued it, and the requested stay would facilitate that review. *Am. Trucking Ass'ns, Inc. v. I.C.C.,* 669 F.2d 957, 960 (5th Cir. 1982) ("[M]andamus is the appropriate remedy to enforce the judgment of an appellate court[.]"); *Int'l Union v. OSHA*, 976 F.2d 749, 750 (D.C. Cir. 1992) ("[T]he court retains a residual jurisdiction to enforce its mandate[.]"); *Off. of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987) ("A federal appellate court has the authority, through the process of mandamus, to correct any misconception of its mandate by a lower court or administrative agency subject to its authority.").

Even without reaching the four-part test for a stay pending appeal, the procedural history of this case is reason alone for this Court to exercise its inherent authority to stay transfer pending proceedings on the writ of mandamus. *See*, *e.g.*, *Fishman Jackson PLLC v. Israely*, 180 F. Supp. 3d 476, 482–83 & n.4 (N.D. Tex. 2016) (explaining the broad discretion under the Supreme Court's decision in *Landis* to stay proceedings and noting that the considerations depend on "context," "without applying any particular test"). But the traditional four-part stay test also favors a pause.

There can be no doubt the Plaintiffs' request for appellate reversal at the very least presents a substantial case on the merits and raises serious issues for appellate consideration. *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (to satisfy the likelihood of success factor, the movant "need only present a substantial case on the merits" involving "a serious legal question"). In addition to the serious issues raised above, the transfer order does not address the judicial policies strongly against using the transfer motion process for purposes of forum shopping. *See, e.g.*, *Betts v. Atwood Equity Co-op. Exch., Inc.*, No. 88-4292-R, 1990 WL 92495, at *1 (D. Kan. June 13, 1990) ("The purpose of § 1404(a) is not to allow judge-shopping by litigants."). In this case, there was

not just some background strategy of the CFTC trying to project what forum might lead to a more favorable substantive decision. Rather, the CFTC was seeking transfer to avoid the implementation of an existing, documented, and firm Fifth Circuit articulation of key legal principles and express application of them to this case. The CFTC also was faced with a Circuit Court that concluded that it had "violate[d]" the court's "injunction pending appeal." *Clarke*, 74 F.4th at 641. The CFTC cannot be blamed for wanting to run for the hills, but the blatant forum-shopping of the agency weighs strongly against transfer, or at least raises a serious issue for resolution for the Fifth Circuit.

The transfer order also does not appropriately address the strong deference and presumption in favor of the plaintiff's choice of forum, barely mentioning the issue. Dkt. 61 at 11. That is contrary to binding Fifth Circuit cases, which time and again emphasize the significant weight that a district court must assign 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) ("the plaintiff is generally entitled to choose the forum"). To outweigh the Plaintiff's choice of forum, the CFTC was required to demonstrate that the D.C. District Court is the "*clearly* more convenient" forum, which the agency did not come close to doing. *Def. Distributed*, 30 F.4th at 433.

What is more, the transfer order is contrary to the Fifth Circuit's strong commitment to hearing challenges to government actions, with nationwide effect, brought by the citizens under its jurisdiction. The CFTC is effectively arguing that what it does from its Washington headquarters must be litigated there. That is simply not the case. *See* 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). Accordingly, the Fifth Circuit has declined to transfer to Washington challenges to federal government action. *See, e.g.*, *Calumet Shreveport Ref., L.L.C. v. United States Env't Prot. Agency*, 86 F.4th 1121, 1133 (5th Cir. 2023). This Court's focus on the "locus of decisionmaking" by the CFTC as a driving factor in the transfer analysis runs contrary to the Fifth Circuit's repeated articulation of and adherence to a "duty to sit" and to hear challenges to federal government action, instead of deferring solely to courts in our Nation's capital.

Focus on the transferor court's relative busyness similarly has been repeatedly criticized by courts within the Fifth Circuit. *See Healthpoint, Ltd. v. Derma Scis. Inc.*, 939 F. Supp. 2d 680, 693 (W.D. Tex. 2013) (quoting *In re Genentech, Inc.*, 566 F.3d 1338, 1347 (Fed. Cir. 2009)); *Koss Corp. v. Apple Inc.*, No. 6-20-00665-ADA, 2021 WL 5316453, at *12 (W.D. Tex. Apr. 22, 2021). In this matter, though, the Court's view of the burdens of its docket was a substantial factor in transferring. Dkt. 61 at 9–10. How the Court weighed the congestion of its docket compared to the federal courts in our Nation's capital, at a minimum, raises serious issues for appellate review. This is especially so because the Fifth Circuit already has made a significant investment in this case.

A stay also would avoid irreparable harm to the court system and the parties. In the absence of a stay, the Fifth Circuit absolutely will retain the power to grant mandamus and to recall this case from Washington, D.C. *Def. Distributed*, 30 F.4th at 423–26. In that event, the D.C. federal court will have wasted scarce judicial resources on a case not properly transferred in the first place, and the parties will have wasted resources in addressing those proceedings elsewhere. This would be particularly inappropriate in light of the Fifth Circuit's ruling *in this case* that the CFTC has acted arbitrarily and capriciously and caused substantial harm to the Plaintiffs. Forcing the

Plaintiffs to spend additional funds chasing proceedings in D.C. that should not be occurring there would expose the Plaintiffs to additional financial harm. And, given the Government's sovereign immunity, those incremental expenses (entirely avoidable with a stay) would be considered irreparable. *Wages and White Lions Invs., LLC v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021).

The balance of equities and the public interest also favor a stay. A relatively short stay of these proceedings while the Fifth Circuit acts will not prejudice the parties. Bringing this case to Washington, now, is hardly urgent, as is evident by the pace of the renewed motion to transfer. The CFTC did not even renew its motion for transfer until well after the Fifth Circuit's decision, and after submitting a scheduling recommendation in response to this Court's request that did not even mention the prospect of transfer. Dkt. 43; Dkt. 47. The CFTC did not make any effort to accelerate the pace of its motion for nearly three months after it filed it, and has shown no urgency in moving this case forward while the motion was pending, seeking multiple extensions of its own filing deadlines. Dkts. 56, 59. Moreover, under Federal Rule of Appellate Procedure 21, if the mandamus petition were without merit (which it is not), it could be disposed of quickly and little time would be lost. If it has merit, these are precisely the circumstances where further administrative burdens implementing an erroneous transfer decision should not be undertaken. *See Def. Distributed*, 30 F.4th at 423–26.

Importantly, the forthcoming mandamus petition will implicate multiple policies that are in the public interest, including ensuring compliance with the law and avoiding the waste of the Fifth Circuit's investment in this case. *See N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.C. Cir. 2009) (the "public interest is served when administrative agencies comply with their obligations under the APA"); *F.T.C. v. Multinet Mktg., LLC*, 959 F. Supp. 394, 395–96 (N.D.

Tex. 1997) ("A change of venue now is likely to upset the discovery and trial schedule and waste judicial resources.").

For the foregoing reasons, the Plaintiffs respectfully request that the Court stay its transfer order for the longer of 14 days or the pendency of the forthcoming mandamus petition seeking reversal of the transfer decision in the Fifth Circuit.

Respectfully submitted,

/s/ Michael J. Edney

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2024, 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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