

**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 Ezra

DEFENDANT CFTC'S OPPOSITION TO MOTION TO STAY TRANSFER ORDER

Plaintiffs' motion to stay this Court's order transferring venue to the District of Columbia in order to "accommodate" a forthcoming petition for writ of mandamus should be denied because it is moot and because Plaintiffs have little chance of prevailing on the merits if they file the planned petition challenging this Court's well-reasoned decision. The transfer order was dated January 16, 2024. Dkt. 61.¹ The original case file and transfer order were received and docketed in the transferee court by January 19, 2024. *See Clarke, et al. v. CFTC*, No. 1:24-cv-

¹ References in the form "Dkt." are to the docket numbers of this case in the District Court for the Western District of Texas unless the context specifically indicates that they are to the docket numbers of this case as docketed in the District Court for the District of Columbia.

00167-JMC at Dkt. 62 (D.D.C.). Plaintiffs filed their motion to stay the transfer order in this Court on Saturday, January 20, 2024, after the case was already docketed in the District of Columbia. Dkt. 63.

Plaintiffs' motion to stay should be denied for several reasons, discussed in more detail in the argument below. Most fundamentally, since the case has now been transferred to the District of Columbia, the action ordered by this Court has been completed and there is nothing to stay, rendering Plaintiffs' motion to moot. Under Fifth Circuit precedent, venue now lies with the District Court for the District of Columbia and this Court lacks authority to undo the transfer, reinforcing the point that a stay of the transfer order would be a meaningless act.

Moreover, even if this Court had jurisdiction to grant a stay, a stay should be denied because Plaintiffs have little chance of succeeding on the merits of the underlying transfer issue. Plaintiffs can only prevail on their forthcoming petition for a writ of mandamus challenging the transfer order if they can demonstrate a clear abuse of discretion by this Court. They will not be able meet this high standard because the transfer order was justified by this Court's well-reasoned accompanying opinion which applied well-established Fifth Circuit standards for transfer. Dkt. 61. Plaintiffs try to argue that the transfer in this case is some sort of extraordinary circumstance, *see* Dkt. 63 at 3-5, but their arguments on this point are little more than a rehash of arguments already made in Plaintiffs' briefs opposing transfer, Dkt. 13, 52, and refuted in the CFTC's replies. Dkt. 16, 54.

PROCEDURAL HISTORY²

Plaintiffs filed this case on September 9, 2022. Dkt. 1. The CFTC filed a motion to

² This history is limited to case developments most relevant to the present motion for a stay.

transfer venue to the District of Columbia pursuant to 28 U.S.C. § 1404(a) on September 20, 2022. Dkt. 8. On December 12, 2022, Magistrate Judge Mark Lane filed a Report and Recommendation recommending that the motion be granted. Dkt. 31. Plaintiffs filed an objection on December 27, 2022. Dkt. 33.

Meanwhile, on December 23, 2022, Plaintiffs appealed what they characterized as the district court's constructive denial of Plaintiffs' previously filed motion for a preliminary injunction. Dkt. 32. On May 12, 2023, while the appeal was pending, this Court denied the CFTC's motion to transfer without prejudice, subject to re-urging. Dkt. 38. On July 21, 2023, the Court of Appeals issued an opinion ordering a preliminary injunction, with the mandate issuing on September 12, 2023. Dkt. 42. Contrary to Plaintiffs' assertion, the Court of Appeals decision did not address venue. *See* discussion below.

The CFTC filed a re-urged motion to transfer on October 13, 2023. Dkt. 50. Plaintiffs responded on October 27, 2023. Dkt. 52. The CFTC filed its reply on November 3, 2023. Dkt. 54. On November 27, 2023, with the consent of the CFTC, Plaintiffs filed a Second Amended Complaint. Dkt. 55. The CFTC's answer or dispositive motion in response is currently due on February 26, 2024. Text Order, Jan. 5, 2024.

As noted above, this Court ordered transfer to the District of Columbia on January 16, 2024. Dkt. 61. The case file was received, and docketed in the transferee court, by January 19, 2024. *See Clarke, et al. v. CFTC*, No. 1:24-cv-00167-JMC at Dkt. 62 (D.D.C.). Plaintiffs filed a notice of intent to file a motion to stay in this Court on January 19, 2024. Dkt. 62 (W.D. Tex.). They filed their motion to stay the transfer order in this Court on Saturday, January 20, 2024. Dkt. 63.

ARGUMENT

I. A stay of the January 16, 2024 transfer order would have no effect because the case has already been transferred to the District Court for the District of Columbia and this Court lacks jurisdiction to reverse the transfer.

Plaintiffs' motion for a stay should be denied as moot because the action ordered by the Court in its January 16, 2024 transfer order—transfer to the United States District Court for the District of Columbia—has already been completed and there is nothing left to stay. Once the case files were received by the District Court for the District of Columbia and the case was docketed in that Court—which occurred by January 19, 2024—the transfer was complete and this Court lost jurisdiction over the case. *See, e.g., Mlodzianowski v. Markus*, 2021 WL 6750852 at *2 (W.D. Tex. October 7, 2021) (collecting cases). This is particularly true because, under Fifth Circuit precedent, this Court, because of its loss of jurisdiction over the transferred case, lacks the authority to reverse the transfer. *Def. Distrib. v. Bruck*, 30 F.4th 414, 423-424 (5th Cir. 2022). As a result, a stay of the January 16 order would have no effect on the case.

In *Def. Distributed*, as in this case, the District Court for the Western District of Texas transferred a case to a United States District Court outside the Fifth Circuit and the plaintiffs sought relief from the transfer via a petition to the Fifth Circuit for a writ of mandamus. 30 F.4th at 423. A divided panel of the Court of Appeals agreed that the original transfer order was erroneous but held that the effect of the transfer was to severely limit what actions either the District Court for the Western District of Texas or the Fifth Circuit could take in response. *Id.* at 423-24. Specifically, the Court of Appeals stated, “[b]ecause of the transfer, the Texas transferor court can no longer enter an appealable order in the case.” *Id.* at 424. And even the Court of Appeals itself “lacks power to order a return of the case to our circuit.” *Id.* at 423. The Court of Appeals vacated the transfer order, *id.* at 436-37, but this did not have the effect of returning the

case to the Western District of Texas. *See id.* at 423. The most the Court of Appeals could do was direct the district court to ask—but not order—the transferee court to retransfer the case back to the Western District of Texas. *Id.* at 424, 436. After receiving the request for retransfer, the transferee court made an independent analysis under 28 U.S.C. § 1404(a), including consideration of the Fifth Circuit opinion, and declined to send the case back to the Western District of Texas. *Def. Distributed v. Platkin*, 617 F. Supp. 3d 213, 225, 232-41 (D.N.J. 2022). *Def. Distributed* thus makes clear that this Court no longer has authority to rule on the transfer, making a stay of the transfer order meaningless.

Other authority similarly holds that once a case has been transferred, the courts in the transferor circuit lose jurisdiction over the transfer and therefore cannot undo or, by implication, stay it. *See, e.g., In re Red Barn Motors, Inc.*, 794 F.3d 481, 484 (5th Cir. 2015) (stating that district court in Louisiana “lost its jurisdiction” when case was transferred to district court in Indiana and that “it seems uncontroversial” that “transfer to another circuit removes the case from our jurisdiction”); 15 Fed. Prac. & Proc. Juris. § 3846 (4th ed.), text at n.1 (“When a motion for transfer under 28 U.S.C. § 1404(a) is granted and the papers are lodged with the clerk of the transferee court, the transferor court and the appellate court for the circuit in which that court sits lose jurisdiction over the case . . .”).

Even the cases cited by Plaintiffs hold that, once a transfer has occurred, the courts in the transferor circuit lose jurisdiction over the transfer order and cannot reverse it. This is so even if, under local rules or precedent not applicable to this case, the district court *should* have stayed its

transfer order before it took effect but did not.³ For example, in *In re Nine Mile Limited*, 673 F.2d 242 (8th Cir. 1982), the District Court for the Northern District of Iowa ordered a transfer to the District of South Carolina and the clerk of transferor court immediately effectuated the order by transferring the record to South Carolina. *Id.* at 243. The Eighth Circuit Court of Appeals held that, while it may have been better practice for the Iowa district court to have delayed the execution of the transfer order for a period of time to allow an opportunity for appellate review, the Eight Circuit had nevertheless lost jurisdiction over the transfer order. *Id.* at 244. As in *Def. Distributed*, the Eighth Circuit directed the Iowa district court to request, but not order, the retransfer of the case, reflecting the fact that the Iowa court no longer had jurisdiction to issue orders in the case. *See also, e.g., Chrysler Credit Corporation v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516-17 (10th Cir. 1991) (stating that, even where it is good practice to delay execution of transfer order to permit appellate review, once the transfer has been effectuated “[t]he transferor court loses all jurisdiction over the case including the power to review the transfer” and “appellate jurisdiction [over the transfer order] in the transferor circuit is terminated”); *In re Warrick*, 70 F.3d 736, 741 (2d Cir. 1995) (stating that Court of Appeals may issue mandamus order “of limited reach” directing district court to “ask” for return of case following transfer). In other mandamus cases cited by Plaintiffs, the district court denied a motion to transfer, so the issue of loss of jurisdiction did not arise. *E.g., In re TikTok, Inc.*, 85 F.4th 352 (5th Cir. 2023); *In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008).

³ Plaintiffs have cited no Western District of Texas rule or Fifth Circuit precedent requiring this Court to stay transfer orders when they are issued. But even if such rule or precedent existed, it would lose effect once a transfer is completed, under the precedent cited by Plaintiffs and described in the text of this paragraph.

Thus, because the case file has been transferred to, and docketed in, the District Court for the District of Columbia, this court lacks jurisdiction to issue further orders regarding the transfer and a stay of the original transfer order would be without force. Plaintiffs' motion for a stay should therefore be denied because it is moot and, relatedly, because this Court now lacks jurisdiction to issue any order, including a stay order, in this case.

II. Even if this Court had authority to stay its transfer order pending a future petition for mandamus, it should not issue a stay because Plaintiffs have little likelihood of prevailing on any such petition.

Even if this Court had authority to stay its January 16, 2024 transfer order pending Plaintiffs forthcoming petition for mandamus, it should not issue a stay because Plaintiffs have little likelihood of prevailing on their planned petition. There is no right to a stay pending a Court of Appeals's disposition of a petition for writ of mandamus. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). To justify a stay, an applicant must, among other requirements make "a strong showing that he is likely to succeed on the merits." *Nken*, 556 U.S. at 426. These factors do not support the requested stay.

First, and most important, Plaintiffs have little likelihood of succeeding on the merits of their planned petition for mandamus. A district court's determination whether to transfer a case is subject to mandamus only if the district court's ruling is "a clear abuse of discretion" leading to a "patently erroneous result." *In re TikTok Inc.*, 84 F.4th at 358. This Court's transfer order clearly does not fall into this category since the Court reached its result based on a meticulous application of the Fifth Circuit's standards for transfer under section 1404(a) to the facts of this case. *See Order Granting Motion to Transfer Venue and Denying as Moot Motion for Expedited Consideration*, Dkt. 61 at 6-11 (applying standards from *In re Volkswagen AG*, 371 F.3d 201 (5th Cir. 2004)).

Plaintiffs argue that the transfer order is “unprecedented” because the Fifth Circuit Court of Appeals addressed numerous issues in the case in its decision ordering this Court to issue a preliminary injunction. Motion, Dkt. 63 at 3. However, as the CFTC explained in its reply brief in support of transfer, rulings by the Fifth Circuit in that decision are not wasted effort because they will be treated as law of the case in the transferee court. Dkt. 54 at 1-2; *see, e.g., Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988). In any event, district courts frequently transfer cases in circumstances where there have been rulings on preliminary injunctions by the transferor court, including rulings pending on appeal in the transferor circuit at the time of the transfer.⁴ *See, e.g., FTC v. IAB Marketing Associates*, 746 F.3d 1228, 1231-32 (11th Cir. 2014); *Jones v. InfoCure Corp.*, 310 F.3d 529, 532-33 (7th Cir. 2002) (collecting cases). Transfers have been ordered in cases where transferor courts have had to grapple extensively with merits issues in the course of ruling on preliminary injunction motions prior to transfer. *See, e.g., Valley Community Preservation Commission v. Mineta*, 231 F. Supp. 2d 23, 29-43, 48 (D.D.C. 2002) (addressing likelihood of success on merits of complex administrative law issues at length in connection with denial of preliminary injunction before ordering transfer of venue). Thus, while there exists a Court of Appeals decision on a preliminary injunction in this case, that does not make the transfer order “unprecedented” in any sense legally relevant to Plaintiffs’ motion for a stay.

Plaintiffs’ further state that “the Fifth Circuit is the court with the largest substantive stake so far in this case” and should have an opportunity to review the transfer order “without the

⁴ In such cases, the court of appeals for the transferor circuit may retain jurisdiction over the interlocutory appeal of the preliminary injunction order because the order was issued before the case was transferred. *See Jones*, 746 F.3d at 532-34.

clerk-or administrative-driven actions effectuating the transfer . . .” Motion, Dkt. 63 at 4. The phrasing of this argument is odd since federal courts are normally considered to be “neutral arbiters,” not entities with a “substantive stake” in cases. *E.g., Elmen Holdings, L.L.C. v. Martin Marietta Materials, Inc.*, 86 F.4th 667, 673-74 (5th Cir. 2023). In any event, as described above in Argument I, the procedural and jurisdictional parameters for Fifth Circuit review of transfer orders are those set forth in *Def. Distributed* and would not be affected by a stay issued by this Court.

In addition, even though venue issues were not argued before the Fifth Circuit, and the Fifth Circuit’s decision on a preliminary injunction contains no analysis of venue, Plaintiffs interpret the words “it” and “its” in the decision as prohibiting future transfer of the case. Motion, Dkt. 63 at 4 (interpreting 74 F.4th at 633, 44). However, the relevant decision language, remanding “for the district court to enter a preliminary injunction while it considers Appellants’ challenge to the CFTC’s actions” is obviously standard remand language and not a preemptive ruling on transfer issues. The same is true of the use of the word “its” in the order language quoted in the motion. *Id.* Similarly, and contrary to Plaintiffs’ assertion, Judge Ho’s concurring statement that “we need not reach a definitive conclusion on [the issue of final agency action] at this time,” 74 F.4th at 644, is merely a restatement of the legal standard for review of a preliminary injunction motion and says nothing about future procedures on remand.

Plaintiffs also reassert their incorrect theory that a transfer of this case to the District of Columbia implies that review of all CFTC actions can only take place in the District of Columbia and is therefore inconsistent with Fifth Circuit doctrine. Motion, Dkt. 63 at 6-7. This theory ignores the decisive point that in this case—unlike in almost all other regulatory review cases—the primary *plaintiffs* are located in Washington, D.C. *See* Transfer Order, Dkt. 61 at 10-11.

Plaintiffs' remaining arguments have been addressed in the CFTC's re-urged Motion to Transfer, Dkt. 52 and Reply in support of that motion, Dkt. 54.

Thus, even if the motion for a stay were not moot and this Court had jurisdiction to issue a stay, Plaintiffs' motion should be denied.

CONCLUSION

Plaintiffs' motion for a stay should be denied.

Respectfully submitted,

/s/ Martin B. White

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CERTIFICATE OF SERVICE

I certify that on January 24, 2024, I caused the foregoing Opposition to Motion to Stay Transfer 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
Martin B. White