

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

**REPLY IN SUPPORT OF PLAINTIFFS’ MOTION FOR THIS COURT TO REQUEST
RETURN OF THE CASE FROM THE DISTRICT OF COLUMBIA AND INTEGRATED
REQUEST FOR EXPEDITED TREATMENT; RENEWED MOTION FOR STAY OF
TRANSFER ORDER; AND REPLY IN SUPPORT OF SUCH STAY**

The Government makes no persuasive argument against requesting return of this matter from Washington and staying the transfer order pending Fifth Circuit review on mandamus.

The Government principally contends that requests to return a case are “typically” made only after the Circuit Court commands it through mandamus. To make this argument, the Government cites one Fifth Circuit example addressing a transfer to a court outside the Circuit: the series of events occurring in *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022). *See* ECF 68, Opp. at 1-2. That case hardly stands for the proposition that “the procedure outlined by the Fifth Circuit . . . is to request transfer only if the Court of Appeals so orders.” Opp. at 2. It is instead a cautionary tale of the impediments to appellate review, the dissatisfaction of this Court’s reviewing circuit, and the administrative chaos when return is not promptly requested. *Def.*

Distributed v. Platkin, 617 F. Supp. 3d 213, 241 (D.N.J. 2022), *reconsideration denied*, *Def. Distributed v. Platkin*, No. 3:19-CV-04753, 2022 WL 14558237 (D.N.J. Oct. 25, 2022); *Def. Distributed v. Platkin*, 48 F.4th 607 (5th Cir. 2022) (Ho, J., concurring) (expressing frustration with the transferee court’s declination to return a quickly transferred case, where the Fifth Circuit ordered its requested return a year after transfer, as a transgression of the “judiciary’s longstanding tradition of comity, both within and across the circuits” as “an easy tradition of respect”).

It is an illustration of why, when the “better procedure” of “hold[ing] up the transfer for a reasonable time pending possible petition for reconsideration or review” is not followed, the proper procedure is for the district court to request return of the file to facilitate orderly review in the original circuit. *In re Nine Mile Ltd.*, 673 F.2d 242, 243-44 (8th Cir. 1982). This expectation is not a peculiarity of the Eighth Circuit, as suggested by the Government. *Opp.* at 2. The Fifth Circuit itself has recognized that “directing the transferor district to request that the transferee district return the case” can be appropriate even before reaching the merits of the transfer order. *In re Red Barn Motors, Inc.*, 794 F.3d 481, 484 & 485 n.9 (5th Cir. 2015); *see also In re Sosa*, 712 F.2d 1479, 1480 n.1 (D.C. Cir. 1983) (recognizing the option of “an informal request that the [transferee] court retransfer the record [to the transferor court] to permit consideration of” a mandamus petition challenging the merits of the transfer order). These decisions are of one piece with the widely recognized principle that the better course is to pause transfer of a case to a court in another circuit, to permit appellate review. *See Wright & Miller*, 15 Fed. Prac. & Proc. Juris. § 3846 (4th ed.) (“[T]he better practice, codified in some local district court rules, is to stay the effect of transfer orders for a sufficient period to enable appellate review to be sought.”). *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.”).

Given the Fifth Circuit’s substantive opinion in this case and the open questions regarding the Circuit’s expectations and mandate regarding future proceedings, there is no risk the Fifth Circuit would criticize this Court’s decision to request return and to facilitate a more orderly appellate review. By contrast, the risk that the Circuit Court would chastise a declination to request return now, especially if it foments into administrative difficulties in implementing the Fifth Circuit’s ultimate view on the propriety of transfer, is substantial.

The Government’s reference to “treating this case like a yo-yo” and suggestion that promptly requesting return of the case would burden the judicial system are misplaced. Opp. at 2. Plaintiffs are requesting this Court to issue a one-page request to the court in Washington. And then an administrative act there—digitally transferring the file back—that was accomplished in hours, if not minutes, by this Court, prior to the transfer decision even having been served on the parties. An actual burden on the judicial system would be progressing this case in the incorrect forum, at least as far as the Fifth Circuit may be concerned, and any frustration of the Fifth Circuit’s ability to implement its position on the inter-circuit transfer of this case.

This Court should avoid the chaos and Circuit Court frustration that occurred in *Defense Distributed* and follow the better practice of keeping the case in this Court until the Fifth Circuit can review the transfer order, a practice that now must be accomplished by requesting the case’s return. *In re Nine Mile Ltd.*, 673 F.2d at 243-44.

Dated: January 29, 2024

Respectfully submitted,

/s/ Michael J. Edney

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 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 _____
Michael J. Edney