IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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. 1:24-cv-00167-JMC The Honorable Jia M. Cobb

REPLY OF COMMODITY FUTURES TRADING COMMISSION TO PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION FOR STAY OF PROCEEDINGS AND BRIEFING ON REQUEST FOR RETRANSFER

INTRODUCTION

The main Plaintiffs in this case are a D.C. political consulting firm and a betting platform it operates, Aristotle, Inc. ("Aristotle"), and Predict It Inc. ("PredictIt"), respectively. The two firms share an office building on Pennsylvania Avenue, S.E., a fifteen-minute walk from the E. Barrett Prettyman United States Courthouse. However, when they sued the Commodity Futures Trading Commission ("CFTC" or "Commission"), an independent federal agency headquartered in the District of Columbia, they filed their complaint in the Western District of Texas. To do so, they paired with a single bettor on the PredictIt platform, and listed him first in the case caption.

The CFTC immediately moved for a transfer of venue to the District of Columbia.

Aristotle and PredictIt responded by adding five more plaintiffs from Texas, along with two others. Nevertheless, the assigned Magistrate Judge recommended that the Commission's motion be granted. Prior to the District Court's consideration of the Magistrate Judge's recommendation, the Plaintiffs immediately lodged an interlocutory appeal in the Fifth Circuit, contesting the District Court's non-action on their motion for preliminary injunction.

On remand, the CFTC renewed its transfer motion. Like the Magistrate Judge had done, the District Court rejected Aristotle and PredictIt's geographic maneuvering and transferred the case here, where all the main parties are located and the events giving rise to the lawsuit occurred. The District Court found that the public interest factors of court congestion and local interest both weighed heavily in favor of transfer.

With their initial attempt to shop for a favorable jurisdiction now foundering, Plaintiffs next went *judge* shopping. They filed a petition for a writ of mandamus in the Fifth Circuit, and repeatedly asked the Court Clerk's office to depart from the usual assignment procedure and assign three specific judges—the same panel who had favorably ruled on their interlocutory appeal. The Clerk declined the request.

On February 21, 2024, the CFTC moved this Court, in the event it received a request for retransfer, to stay proceedings and schedule briefing on whether the case should be returned to the Western District of Texas. Dkt. 63. The Western District of Texas, which originally ordered transfer, has now requested return of case pursuant to a writ of mandamus by the Fifth Circuit Court of Appeals. Dkt. 69-1.

It is undisputed that neither the Fifth Circuit nor the Western District of Texas currently has jurisdiction over this case, which is why the Fifth Circuit writ resulted in a request, not an order, to this Court. *Def. Distrib. v. Bruck*, 30 F.4th 414, 423-24 (5th Cir. 2022); *Starnes v.*

McGuire, 512 F.2d 918, 924-25 (D.C. Cir. 1974); *Def. Distrib. v. Platkin*, 2022 WL 14558237 at *2, *4 (D.N.J. Oct. 25, 2022); *Def. Distrib. v. Platkin*, 617 F. Supp. 3d 213, 240 (D.N.J. 2022).

In their Response in Opposition to the CFTC's February 21 motion, Dkt. 67 ("Response"), Plaintiffs, ask the Court to treat the non-binding request as mandatory, and comply with it by rote, as a matter of comity. However, as the Court with jurisdiction over the case, this Court has a responsibility to consider all relevant factors before acting. "The federal courts spread across the country owe respect to each other's efforts but each has an obligation to engage independently in reasoned analysis." *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987). In this case, comity is far outweighed by the close connection of the case to this district; and the reasons the Fifth Circuit gives for retransfer are inconsistent with the law and practice in this circuit and unpersuasive on their own terms. This Court should not decide on retransfer until the issue has been briefed and the Court has considered the issue in a deliberative fashion.

BACKGROUND

This case is about the operation of PredictIt, an event contract market that enables traders to bet on the outcome of elections. PredictIt is operated by two companies, Aristotle and PredictIt, that share an office building in the 200 block of Pennsylvania Avenue, S.E., in Washington, D.C. Second Amended Complaint, Dkt. 55 ("SAC") ¶¶ 37, 38; *see* https://capitolhillbid.org/go/predict-it; www.aristotle.com/contact-us/ (accessed March 8, 2024). Aristotle is a political consulting firm whose website boasts of its location on Capitol Hill and services provided to presidents and congressional campaigns. SAC ¶ 38; *see* www.aristotle.com; www.aristotle.com/about (accessed March 6, 2024). PredictIt is a subsidiary of Aristotle. SAC ¶ 37. Aristotle and PredictIt challenge the withdrawal of a 2014 no-action letter regarding the

operation of an unnamed political event contract market that was issued to Victoria University of Wellington, New Zealand by the Director of the Commodity Futures Trading Commission ("CFTC") Division of Market Oversight ("DMO"), a CFTC official whose office is in the CFTC headquarters building in Washington, D.C.[1] SAC ¶ 7, Ex. 1 and ¶ 69. The 2022 DMO letter withdrawing the no-action letter was issued by the same official in the same location; as was a 2023 letter that is also challenged by Plaintiffs, which superseded the 2022 letter. SAC Ex. 2, Ex. 3.

Despite the District of Columbia location of the business entities that operate PredictIt, the challenged DMO decisions, and the conduct by those entities that triggered the challenged decisions, Aristotle and PredictIt sued the CFTC in the Western District of Texas. Dkt. 1; *see* SAC Ex. 3. They sought to establish venue by including as a Plaintiff a single PredictIt trader who resides in Austin, Texas. Dkt. 1 ¶¶ 18, 21. The other Plaintiffs were Aristotle, PredictIt, and traders and users of PredictIt data located in Michigan, New Jersey, and New York. Dkt. 1 ¶¶ 22-24, 26-27. According to Plaintiffs, PredictIt is used by thousands of traders throughout the United States and data generated by PredictIt is used by academics around the world. Dkt. 1 ¶ 32; SAC ¶¶ 4, 50. Plaintiffs have never explained why they chose to file suit in the Western District of Texas rather than Washington, D.C. or some other district where persons named as Plaintiffs are located.

On September 20, 2022, eleven days after suit was filed, the CFTC moved to transfer

[1] The no-action letter was issued to Victoria University of Wellington, New Zealand for the operation of a small-scale political event contract market for educational purposes. SAC Ex. 1 at 2. The University represented to the CFTC that Aristotle would carry out certain limited functions in connection with the market, specifically age and identity verification as part of a "know your customer" process. *Id*. at 3 n.4. However, it is undisputed that Aristotle and PredictIt now operate the event contact market known as PredictIt with only limited involvement by the University. Dkt. 52 at 4. Victoria University has not sought judicial review of the withdrawal of the no-action letter and is not a plaintiff in this lawsuit. *See* SAC ¶¶ 17, 37-38, 92, 107(c), 115(a)-(b), and 118.

venue to the District of Columbia. Dkt. 8. Prompted by the CFTC's motion to transfer, Plaintiffs amended their complaint on October 6, 2022 to add five market users from Austin and two from Massachusetts and Ohio as Plaintiffs. Dkt. 15. Plaintiffs have not identified any material differences between PredictIt traders and data users in the Western District of Texas and other PredictIt users; and have never alleged that PredictIt plays an economic, political, or other role in the Western District of Texas that differs from its role elsewhere in the United States.

On December 12, 2022, the Magistrate Judge issued a report recommending transfer to the District of Columbia, Dkt. 31. On December 23, 2022, Plaintiffs appealed the original judge's delay in ruling on its previously filed motion for a preliminary injunction to the Fifth Circuit. Dkt. 32. The District Court Judge assigned to the case never acted on the transfer report. On May 12, 2023, a newly assigned judge denied the CFTC's transfer motion without prejudice subject to re-urging. Dkt. 38. The Fifth Circuit ordered entry of a preliminary injunction on July 21, 2023. *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023). On remand, the CFTC renewed its motion to transfer. Dkt. 50. Like the Magistrate Judge who reported on the CFTC's original motion, the District Court rejected Aristotle and PredictIt's geographic maneuvering and, on January 17, 2024, ordered that the case be transferred to the District of Columbia. Dkt. 61.

In its decision ordering transfer, the District Court determined that the private interest factors normally considered under 28 U.S.C. § 1404(a), such as cost of attendance of witnesses, were neutral because this case involves review under the Administrative Procedure Act ("APA") and would likely be decided based on the agency record. Dkt. 61 at 8. The Court found that the public interest factor of court congestion favored transfer based on the multiple delays in this case and the Court's knowledge of its own heavy docket. *Id*. at 9-10. Finally, the Court found

that the public interest factor of local interest favored transfer. Based on Fifth Circuit precedent, the Court gave lesser weight to the presence of some PredictIt users in Austin, Texas because this interest could apply to any judicial district in the United States. *Id*. at 10-11. By contrast, it found that the two entities that operate PredictIt are located in the District of Columbia and possibly could suffer the greatest economic harm. *Id*. Weighing these considerations against Plaintiffs' choice of forum, the Court found that the two public interest factors strongly favored transfer. *Id*. at 11.

Pursuant to the transfer order, the case file was transferred and the case was docketed in this Court on January 19, 2024. Dkt. 62. On January 20, 2024, Plaintiffs moved the Western District of Texas to stay the transfer to keep jurisdiction in the Western District of Texas while Plaintiffs sought review in the Fifth Circuit. Dkt. 63 (W.D. Tex.). The District Court denied the motion for lack of jurisdiction, since jurisdiction had already shifted to this Court. Dkt. 66 (W.D. Tex.). The Western District Court noted that Plaintiffs, in their pre-transfer briefing, had not requested a stay; and that there was no authority requiring a court in the Western District of Texas to stay a transfer order *sua sponte*.[2] *Id*. at 3.

Plaintiffs then moved the Western District Court to request return of the case from this Court without waiting for a ruling from the Fifth Circuit on the merits of the transfer. Dkt. 67 (W.D. Tex.). This motion was denied on February 1, 2024. Dkt. 70 (W.D. Tex.). The Court stated that it remained convinced that venue in the District of Columbia was more appropriate and that the case likely would have been transferred pursuant to the Magistrate Judge's recommendation in 2022 but for the Western District of Texas's congested docket. *Id.* at 7. The

[2] Plaintiffs' Response asserts that the file was only transferred and the case docketed in this Court on January 19 because of an "administrative accident." Dkt. 67 at 1. However, since no Western District of Texas rule or other authority required a *sua sponte* stay, the transfer involved no error but only the prompt execution of the Western District Court's order by the clerk's office.

Court noted that the D.C. District Court judge assigned to this case is also handling another case involving the CFTC and political event contracts, *KalshiEx, LLC v. Commodity Futures Trading Comm'n*, 1:23-cv-03257-JMC (D.D.C.), putting the D.C. District Court in a better position to consider the merits of Plaintiffs' arguments here. Dkt. 70 (W.D. Tex.) at 8 n.1. The Court also rejected Plaintiffs' argument that the Fifth Circuit decision ordering entry of a preliminary injunction had effectively resolved the merits of the underlying litigation. *Id*. at 4-7. The Court stated that it found it "curious … why Plaintiffs are fighting so hard to keep venue here" and that it found "Plaintiffs' arguments that the CFTC seeks to forum shop a bit of a contradiction given that Plaintiffs, at nearly every opportunity, have attempted to appeal this Court's orders (or inaction given the congested docket) to the Fifth Circuit, suggesting their own preferred forum." *Id*. at 7.

On February 2, 2024, Plaintiffs filed a petition for a writ of mandamus in the Fifth Circuit. *In re: Clarke*, No. 24-50079 (5th Cir.), Dkt. 4. The petition asked the Fifth Circuit to order the Western District of Texas to request return of the case to Fifth Circuit jurisdiction even before the Fifth Circuit ruled on the merits; and to then reverse the transfer order. *Id*. Plaintiffs' primary argument against transfer was that allowing transfer in this case would set a precedent centralizing all APA litigation in the District of Columbia and would deprive the Fifth Circuit of its ability to review important federal actions. *See id*. at 22-30. Plaintiffs made this argument despite the fact that this case only involves a single unregistered trading platform and is distinguishable from almost all other APA litigation because the businesses operating the platform are physically located in the District of Columbia. The mandamus petition was opposed by the CFTC and the District Court judge. *In re: Clarke*, No. 24-50079, Dkt. 21, 24, 43.

In an apparent effort to obtain favorably inclined judges, Plaintiffs asked the Fifth Circuit

Clerk to depart from normal procedures and assign their mandamus petition to the panel that had ruled on their preliminary injunction appeal, even though that panel had not retained jurisdiction or addressed venue. *Id.* at Dkt. 6. This request was denied.

On March 1, 2024, the Fifth Court of Appeals issued an opinion finding the transfer order to be an abuse of discretion. *Id.* at Dkt. 51. A writ ordering the Western District of Texas to request retransfer was issued on March 7, 2024. *Id*. at Dkt. 58.

The Fifth Circuit opinion found no abuse of discretion in the District Court's determination that court congestion favored transfer but held that congestion, by itself, cannot justify transfer. *Id*. at Dkt. 51 at 7, 17. With respect to local interest, the Court of Appeals rejected the District Court's determination that this factor favored venue in the District of Columbia. The Court of Appeals endorsed the District Court's decision to give little weight to the presence of PredictIt users in Austin because market users also existed other judicial districts. *Id*. at 8-9. But it held that the District Court's evaluation of local interest in Aristotle and PredictIt erred by focusing on the connection between these entities and the District of Columbia when it should have focused on the connections between the potential venue districts and "the events that gave rise to [the] suit." *Id*. at 9. The Court of Appeals then found the local interest factor to be neutral because, in its view, relevant events occurred in both the Western District of Texas and the District of Columbia. *Id*. at 11-12. However, while the Court of Appeals observed that "[a]t bottom, the transfer factors are *relative*," *id*. at 8 (emphasis in original), its opinion contained no weighing of the relative contribution of events in Austin and D.C. to Plaintiffs' claims. *Id*. at 11-12. The Court of Appeals also asserted that, if Plaintiffs won the case, reinstatement of the 2014 no-action letter would affect "persons in all judicial districts equally." *Id*. at 12. But the opinion gave no explanation why the direct and concentrated effects

of a favorable ruling on the operators of PredictIt should be considered "equal" to the indirect and diffuse effects on PredictIt's dispersed customers. *Id*.

The Court of Appeals also held that the District Court erred by not crediting Plaintiffs' claim that trial testimony, and associated witness travel costs, might be needed for Plaintiffs to prove standing, specifically in the form of testimony by a PredictIt trader located in Austin, Texas. *Id*. at 12-16. The Court of Appeals dismissed the CFTC's argument that standing issues in APA cases are normally decided based on declarations, despite the fact that the trader in question had already submitted two declarations regarding standing in this case in response to CFTC motions. *Id.* at 14-15 and 14 n.18; *see* Dkt. 23, Ex. 3 and Dkt. 30, Ex. 3. Based on its determination that the local interest factor was neutral, and its crediting the claim that in-court testimony might be needed to prove standing, the Fifth Circuit found that the District Court abused its discretion and ordered the Court to request retransfer.

The Fifth Circuit decision is not binding on this Court because the decision was issued after jurisdiction had transferred to this Court and because, in any event, the Fifth Circuit Court of Appeals lacks authority to issue mandates to district courts outside the Fifth Circuit. *See Def. Distrib.* 30 F.4th at 423; *Starnes*, 512 F.2d at 924-25; *Def. Distrib. v. Platkin*, 2022 WL 14558237 at *2, *4; *Def. Distrib. v. Platkin*, 617 F. Supp. 3d at 240. The Fifth Circuit's reasoning can be evaluated as non-controlling persuasive precedent, as discussed in Argument II, *infra*, but cannot substitute for this Court's own judgment.

ARGUMENT

I. THIS COURT SHOULD INDEPENDENTLY EVALUATE THE ISSUES BEFORE DETERMINING WHETHER TO RETAIN JURISDICTION OR RETRANSFER THE CASE TO THE WESTERN DISTRICT OF TEXAS

Plaintiffs' Response, at bottom, rests on several cases in which transferee district courts

have voluntarily complied with requests for retransfer. Response at 5, citing *CCA Glob. Partners, Inc. v. Yates Carpet, Inc.*, No. 5:05-CV-221, 2005 WL 8159381, at *1 (N.D. Tex. Dec. 22, 2005); *Billings v. Ryze Claim Solutions, LLC*, No. 1:19-CV-01038, Dkt. 120 (E.D. Cal. Jan. 27, 2021); *Warrick v. General Electric Co.*, No. 3:95-CV-01661, Dkt. 4 (M.D. Pa. Dec. 11, 1995); *In re Nine Mile Ltd.*, 692 F.2d 56, 58 (8th Cir. 1982) (describing action of district court). The key word here is *voluntarily*. In none of these cases is there any holding that retransfer was legally required. In all but *CCA*, we have no record of the district court's reasoning at all, but only a docket entry, brief order, or reference to retransfer in a later opinion. In *CCA*, the transferor district court only acted on the retransfer request after the plaintiff moved for retransfer and there was full briefing by the parties. 2005 WL 8159381 at *1. In ordering retransfer, the *CCA* court cited no authority requiring retransfer, and made clear that it was doing so in its own discretion "in the interest of justice." *Id* at *2. The Court of Appeals cases cited by Plaintiffs similarly contain no holding, or even suggestion, that compliance with requests for retransfer is obligatory. *See* Response at 5*, In re Ryze Claims Solution LLC*, 968 F.3d 701 (7th Cir. 2020); *In re Warrick*, 70 F.3d 736, 737 (2d Cir. 1995) (stating that in ordering request for retransfer "we recognize that we have no power to compel the Pennsylvania court to comply with the request"); *In re Sosa*, 712 F.2d 1479, 1480 n.1 (D.C. Cir. 1983) (noting possibility of informal request for retransfer but not ordering such a request); *In re Nine Mile Ltd*., 673 F.2d 242, 244 n.5 (8th Cir. 1982) (noting possibility that transferee court might not honor request for retransfer and outlining remedies available in transferee court); *Fine v. McGuire*, 433 F.2d 499, 500 n.1 (D.C. Cir. 1970) (stating that District of Maryland complied with D.C. Cir. request to return case but not stating that District of Maryland was required to do so or otherwise analyzing standards for retransfer).

There are a number of reasons why this Court not only can but should order briefing and make an independent determination on retransfer, taking comity into account but also evaluating other factors relevant to choosing the most appropriate venue.

First, as is apparent from the procedural history set forth above, this case has much closer connections to the District of Columbia than to the Western District of Texas.

Second, now that the case has been transferred to the District of Columbia, this Court is required to apply the law of the District of Columbia Circuit to federal law issues before it.[3] *Hartline v. Sheet Metal Workers' National Pension Fund*, 286 F.3d 598, 599 (D.C. Cir. 2002); *Korean Air Lines Disaster*, 829 F.2d at 1175-76; *Mesa Power Group, LLC v. Government of Canada*, 255 F. Supp. 3d 175, 181 (D.D.C. 2017) (collecting cases). The D.C. Circuit adopted this rule based on the principle that a district court that acquires jurisdiction as a result of a transfer "has an obligation to engage independently in reasoned analysis" and is only bound by precedent from the Supreme Court and the Court of Appeals for its own circuit, not precedent from a transferor circuit. *Korean Air Lines Disaster*, 829 F.2d at 1176. The D.C. Circuit also adopted this rule to put constraints on forum shopping among circuits. "[T]here is no compelling reason to allow [a] plaintiff to capture the most favorable interpretation of [federal] law simply and solely by virtue of his or her right to choose the place to open the fray." *Id*. at 1175. Simply

[3] Notably, principles of law of the case apply to rulings by transferor courts that were issued before jurisdiction transferred to a new court. *See*, *e.g.*, *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1520 (10th Cir. 1991); *Mesa Power Group*, 255 F. Supp. 3d at 181. However, the Fifth Circuit mandamus decision was issued after the case was transferred. *See Chrysler*, 928 F.2d at 1520 (holding that "rulings made prior to transfer" are law of the case). District court decisions to transfer are often treated as law of the case because those decisions necessarily were issued before transfer was consummated and because treating them as law of the case reduces the chance of cases unstably moving back and forth between districts. *See*, *e.g.*, *Christianson v. Colt. Indus. Operating Corp*., 486 U.S. 800, 816 (1988). Thus, to the extent that law of the case principles apply to any of the prior venue rulings, they apply only to the original Western District of Texas transfer order since that is the only venue order issued before the transfer was completed.

deferring to the Fifth Circuit mandamus decision is inconsistent with these principles.

Plaintiffs suggest that there are no differences between the Fifth Circuit and D.C. Circuit standards for venue transfer, Response at 8. However, while there are broad similarities, the mandamus decision differed from D.C. Circuit practice in important respects, discussed in Argument II, *infra*. In any event, the logic of the cases just discussed is that this Court needs to make an independent judgment concerning venue.

Third, while the D.C. Circuit Court of Appeals has recognized that informal requests for retransfer are a sometimes a procedural option, it has stated that the "appropriate" way to challenge a transfer of venue, once jurisdiction has transferred, is to move for retransfer in the transferee court and, if the motion is denied, pursue an appeal in the Court of Appeals for the transferee circuit. *Sosa*, 712 F.2d at 1480; *Starnes*, 512 F.2d at 924. To date, Plaintiffs have filed no such motion in this Court.

Fourth, the CFTC is aware of three cases in which district courts faced with requests, or potential requests, for retransfer have issued decisions addressing the issue and explaining their choices.[4] In *CCA*, discussed above, the district court made a discretionary decision to return the case. In *Def. Distrib. v. Platkin*, the district court determined not to comply with a request for retransfer and issued two decisions explaining its reasoning in detail. 2022 WL 14558237; 617 F. Supp. 3d at 213. Plaintiffs argue that *Def. Distrib.* is distinguishable based on its facts, Response at 6-7, but there is no question that the case strongly supports the principle that a district court faced with a post-transfer request for retransfer can properly make an independent evaluation of whether retransfer is the most appropriate course of action. *Def. Distrib. v. Platkin,* 2022 WL 14558237; 617 F. Supp. 3d at 213. The third case is *Redding v. Mayorkas*, 2024 WL

[4] The CFTC is aware of no appellate decisions reviewing district court decisions responding to retransfer requests.

663038 (E.D. Va. February 5, 2024) (appeal pending). In *Redding* a plaintiff filed suit in the United States District Court for the District of Columbia and that court transferred the case to the Eastern District of Virginia. *Id*. at *2. Shortly after the transfer was completed, the plaintiff petitioned for a writ of mandamus in D.C. Circuit and also moved for a stay of proceedings in the Eastern District of Virginia pending resolution of the mandamus proceedings. *Id*. The Eastern District of Virginia denied the stay on the ground that the petition for mandamus was futile due to the D.C. Circuit's loss of jurisdiction. *Id*. at *3-4. As part of its analysis, the Eastern District acknowledged that the D.C. Circuit might direct the D.C. district court to request retransfer of the case. *Id*. at *4. However, the Eastern District stated that, in that event, it would still need to make an independent determination whether to return the case and would be unlikely to do so based on the facts set forth in original transfer opinion by the D.C. district court. *Id*. *citing Def. Distrib. v. Platkin*, 617 F. Supp. 3d at 240. Thus, the limited available precedent directly ruling on how a district court should respond to a request for retransfer supports making an independent judgment.

Finally, comity concerns are greatest when there is a risk of parties becoming subject to conflicting orders from different courts. *See*, *e.g.*, *Def. Distrib. v. Platkin*, 617 F. Supp. 3d at 240. There is no risk of that outcome here. Even if this Court were to disagree with the Fifth Circuit mandamus order on the subject of venue, that would not result in any parties being subject to conflicting orders since this Court now has jurisdiction and the Fifth Circuit writ is not binding on any parties. This is particularly true since the writ merely directed the Western District of Texas to make a non-binding request.

Thus, this Court should order briefing and make an independent determination with respect to the request for retransfer.

II. THIS COURT SHOULD NOT DEFER TO THE REASONING OF THE FIFTH CIRCUIT MANDAMUS OPINION AS PERSUASIVE PRECEDENT WITHOUT INDPENDENTLY EVALUATING IT BECASE THE OPINION IS INCONSISTENT WITH THE LAW OF THIS CIRCUIT AND OTHERWISE FLAWED.

For reasons already discussed, *supra*, the Fifth Circuit mandamus opinion is not binding on this Court. It can properly be considered as persuasive precedent from another circuit but its reasoning should not be adopted uncritically. Some examples of the reasons why include:

Under the law in this circuit, the location of "the material facts that form the factual predicate of a plaintiff's claim" are an important factor for determining venue under 28 U.S.C. § 1414(a). *Ngonga v. Sessions*, 318 F. Supp. 3d 270, 275 (D.D.C. 2018). In cases involving judicial review of agency action under the APA, this location is generally considered to be the location "where the [agency] decision making process occurred."[5] *Id.* *See also*, *e.g.*, *Alaska Wilderness League v. Jewell*, 99 F. Supp. 3d 112, 119-20 (D.D.C. 2015); *National Association of Home Builders v. U.S. Environmental Protection Agency*, 675 F. Supp. 2d 173, 179 (D.D.C. 2009). By contrast, the mandamus opinion assigned no weight to the location of the decision-making process here.

Under the law in this circuit, determining appropriate venue under 28 U.S.C. § 1404(a) generally involves a weighing of relevant factors against one another. *See*, *e.g.*, *Ariachak Native Cmty. v. Dept. of Interior*, 502 F. Supp. 2d 64, 67 (D.D.C. 2007); *Intrepid Potash-New Mexico, LLC v. U.S Dept. of Interior*, 669 F. Supp. 2d 88, 93 (D.D.C. 2009). The mandamus opinion agreed in principle, stating that "the transfer factors are *relative*." *In re: Clarke*, No. 24-50079,

[5] This factor does not imply that all APA cases are heard in the District of Columbia. As reflected in the cases cited in the text, federal agency decisions are often made outside of Washington, D.C. and, in many cases, specialized local interests or other venue considerations can outweigh the factor of the location of the decision-making process. But, for reasons set forth in the Background section, *supra*, that is not true in this case.

Dkt. 51 at 8 (5th Cir.) (emphasis in original). However, in practice, the opinion did not carry out this weighing for the crucial issue of local interest, finding this factor neutral while making no effort to evaluate the relative interests of Austin, Texas and Washington, D.C. in this case. For example, in *Alaska Wilderness League*, a case involving regulation of oil and gas exploration in the ocean off Alaska, the court transferred venue to Alaska, despite some national implications of the case, because the case "most *directly* affects" Alaska and the decision will be "felt most acutely" there. 99 F. Supp. 3d at 117 (emphasis in original). By contrast, the mandamus opinion made no effort to compare the direct and acute connection of Aristotle and PredictIt to the events giving rise to this case with the indirect and diffuse connection of PredictIt users.

Finally, this Court can take notice based on its own experience that there is little likelihood that witnesses will need to appear in court merely to establish standing in a case of this sort. A plaintiff "must support each element of its claim to standing *'by affidavit or other evidence.'"* *Ams. for Safe Access v. Drug Enforcement Admin.,* 706 F.3d 438, 443 (D.C. Cir. 2013) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992)) (emphasis added). The D.C. Circuit has recognized that an APA plaintiff's standing may not always be evident from the administrative record, so affidavits or other evidence outside of the record may be necessary to establish injury. *Sierra Club v. EPA,* 292 F.3d 895, 900-01 (D.C. Cir. 2002). The absence of any need for in-court testimony on standing is particularly clear since the one Texas witness mentioned by Plaintiffs, Kevin Clarke, has already submitted two declarations on the subject (*see* Dkt. 23, Ex. 3 and Dkt. 30, Ex. 3), and the CFTC's motion to dismiss challenging standing was based on issues of law, not fact. *See* Dkt. 19. Moreover, if live testimony were needed to establish standing in this case, it is unclear why that would be true for only one of the thirteen plaintiffs. Of these, six are located in Austin, two (Aristotle and PredictIt) are located a mile

from this Court in the District of Columbia, and the remaining five are located in states, such as New Jersey, Massachusetts, and Ohio, that are closer to D.C. than to the Western District of Texas.

Thus, while the Court can properly consider the reasoning of the Fifth Circuit mandamus opinion as persuasive precedent, it cannot properly rely on it without scheduling briefing and making an independent judgment.

CONCLUSION

The CFTC thus respectfully requests that this Court stay all proceedings in this matter until the issue of retransfer of this case has been briefed and the Court has considered the issue in a deliberative fashion.

Respectfully submitted,

/s/ *Martin B. White*
Robert A. Schwartz (D.C. Bar No. 489240)
General Counsel
Anne W. Stukes (D.C. Bar. No. 469446)
Deputy General Counsel
Martin B. White (D.C. Bar. No. 221259)
Senior Assistant General Counsel
U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581
Phone: (202) 993-1390
Fax: (202) 418-5567
mwhite@cftc.gov

CERTIFICATE OF SERVICE

I certify that on March 12, 2024, I caused the foregoing document 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