**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| 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,<br><br>*Plaintiffs*,<br>v.<br><br>COMMODITY FUTURES TRADING COMMISSION,<br><br>*Defendant*. | Civil Docket No. 1:24-cv-00167-JMC<br><br>The Honorable Jia M. Cobb |

**DEFENDANT CFTC'S SUPPLEMENTAL BRIEFING OPPOSING RETRANSFER OF THIS CASE TO THE WESTERN DISTRICT OF TEXAS**

In its Reply in support of its February 21, 2024 motion for briefing and a stay, the CFTC explained why this case belongs in this district and why the Court is under no compulsion to retransfer the case in response to a non-binding request from a court in another circuit that no longer has jurisdiction. Dkt. 71. A number of lines of additional statutory and judicial authority strongly support the CFTC's position.

## I. Plaintiffs' have not met their burden of showing that this case should be retransferred to the Western District of Texas.

In the procedural posture of this case, the only possible statutory basis for retransfer is 28

U.S.C. 1404(a).[1] The requested retransfer is thus a new transfer for convenience governed by section 1404(a); and Plaintiffs have the burden of justifying transfer under that statute. *See, e.g.*, *Def. Distrib. v. Platkin*, 617 F. Supp. 3d 213, 225 (D.N.J.) (analyzing court request and motion for retransfer under section 1404(a) standards). As discussed in Argument II, Plaintiffs' burden is even higher because the law in this circuit strongly discourages retransfer. But even under normal section 1404(a) standards, Plaintiffs have failed to meet their burden. *See generally Wilderness Workshop v. Harrell*, 2023 WL 3879505 at *3 (D.D.C. June 8, 2023) (summarizing standards for transfer in D.C. Circuit).

Plaintiffs have presented no rebuttal of the reasons for litigating this case in this district. *See* Response, Dkt. 67. Plaintiffs have not rebutted the close ties of this case to the District of Columbia or the Western District of Texas's finding that court congestion favors the District of Columbia.[2] *Id*. And Plaintiffs' argument before the Fifth Circuit that a witnesses might need to travel from Texas is inconsistent with D.C. Circuit law, under which injury and standing are normally established by declarations. *See* Reply at 15-16. Plaintiffs refer to the Fifth Circuit mandamus decision. Response, Dkt. 67 at 3-4. But, as explained in the CFTC's Reply, that decision was issued after the Fifth Circuit lost jurisdiction and is non-binding out-of-circuit

[1] Since venue is legally permissible in this district, 28 U.S.C. § 1406, providing for cure of legally defective venue, does not apply. 28 U.S.C. § 1404(a) is thus the only possible statutory authority for retransfer.

[2] The closest Plaintiffs come is an assertion that, for purposes of determining localized interest in a case, courts should focus on the interest of non-party citizens. Dkt. 67 at 8, citing *Adams v. Bell*, 711 F.2d 161, 167 n.34 (D.C. Cir. 1983) and *Wolfram Alfa LLC v. Cuccinelli*, 490 F. Supp. 3d 324, 338 (D.D.C. 2020). But *Wolfram Alfa* makes clear that the citizens of a judicial district have an interest in government decisions made in their district and in the regulation of businesses located there. *Id*. at 338-39. The localized interest of the citizens of the District of Columbia in the regularity of government decisions made in their district and in protecting local businesses against allegedly irregular government action thus supports venue in the District of Columbia in this case. *See* Reply, Dkt. 71 at 3-4 (describing location of government decision and regulated businesses in this case).

precedent. Reply at 9. As also explained in the CFTC's Reply, the reasoning in the decision is inconsistent with the law in this circuit. Reply at 14-16.

Plaintiffs fall back on "comity." Dkt. 67 at 2. But, as explained in Argument III, *infra*, comity, in this circuit, does not require avoidance of all disagreements with other courts and has limited relevance to this case. As a result, Plaintiffs have not met their burden under section 1404(a) and the case should be retained in this district.

**II. D.C. Circuit precedent discourages retransfer.**

In a number of cases, the D.C. Circuit has stated that district courts in this circuit should not "directly review" transfer orders by other district courts. *E.g.*, *Starnes v. McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974); *see FMC v. U.S. E.P.A.*, 557 F. Supp. 2d 105, 109-110 (D.D.C. 2008) (collecting cases).[3] However, the reasoning of these cases does not apply to the Fifth Circuit mandamus decision in this case, and supports keeping this case in this district.

The cases in question concern district court decisions, like the original Western District of Texas transfer order in this case, transferring a case into this district. *See*, *e.g.*, *FMC*, 557 at 109-110. The admonishment against "reviewing" transfer orders is based on two considerations: (a) law of the case principles; and (b) avoiding situations where cases shuttle between two districts. *See FMC*, 557 F. Supp. 2d at 109-110. The first consideration, law of the case, does not apply to the Fifth Circuit mandamus decision because that decision was issued after the Fifth Circuit no longer had jurisdiction. *In re Clarke*, 94 F.4th 502 (5th Cir. March 1, 2024); *see Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1520 (10th Cir. 1991) (stating

[3] *FMC* suggests that the proper forum for challenging a transfer order is the transferor circuit, 557 F. Supp. 2d at 110, but *Starnes* makes clear that that is so only until the transfer is completed; and that once the transfer has occurred, the appropriate forum in which to challenge a transfer order is the transferee circuit. 512 F.2d at 924.

that "rulings made prior to transfer" are law of the case). The same is true of the Western District of Texas's request for retransfer, Dkt. 70, which was made after that court lost jurisdiction and which, in addition, is a request for voluntary action, not a legal holding to which law of the case applies. Thus, to the extent law of the case principles apply here, they apply only to the original transfer order, Dkt. 61, the last order made by a court outside this district with jurisdiction over this case. The second consideration, avoiding the shuttling of cases back-and-forth between courts, favors keeping the case in this district, now that it has been transferred. Thus, overall, D.C. Circuit precedent is skeptical of retransfer, providing additional support for keeping this litigation in this district.

In addition, in the procedural posture of this case, the CFTC is not asking this Court to "review" the Fifth Circuit mandamus decision. Rather, as the only court with jurisdiction over this case, this Court should make an independent determination regarding retransfer, applying the law of this circuit and viewing the Fifth Circuit like other out-of-circuit precedent, entitled to weight to the extent it is convincing and not inconsistent with the D.C. Circuit law. As noted above, however, the mandamus decision is not consistent with the law in this circuit and its reasoning does not justify retransfer.

**III. Comity, as normally applied in this circuit, does not justify retransfer.**

As noted above, Plaintiffs rely almost exclusively on "comity" as grounds for retransfer. In its Reply, the CFTC pointed out that comity does not require deference to decisions in another circuit merely to avoid disagreement. Dkt. 71 at 13. This position is strongly supported by D.C. Circuit precedent. Courts in this circuit normally invoke comity to avoid situations where substantially the same case is litigated in two different courts at the same time, with the associated harms—not present here—of wasted judicial resources and the risk of parties

becoming subject to conflicting court orders. *Washington Metropolitan Area Transit Authority v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980) summarized the doctrine as follows: "Considerations of comity and orderly administration of justice dictate that two courts of equal authority should not hear the same case simultaneously." *See also, e.g.*, *UtahAmerican Energy, Inc. v. Department of Labor*, 685 F.3d 1118, 1124 (D.C. Cir. 2012). The primary practical implication of comity is the "first to file" rule when similar cases are filed in two different courts. *E.g.*, *Ragonese*, 617 F.2d at 830.

The D.C. Circuit has made clear that application of comity should be limited to its proper scope. "Rather, in strictly limited circumstances, we have sometimes held that comity may warrant dismissal of an action where there is a *case pending* in another jurisdiction involving the same parties, issues, and subject matter." *Northwest Forest Resource Council v. Dombeck*, 107 F.3d 897, 901 (D.C. Cir. 1997) (emphasis in original); *see also*, *e.g.*, *Consumers Union of U.S. v. Consumer Product Safety Commission*, 590 F.2d 1209, 1218-19 (D.C. Cir. 1978) *rev'd on other grounds*, 445 U.S. 375 (1980) (stating that comity "should not be permitted to hold sway outside situations in which it was designed to apply").

In this litigation there is no "case pending" in another jurisdiction because the rules of transfer shift jurisdiction over a case from the transferor court to the transferee court at a defined point in time. *See*, *e.g.*, *Starnes v. McGuire*, 512 F.2d 918, 924-925 (1974). The rules of transfer thus avoid the problem of parallel litigation in two different courts that comity is designed to solve, making comity of little or no relevance. That comity is not the same as avoiding disagreement is made clear by *Northwest Forest*, *supra*. *Northwest Forest* did not involve a transfer but it held that comity is not a reason for a district court in this circuit to consider itself bound by the prior holding of a district court in another circuit. 107 F.3d at 900-01.

That comity does not preclude disagreement is even more strongly illustrated by *Murphy v. Federal Deposit Insurance Corp.*, 208 F.3d 959 (11th Cir. 2000). In *Murphy*, the Eleventh Circuit affirmed a ruling by the Southern District of Florida that disagreed with an earlier ruling by the D.C. Circuit Court of Appeals in the very same case. In *Murphy*, an investor sued the FDIC in the United States District Court for the District of Columbia. *Id*. at 961. The district court granted summary judgment to the FDIC based on a certain legal doctrine but the D.C. Circuit held that the doctrine had been preempted by statute and remanded. *Id*. at 961-62. The district court then transferred the case to the Southern District of Florida, which ruled for the FDIC based on the same legal doctrine that had been rejected by the D.C. Circuit. *Id*. at 962. The Eleventh Circuit affirmed, holding that the ruling was correct under Eleventh Circuit precedent. *Id*. at 964, 967-68. Importantly for present purposes, in *Murphy* there was no suggestion that the Southern District of Florida was violating comity or acting disrespectfully in disagreeing with the earlier ruling of the Court of Appeals for the D.C. Circuit in the same case. The important thing was whether the district court properly applied its own circuit law to the facts before it.[4] *Id*. at 963-65, 968. The same is true here.

Comity therefore does not justify disregarding the bedrock transfer issues in this case, including most importantly the close ties of the case to this district and the absence of any realistic likelihood that witnesses will need to travel from Texas to this district. *See* Reply, Dkt. 71 at 14-16.

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[4] In *Murphy* there was an issue of whether the D.C. Circuit ruling should have been applied as law of the case but the Eleventh Circuit held that, in the circumstances of that case, reconsideration was proper because the prior decision was clearly erroneous under Eleventh Circuit precedent and would work manifest injustice. 208 F.3d at 966. In the present case, law of the case does not even potentially apply to the Fifth Circuit mandamus decision because that decision was issued after the Fifth Circuit lost jurisdiction. *See* Argument II, *supra*.

## CONCLUSION

This case should not be retransferred to the Western District of Texas.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on March 27, 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*
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