

**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 D. MILLER, JOSIAH
NEELEY, GRANT SCHNEIDER, and WES
SHEPHERD,

Plaintiffs,

v.

COMMODITY FUTURES TRADING
COMMISSION,

Defendant.

Case No. 1:24-cv-00167

The Honorable Jia M. Cobb

**PLAINTIFFS' RESPONSE TO DEFENDANT CFTC'S SUPPLEMENTAL BRIEFING
OPPOSING RETRANSFER**

Having been given the opportunity “to identify any case law not previously cited in its prior briefing” (March 21, 2024 Minute Order), the CFTC instead presented three entirely new arguments. Dkt. 73 at 1–2 (“New Br.”). Each of these new arguments is meritless, and none of the cases cited in them supports not honoring a sister court’s request for return.

First, contrary to the CFTC’s argument (New Br. at 1–2), a new motion to transfer is not necessary and the Plaintiffs do not have a burden to show that the place where this case started is clearly more convenient. In this case, a sister court timely requested return of a transferred case, and courts have honored such requests without further analysis save the most exceptional of circumstances. Dkt. 67 at 4–8 (citing cases). The 2022 New Jersey District Court decision confronting a return request a year after transfer where the State of New Jersey was a party—after all this briefing—is still the only one suggesting a different path. *Id.* at 6–8 (distinguishing *Def.*

Distributed v. Platkin, 617 F. Supp. 3d 213 (D.N.J. 2022)).

Second, contrary to the CFTC’s argument (New Br. at 3–4), the D.C. Circuit does not discourage honoring sister court requests to return a transferred case. Instead, the D.C. Circuit recognizes that the transferor circuit is “the only appropriate forum for direct review of the transfer order,” *Starnes v. McGuire*, 512 F.2d 918, 935 (D.C. Cir. 1974) (*en banc*), and, if necessary, a return should be requested and made to accommodate that review. *Fine v. McGuire*, 433 F.2d 499, 500 n.1 (D.C. Cir. 1970). Indeed, the D.C. Circuit has been grateful when its own request for a transferee court to return a case to the D.C. District Court—made “to permit orderly consideration of” the transfer order on mandamus—was honored. *Id.*

In its third section, the CFTC tries to suggest that comity has no application to a request for return, but instead that the D.C. Circuit has somehow limited comity’s invocation to very narrow circumstances. New Br. at 4–5. The CFTC misreads cases to make this point. In *Northwest Forest Resource Council v. Dombeck*, 107 F.3d 897 (D.C. Cir. 1997), for example, the Court held that “‘comity’ is rarely employed *to justify the dismissal of viable claims* that are otherwise properly before the court.” *Id.* at 901 (emphasis added); *see also* New Br. at 5. *Northwest Forest* was all about the circumstances in which a district court can *dismiss* claims because of litigation elsewhere. *Id.* In that case, the D.C. Circuit said absolutely nothing about the use of comity for actions other than dismissal. And, at the risk of tedious repetition, the D.C. Circuit and many other courts have held that comity compels honoring a sister court’s request to return a transferred case. Comity clearly and regularly applies to the movement or transfer of cases among the district and circuit courts of our Nation.

Interwoven in the same discussion, the CFTC suggests that comity does not prohibit disagreement with a sister court’s decision, seemingly inviting a searching review of the Fifth

Circuit’s thorough mandamus decision. New. Br. at 4, 6. For this proposition, the CFTC appears to be marshalling decisions explaining the “law of the case” doctrine, which affords some deference to prior decisions in a case when a new judge has inherited it or it has been transferred. *Id.* at 6 (citing *Murphy v. FDIC*, 208 F.3d 959 (11th Cir. 2000)). Those cases, however, concern the extent of the duty to accept *substantive* decisions dispositive of merits issues. *Murphy*, 208 F.3d at 967–68 (after transfer, discussing comity’s role in implementing a prior substantive decision that would end much of the case). Even in these circumstances, the Eleventh Circuit said comity required it to find the prior decision “clearly erroneous” and working a “manifest injustice,” to chart a different course. *Id.* at 966; *see also FMC Corp. v. U.S. E.P.A.*, 557 F. Supp. 2d 105, 109 (D.D.C. 2008) (comity precludes “reconsideration of one judge’s ruling by a different judge . . . unless ‘convinced that it is clearly erroneous and would work a manifest injustice.’” (quoting *Arizona v. California*, 460 U.S. 605, 619 n.8 (1983))). The CFTC has not even tried to meet that standard here.

In any event, it is far from clear that even that largely deferential review is warranted with respect to a sister court’s request to return the case to where it started. These issues are important, but are not substantive merits issues, and go to questions about how cases are distributed among this Nation’s many courts, an issue with regard to which the facilitating influence of comity is particularly needed. *E.g.*, *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) (each involving an honored retransfer requested).

The CFTC’s many filings are before this Court because of a clerk’s nearly instantaneous

click of a mouse. *In re Clarke*, 94 F.4th 502, 507 n.1 (5th Cir. 2024). The Fifth Circuit decided its district court made a mistake. *Id.* at *passim*. The CFTC has presented no reason for this Court to create “unseemly tension between federal jurisdictions” by keeping this case following a published mandamus opinion from the Fifth Circuit and corresponding request for retransfer from a sister district court. *In re U.S.*, 273 F.3d 380, 382 n.1 (3d Cir. 2001).

Respectfully submitted,

/s/ Michael J. Edney

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CERTIFICATE OF SERVICE

I hereby certify that on March 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
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