IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KALSHIEX LLC,

Plaintiff,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

No. 23-cv-03257-JMC

Response to Motion for Leave to File Supplemental Memorandum

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM

Defendant Commodity Futures Trading Commission (CFTC) seeks leave to file a supplemental memorandum in support of its cross-motion for summary judgment. ECF 41. Kalshi no longer opposes the CFTC's motion because its supplemental memorandum only confirms the points that Kalshi advanced at oral argument.

Kalshi initially told the CFTC it would oppose supplemental briefing because the two "new arguments" supposedly requiring response are not "new" at all. Kalshi made the first relevant point—that the Commodity Exchange Act (CEA) often refers to "agreements, contracts, or transactions" as a unit—in response to a question from the Court. *See* Tr. 9:18–10:9. Moreover, that question concerned an argument the CFTC raised for the first time in its final reply brief. *See* ECF 37 at 3. The other supposedly novel point—that the CFTC has not banned *other* event contracts that fit its contrived definition of gaming—also responded to an argument by the CFTC, this time during argument. *See* Tr. 56:9–20, 76:11–22. Neither topic represents a "new argument," and the CFTC was free to discuss each point at the hearing.

Having reviewed the proposed supplemental memorandum, however, Kalshi withdraws its opposition. Instead, Kalshi offers the below short responses on the merits to the CFTC's supplemental memorandum.

First, the CFTC confirms that Congress used the phrase "agreement, contract, or transaction" *throughout* the CEA to refer to the financial instrument itself. *See* ECF 41-1 at 4.[1] There is no basis to infer that the word "transaction" in 7 U.S.C. 7a-2(c)(5)(C)(i) was added to capture the *act of trading* the derivative.

Indeed, that reading makes especially little sense here. This provision says that, if an "agreement, contract, or transaction" involves an enumerated activity and the CFTC determines that such "agreement, contract, or transaction" is contrary to the public interest, then that "agreement, contract, or transaction" cannot be "*listed*" for trading. 7 U.S.C. 7a-2(c)(5)(C)(i)–(ii) (emphasis added). The "agreement, contract, or transaction" thus must be something capable of being "listed" on the exchange—*i.e.*, the derivative itself—not the act of buying or selling the derivative.

For the reasons Kalshi has explained, that interpretation yields a coherent rule across each of the statute's enumerated activities and avoids sweeping in *all* event contracts. The CFTC's contrary reading does not. Regardless, even if the CFTC were somehow correct that the word "transaction" in this triplet shifts the statutory inquiry from a derivative's event to its traders' actions, staking something of value on an *election* does not qualify as "gaming." *See* ECF 35 at 13–19. And, tellingly, the

[1] *See also, e.g.*, 7 U.S.C. § 1a(10)(A)(ii); 7 U.S.C. § 2 (using phrase 25 times); 7 U.S.C. § 6 (16 times); 7 U.S.C. § 7a-1 (five times); 7 U.S.C. § 25 (four times).

CFTC's memorandum does not mention the "unlawful activity" category, which—as the CFTC's oral presentation confirmed—would swallow the provision under its trader-focused reading. *See* ECF 35 at 19–21; Tr. 10:7–13:15, 45:20–53:19.

Second, the CFTC also confirms that it has never treated event contracts relating to award shows as contracts that involve "gaming." That is just one more data point casting doubt on the CFTC's novel definition of "gaming"—found in no dictionary or statute—to encompass wagering on the outcome of a game "or contest," including an election, but not on other contingencies.

The CFTC admits the inconsistency but blames the fact that Kalshi self-certified its award-show contracts as compliant with the CEA. ECF 41-1 at 7. Kalshi *also* self-certified the Congressional Control Contracts at issue here. *See* AR 26–35. The agency stayed the latter, claiming they appeared to involve gaming. AR 148. But it never did the same for award-show contracts, even though they would qualify as "gaming" contracts under the Commission's bespoke definition of that term.

Repeating its refrain at the hearing, the CFTC also argues that its inconsistent and implausible interpretation of the statute is tolerable because it formed the basis for an adjudication rather than a rule. *See* ECF 41-1 at 7–8; Tr. 47:4–50:20, 52:24–53:12, 57:14–60:11. That makes no sense: Basic principles of statutory interpretation do not toggle on or off depending on the form of agency action under review. The first step in determining whether the Order exceeds the CFTC's statutory authority is to discern the scope of that authority—which presents a threshold question of statutory interpretation that this Court must evaluate *de novo*. *Accord* Tr. 41:15; 76:1.

Kalshi has offered an interpretation of the CEA that accords with dictionary definitions, conforms to statutory context and structure, aligns with the legislative history, and makes policy sense. Not only does the CFTC's interpretation achieve none of those things, it conflicts with how the agency has itself applied the statutory regime for years. All this confirms, beyond doubt, that the CFTC exceeded its statutory authority by blocking Kalshi's contracts.[2]

CONCLUSION

Whether or not it considers the supplemental memorandum, this Court should vacate the Order and declare that Kalshi is entitled to list the Congressional Control Contracts for trading. And given the upcoming congressional elections, Kalshi respectfully renews its request that the Court rule on the pending motions as expeditiously as possible.

Dated: June 11, 2024

Respectfully submitted,

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[2] The Commission ventures that, if a pending rule proposal based on the Order is ultimately adopted, then the agency will apply its definition of "gaming" consistently going forward. As the CFTC acknowledges, however, that proposal "may or may not" be adopted, and has no bearing on the proper resolution of this case. ECF 41-1 at 10. Of course, any agency interpretation of "gaming," whether entailed by an adjudication or memorialized in a regulation, must comport with the statute and any judicial decisions construing it.

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