IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

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-614-DAE The Honorable David A. Ezra

DEFENDANT CFTC'S MOTION FOR JUDGMENT ON THE PLEADINGS

PRELIMINARY STATEMENT AND OVERVIEW

The Commodity Futures Trading Commission ("CFTC") hereby moves for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c), in favor of Plaintiffs based on the allegations in Plaintiffs' Second Amended Complaint ("SAC")[1] and the rulings of the United States Court of Appeals for the Fifth Circuit in *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023) ("*Clarke*").[2] The proposed judgment would result in vacatur in toto of the two CFTC Division of Market Oversight ("DMO") letters challenged by Plaintiffs in the SAC, returning the parties to the status quo ante. This would give Plaintiffs all of the relief to which

[1] The SAC is at Docket No. 55. *See* SAC ¶¶ 9-21. For purposes of this motion only, the CFTC assumes the accuracy of factual allegations in the SAC.
[2] References to "*Clarke*" herein are to the appellate decision reported at 74 F.4th 627 unless otherwise indicated.

they are potentially entitled under the law but not relief they ask for that goes beyond this. The CFTC is filing this motion because of the unusual procedural posture of this case. At the time the DMO letters were issued, all existing precedent held that no-action letters were not final agency action subject to the associated Administrative Procedure Act ("APA") requirements. But, in an interlocutory decision in this case, the Fifth Circuit stated, for the first time, that a no-action letter can be enforceable final agency action. In this circumstance, it makes no sense to litigate whether letters issued under one body of law pass muster under later precedent.[3]

As the Court is aware from previous filings, this case arises out of a "no-action letter" relating to the operation of a small-scale binary options market for academic purposes, that was issued to Victoria University of Wellington, New Zealand (a non-party to this litigation) ("Victoria University" or "Victoria"), by DMO staff in 2014 (the "NAL"). SAC, Ex. 1. The market in question, known as "PredictIt," is currently operated by the two corporate plaintiffs in this case. SAC ¶¶ 37-38. The two letters challenged in the SAC are:

1. An August 4, 2022, letter ("2022 letter") to Victoria withdrawing the NAL. Plaintiffs contend this letter violated the APA, because it did not adequately explain the grounds for withdrawal and because the CFTC did not follow the procedures for revocation of a license set forth in 5 U.S.C. § 558(c). SAC ¶¶ 120-129.

2. A March 2, 2023, letter ("2023 letter") to Victoria withdrawing the 2022 letter, stating that DMO "preliminarily believes that" the NAL "is void and should be withdrawn"; setting forth reasons for this preliminary belief; and inviting Victoria to respond. Plaintiffs contend the 2023 letter was an improper post-hoc rationalization of the 2022 withdrawal, that the

[3] For purposes of this motion, the CFTC takes no position on the merits of the analysis of no-action letters in *Clarke* for matters outside the scope of this case.

reasons stated in the 2023 letter did not justify shutting down PredictIt, and that the letter did not adequately consider alternatives to a prompt shut-down. SAC ¶¶ 18-23.[4]

At the time the DMO Letters were issued, all existing precedent held that no-action letters were not final agency action subject to the associated procedural and substantive requirements of the APA, or to judicial review. *See*, *e.g.*, *New York City Employees' Retirement System v. SEC*, 45 F.3d 7, 12 (2d Cir. 1995) ("No-action letters . . . do not impose or fix a legal relationship upon any of the parties."); *Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 331 (3d Cir. 2015) ("[N]o-action letters are not binding—they reflect only informal views of the staff and are not decisions on the merits."); *Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989) ("The petition for review of the no-action letter . . . is dismissed for want of a reviewable order."); *S & D Trading Academy, LLC v. AAFIS Inc.*, 336 Fed. Appx 443, 448 (5th Cir. 2009) (SEC no-action letters "are not binding on the courts or the SEC"); *Clarke*, 74 F.4th at 643 (Ho, J. concurring) (stating "To my knowledge, no circuit has held that a no-action letter or its withdrawal is sufficient to constitute 'final agency action' under the Administrative Procedure Act. And some have held the opposite.") A logical implication of this body of precedent was that withdrawals of no-action letters were similarly not final agency action subject to judicial review and associated procedural and substantive requirements. The DMO Letters were issued against this legal background.

Subsequently, on July 21, 2023, the Fifth Circuit issued a decision stating, for the first time, that, at least in the circumstances of this case, a no-action letter can be an enforceable license and withdrawal of a no-action letter can be final agency action subject to judicial review and the associated APA requirements. *Clarke*, 74 F.4th at 637-39. In this procedural posture—

[4] The 2022 letter and the 2023 letter (collectively, "DMO Letters").

with a sea change in the state of precedent regarding no-action letters in this circuit between the time of the challenged DMO Letters and the present—it makes no sense to engage in litigation as to whether letters issued based on an earlier body of law are valid after *Clarke*. Instead, this Court should issue a final judgment in favor of Plaintiffs vacating the DMO Letters for the reasons set forth in *Clarke* and return the parties to the status quo ante with the NAL in place. Relief beyond vacatur is unnecessary and inappropriate for reasons discussed in detail in Argument II, *infra*, because any future decision-making by DMO with regard to the NAL would necessarily be done in light of *Clarke*, thereby protecting all of Plaintiffs' interests.[5]

BACKGROUND

I. STATUTORY CONTEXT

A. Statutory Context

The CFTC is the federal agency tasked with administering and enforcing the Commodity Exchange Act ("CEA"). 7 U.S.C. § 2. The CEA grants authority to make decisions for the agency (other than internal administrative decisions) to a five-member commission whose members are appointed by the President and confirmed by the Senate ("the Commission"). 7 U.S.C. § 2(a)(2).

Under the CEA, the event contracts traded on PredictIt are a type of instrument called a "swap." *See* 7 U.S.C. § 1a(47)(A)(ii). The CEA mandates that retail investors who are not "eligible contract participants" ("ECPs") can only trade swaps on a "designated contract market" ("DCM"). *Id*. § 2(e).[6] A DCM is a form of market or exchange that is licensed as such by the

[5] Recent mandamus regarding venue in this case suggests that Plaintiffs' future litigation regarding PredictIt, if any, would take place in the Fifth Circuit.

[6] ECPs are limited to certain entities and to individuals with investments aggregating over either $5,000,000 or $10,000,000, depending on the purpose. *Id*. § 1a(18).

CFTC and that meets certain statutory requirements. *See Id*. §§ 7 (describing application for designation as a DCM and "core principles" for such markets), 8 (describing application process). Applications for licensure as a DCM may only be approved or denied by "the Commission." *Id*. § 8(a). Plaintiffs do not allege that PredictIt is a DCM or that it limits trading to ECPs; and they do not identify a statutory exception to the requirement in 7 U.S.C. § 2(e).

B. CFTC No-Action Letters

The CEA contains no provision regarding no-action letters. CFTC regulations define a no-action letter, in relevant part, as a written statement issued by staff of a CFTC division stating that staff of that division will not recommend that the Commission take an enforcement action for failure to comply with a specific provision of the CEA or a CFTC rule or order. 17 C.F.R. § 140.99(a)(2). The rules specify that a no-action letter represents the issuing division's position and binds only that division, not the Commission or other Commission staff. *Id.* The rule further specifies that "[o]nly the Beneficiary may rely upon the no-action letter." *Id*. An application for a no-action letter must specify the name of each person "for whose benefit" the requester is seeking the letter. *Id*. §§ 140.99(c)(1)(i), 140.99(c)(1)(ii). The application must also "set forth as completely as possible all material facts and circumstances giving rise to the request." *Id*. § 140.99(b)(5)(i).

II. PROCEEDINGS IN THIS CASE

A. The 2014 DMO No-Action Letter to Victoria University

In June of 2014, Victoria requested a no-action letter from DMO to operate a "not-for-profit" market offering political event contracts to U.S. persons without registering as a DCM. Dkt. 1, Ex. 3 at 1. The letter stated Victoria intended to establish a not-for-profit subsidiary in the U.S. for the market and also specified that the market's "know-your-customer" ("KYC")

process would be handled by third-party Aristotle International Inc. ("Aristotle"). *Id*. at 1-4. On October 29, 2014, DMO issued the NAL that gave rise to this case. SAC, Ex. 1. The NAL stated it would allow Victoria to operate a small-scale, not-for-profit, political event contracts market for educational purposes and specified the types of contracts that would be offered.[7] *Id*. at 1-3. It further stated that, based on the representations in the request, "DMO does not believe that operation of this proposed market without registration as a DCM, FBOT, or swap execution facility"[8] would be against the public interest and that "[c]onsequently, DMO will not recommend that the Commission take any enforcement action in connection with the operation of your proposed market for event contracts based upon the operators' not seeking designation as a contract market, registering under the [CEA], or otherwise complying with the [CEA] or Commission regulations." *Id*. at 5.

Based on Victoria's representations, the NAL set forth a variety of conditions on which it was premised, stating that "[a]ny . . . changed . . . material facts or circumstances may render this no-action relief void." *Id.* at 3-5. Consistent with CFTC rules for no-action letters, the NAL stated, "This letter, and the no-action position taken herein, represents the view of DMO only, and does not necessarily represent the positions or views of the Commission of or any other division or office of the Commission." *Id*. at 5-6. The NAL further stated, "As with all no-action letters, DMO retains the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein, in its discretion." *Id*. As noted above, when the NAL was issued, all available precedent held that no-action letters were

[7] The NAL noted that Victoria represented that it would employ an outside party, Aristotle, to "implement an age and identity verification system as part of a [KYC] process." SAC, Ex. 1 at 3 n.4.

[8] FBOTs (foreign boards of trade) and swap execution facilities are two types of facilities for trading derivatives.

not final agency action, thus not binding on agencies and not judicially enforceable.

B. The 2022 DMO Letter

On August 4, 2022, DMO issued the first of the two letters to Victoria challenged in the SAC. SAC Ex. 2. The 2022 letter listed nine representations by Victoria on which the NAL was premised. *Id*. at 1-2. The letter stated: "The University has not operated its market in compliance with the terms of [the NAL]. As a result, [the NAL] is hereby withdrawn and, as such, is not available for the listing or operation of any new or related contracts." *Id*. at 2. With respect to existing contracts, the letter stated that, to the extent particular contracts complied with the NAL, those contracts should be closed out by February 15, 2023. *Id.* at 2. The letter concluded by directing Victoria to contact specific DMO employees with any questions. *Id*.

C. Initial Court Proceedings

On September 9, 2022, Plaintiffs, operators and users of PredictIt (but not the recipient of the NAL, Victoria), filed suit in the Western District of Texas to block DMO's withdrawal of the NAL by alleging that the 2022 letter revoking the NAL was arbitrary and capricious in violation of the APA, 7 U.S.C. §§ 702, 704, 706(2)(A), because in their view the letter failed to explain the decision to revoke the NAL. Complaint, Dkt. 1 at ¶¶ 61-67. Plaintiffs also claimed that revocation of the NAL constituted a withdrawal of a license without the required procedural steps in violation of sections 558(c) and 706(2)(D) of the APA, 7 U.S.C. §§ 558(c), 706(2)(D). *Id*. at ¶¶ 68-75. Victoria University has never joined the suit.

The CFTC filed a motion to dismiss on the grounds that, *inter alia*, based on then-existing precedent, withdrawal of the NAL was not reviewable final agency action and that Plaintiffs lacked Article III standing. Dkt. 8, 19. The district court never ruled on these motions. Dkt. 38. Plaintiffs filed a motion for a preliminary injunction ("PI"). Dkt. 12. On December 23,

2022, when the district court had not yet ruled on the PI motion, Plaintiffs appealed to the Fifth Circuit what they characterized as a constructive denial of the motion. Dkt. 32.

D. The 2023 DMO Letter

On March 2, 2023, while the PI appeal was pending, DMO issued the second letter to Victoria. SAC, Ex. 3. The 2023 letter stated that it "withdraws and supersedes" the 2022 letter. *Id*. at 1. The letter's first part recounted the procedural background of the 2022 letter, indicating that DMO staff had met with Victoria representatives to give notice that DMO planned to withdraw the NAL and recounting the reasons given to Victoria before withdrawing the NAL. *Id*. at 3.

The 2023 letter withdrew the 2022 letter and stated that DMO "preliminarily" believes the NAL is void and "should" be withdrawn. *Id*. The letter explained the bases for this preliminary belief, specifically that a 2021 letter from Victoria ("2021 letter") notified DMO that Victoria was not operating PredictIt as of that time and that Aristotle's role had expanded beyond the KYC function specified in the NAL. *Id*. at 3-4. The 2023 letter concluded that Victoria ceded all control over PredictIt to Aristotle, a for-profit corporation, and questioned whether Victoria ever operated PredictIt. *Id*. at 4. The 2023 letter further stated that, according to the 2021 letter, a Victoria subsidiary receives $2,000 a month in user fees for monitoring PredictIt, which "appears to constitute separate compensation" in violation of the terms of the NAL. *Id*. at 4-5. The letter also referred to certain fees charged to PredictIt customers, which "appear[ed] likely" to be higher than necessary to cover costs, and thus inconsistent with non-profit status. *Id.* at 5. Finally, the 2023 letter stated that PredictIt had listed numerous contracts outside the scope specified in the NAL; and gave examples. *Id*. at 5-6.

The 2023 letter stated that, because of these violations, PredictIt had required CFTC staff time that "far exceeded the level" contemplated by the NAL and that "is not an appropriate use of taxpayer resources." *Id*. at 6. Based on non-compliance with the NAL, DMO determined "as a preliminary matter" the NAL is void and should be withdrawn, but stopped short of actually withdrawing or revoking the NAL. *Id*. The 2023 letter further stated that DMO preliminarily does not believe that its no-action position should continue to apply to certain markets until they expire on their own terms after the 2024 elections because Victoria's persistent violations of the NAL suggested a likelihood of recurrence and additional unreasonable use of taxpayer resources. *Id*. at 7. The letter invited Victoria to submit any objections it had to the letter's conclusions to DMO, which Victoria did on April 6, 2023.[9] The SAC does not (and cannot) assert that DMO made any further determinations after the preliminary determinations in the 2023 letter or a response by Victoria.

E. The Fifth Circuit *Clarke* Decision

On July 21, 2023, the Fifth Circuit issued a decision ordering the district court to enter a PI. *Clarke*, 74 F.4th 627. First, the Court rejected the CFTC's argument that the withdrawal of the NAL was non-justiciable, stating that the withdrawal was reviewable final agency action and not committed to agency discretion; that Plaintiffs had Article III standing; and that the 2023 letter did not moot the case. 74 F.4th at 635-40. As part of this discussion, the Court stated that the NAL was a license within the meaning of the APA. *Id*. at 637.

In determining that Plaintiffs were likely to succeed on the merits, the Court criticized the DMO Letters. The Court stated that the APA arbitrary-and-capricious standard requires that

[9] *See PredictIt Announcements, Notice to Traders*, available at https://www.predictit.org/platform-announcements (last visited, July 11, 2024) (hyperlinking copy of Victoria's April 6, 2023 response).

agency action be "reasonably explained" and that the 2022 letter did not meet this standard because it did not disclose what terms of the NAL had been violated or what evidence supported the violations. *Id*. at 641. It stated that DMO did not adequately explain its reasons for requiring the closing of all contracts by a date certain, in light of the reliance interests in play. *Id*. The Court also stated that the 2023 letter did not comply with the APA procedures for withdrawing a license because it did not give Victoria an opportunity to bring itself into compliance. *Id*. at 642 (citing 5 U.S.C. § 558(c)). Finally, as relevant here, the Court stated that the 2023 letter did not meaningfully explain why DMO rejected alternatives such as allowing existing markets to expire on their own terms; did not justify its conclusion that monitoring future compliance would require an unreasonable use of taxpayer resources because it did not discuss the magnitude of such resource use or balance it against reliance interests; and improperly relied, in part, on statements made by Aristotle's counsel at oral argument. *Id.* at 642.

F. Second Amended Complaint

On November 27, 2023, Plaintiffs filed their SAC re-asserting substantially the same claims with respect to the 2022 letter and adding claims that the 2023 letter was also arbitrary and capricious and violated the APA; including the APA procedural requirements for withdrawal of licenses. *See* SAC ¶¶ 110-119, 121-27, 129. The CFTC answered on February 26, 2024. Dkt. 64. To date, there have been no substantive proceedings or rulings in the district court.

G. Venue Proceedings

On January 16, 2024, this Court transferred the case to the United States District Court for the District of Columbia. Dkt. 61. On March 1, 2024, the Fifth Circuit issued a writ of mandamus directing this Court to request return of the case. *In re Clarke*, No. 24-50079 (5th

Cir. March 1, 2024). Pursuant to this Court's ensuing request, the case was retransferred back to this district and was redocketed here on June 4, 2024. *See* Dkt. 78, 79.

ARGUMENT

I. THE COURT SHOULD VACATE THE DMO LETTERS BASED ON *CLARKE*.

As noted above, at the time the DMO Letters at issue in this case were issued, all available precedent held that no-action letters, and, by implication, withdrawals of no-action letters, were not final agency action and were not binding on agencies or judicially reviewable. The letters in question, including the procedures that were followed and the level of explanation provided, were issued in the context of this body of law. However, *Clarke* stated that, at least in the circumstances here, the NAL was a license within the meaning of the APA and its withdrawal was reviewable final agency action. 74 F.4th at 636-39. In this unusual procedural posture, it does not make sense to engage in litigation evaluating whether letters issued in the context of one body of precedent pass muster under newer and different precedent. Instead, the Court should enter judgement on the pleadings against the CFTC vacating the DMO Letters based on *Clarke*.[10] This would return the parties to the status quo ante with the NAL restored.

The *Clarke* decision criticized the DMO Letters for failure to comply with APA procedures for license withdrawal, failure to adequately explain the reasons for the withdrawal of the NAL, and failure to adequately address issues, including reliance interests, and alternatives to closure of contracts by a date certain. The standard APA remedy for failures of this sort is

[10] Under Fed. R. Civ. P. 12(c), "any party may move for judgment on the pleadings after the pleadings are closed." *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5th Cir. 2001). A motion for judgment on the pleading is "designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Hebert Abstract Co. v. Touchstone Props., Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990) (per curiam) (internal citations omitted).

vacatur of the agency action. *E.g.*, *Nat'l Ass'n of Manufacturers v. United States SEC*, --F.4th--, 2024 WL 3175755 (5th Cir. June 26, 2024) at *9 (vacating rescission of rule where SEC did not reasonably explain decision); *Braidwood Mgmt., Inc. v. Becerra*, No. 23-10326, 104 F.4th 930, 952, (5th Cir. June 21, 2024) ("[V]acatur under [5 U.S.C.] §706 is . . . the 'default' remedy for unlawful agency action.") (internal citations omitted); *Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (en banc) (same); *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374-75 (5th Cir. 2022) ("Vacatur is the only statutorily prescribed remedy for a successful APA challenge.").

Vacatur of the DMO Letters is particularly appropriate here because Plaintiffs identify no statutory provision or regulation authorizing them to operate PredictIt, but rely solely on the NAL.[11] Vacating the DMO Letters leaves the NAL standing without a preliminary challenge to its status and thus leaves Plaintiffs with all the legal rights that they ever had. Plaintiffs' interests are also protected going forward because any future DMO decisions on the subject will have to made in light of *Clarke* rather than the state of the law at the time of the 2022 letter.

II. RELIEF OTHER THAN VACATUR IS UNNECESSARY AND IMPROPER IN THE CIRCUMSTANCES OF THIS CASE.

A. This case presents no unusual circumstances requiring relief beyond vacatur

This case presents no unusual circumstances requiring relief beyond the standard APA remedy of vacatur, for several reasons. First, Plaintiffs assert no statutory right to operate an events contract market or trade such contracts and no such right exists. *See* 7 U.S.C. § 2(e). There is therefore no reason for the Court to give statutory guidance to DMO going forward. Second, the *Clarke* decision reached no conclusions on the underlying issues of whether Victoria complied with the terms of the NAL or whether any violations of those terms could justify

[11] Plaintiffs rely on 5 U.S.C. § 558(c), the APA provision on licenses, but this is a purely procedural provision.

withdrawal of the NAL if DMO used proper procedures and explanations. 74 F.4th at 641-42. The Supreme Court has repeatedly held that, when an agency violates APA procedural requirements or requirements to adequately explain and justify decisions, it is *not* the job of reviewing courts to resolve the merits of the underlying issue before the agency. This task must be left, in the first instance, to the agency on remand:

> It is a well-established maxim of administrative law that if the record before the agency does not support the agency action or if the agency has not considered all relevant factors . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Calcutt v. FDIC, 143 S.Ct. 1317, 1320 (2023) (cleaned up); *see also*, *e.g.*, *Wages and White Lion Investments, L.L.C. v. FDA*, 90 F.4th 357, 390 (5th Cir. 2024) (en banc) (vacating FDA orders that did not meet APA standards and remanding to agency for further proceedings based on *Calcutt*). The holdings of these cases follow logically from the fact that the role of courts in APA cases is to review agency decisions, not to decide the underlying issues itself de novo. **"**When a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal . . . . [I]t is the role of the agency to resolve factual issues to arrive at a decision . . . whereas 'the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted [the agency decision].'" *Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020) (quoting *Redeemed Christian Church of God v. United States Citizenship & Immigration Servs.*, 331 Fed. Supp. 3d 684, 694 (S.D. Tex. 2018)). Thus, should DMO decide to revisit the NAL following vacatur, it would be up to DMO—and not this Court in this proceeding—to address the relevant issues, as necessary, at that time.[12]

[12] There is a narrow exception to the language from *Calcutt* but it does not apply to this case. A

Finally, the fact that DMO expressed the view (preliminarily in the 2023 letter) that the NAL should be withdrawn is not an unusual circumstance that justifies unusual relief. Any time a reviewing court finds that an agency has violated the APA, the agency will have previously expressed a firm viewpoint on some policy or adjudicative issue. Otherwise there would be no final agency rule or adjudication for the court to review. As the Supreme Court has observed, "[i]t is hardly improper for an agency head to have policy preferences" and work "to substantiate the legal basis for a preferred policy." *Biden v. Texas*, 587 U.S. 785, 142 S.Ct. 2528, 2547 (2022) (cleaned up). The same logic applies to the head of a CFTC division. This fact of administrative law does not alter the Supreme Court's and the Fifth Circuit's admonitions that the normal remedy for APA violations is vacatur, and that a reviewing court should not leap ahead to decide the underlying merits. Instead, it must allow the agency, using proper procedures and explanations, to address those issues itself in the first instance, subject to judicial review if appropriate.

B. The particular relief, other than vacatur, sought in the Second Amended Complaint is unnecessary and improper.

1. Introduction

In the SAC, Plaintiffs ask the Court for ten forms of relief:

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reviewing court can address the underlying merits of an administrative decision that violates the APA if, and only if, an agency is legally required to take a particular action so there is "not the slightest doubt" as to the outcome on remand. *Calcutt*, 143 S.Ct. at 629-30. This case does not fall within this exception, for at least three reasons. First, Plaintiffs cite no statutory provision giving them a right to operate an event contract market or trade event contracts. Second, Plaintiffs cite no statutory or judicial authority stating that violation of the terms of a CFTC staff no-action letter can never justify its withdrawal. Finally, there has never been a definitive administrative ruling on whether Victoria violated the NAL and whether that violation justifies withdrawal since (a) the DMO Letters do not pass muster according to *Clarke*; and (b) DMO itself withdrew the 2022 letter and never completed the factfinding process initiated in the 2023 letter since it never addressed Victoria's response.

a) An order vacating, "hold[ing] unlawful and set[ting] aside" the CFTC's revocation of the NAL as arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law and/or without observance of procedure required by law, 5 U.S.C. § 706;

b) An order vacating the CFTC's revocation of the NAL for failure to provide written notice or an opportunity to demonstrate or achieve compliance with the NAL's requirements, 5 U.S.C. §§ 558, 706;

c) An order vacating, "hold[ing] unlawful and set[ting] aside" the CFTC's 2023 letter as arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law and/or without observance of procedure required by law, 5 U.S.C. § 706;

d) An order declaring that each of the alleged violations cited in the 2023 letter is an invalid justification for cancelling the CFTC's license for the Market to operate;

e) An order vacating the CFTC's 2023 letter for failure to provide an opportunity to demonstrate or achieve compliance with the NAL's requirements and an opportunity for beneficiaries of the CFTC's license for PredictIt to respond to the alleged violations, 5 U.S.C. §§ 558, 706;

f) An order enjoining the CFTC from liquidating open contracts on PredictIt before they expire on their own terms and from prohibiting the addition of new contracts or deterring trading in any existing or new contracts;

g) An order enjoining the CFTC from liquidating open contracts on PredictIt before they expire on their own terms or prohibiting the issuance of new contracts or deterring trading in existing or new contracts until Plaintiffs have had the opportunity to be heard and to present evidence before the Court in support of its claims that the revocation of the NAL violates the APA;

h) An order providing for the Court's continued jurisdiction over this case and permanently enjoining the CFTC from prohibiting or deterring the issuance or trading on PredictIt or to close or otherwise to impede the normal operations of PredictIt, until 60 days after a final order disposing of any challenge to such CFTC action, provided a Plaintiff files a challenge to that action within 60 days of it becoming final;

i) An award to Plaintiffs of their litigation costs and reasonable attorneys' fees, … [under EAJA or other law]; and

j) Such other relief as the Court may deem just and proper.

SAC, Prayer for Relief §§ a-j, at pages 45-47. Grant of the present motion would give Plaintiffs the relief they request, or the substantial equivalent, in requests a, b, c, and e. The remaining requests have no legal justification.

2. Request d is inconsistent with Supreme Court and Fifth Circuit Precedent and otherwise legally infirm.

Plaintiffs' relief request d asks the Court to issue an order declaring that each of the alleged violations cited in support of the 2023 letter is an invalid justification for cancelling the "license." SAC, Prayer for Relief § d. This relief would violate the holdings in cases such as *Calcutt v. FDIC*, 143 S.Ct. at 1320 and *Wages and White Lion Investments,* 90 F.4th at 390, that when a court finds APA violations, it should not decide the underlying issues, but should give the agency the opportunity to revisit them.

Request d is particularly improper if the Court vacates the DMO Letters, as sought by both Plaintiffs and the CFTC. Following vacatur, there would be no existing DMO ruling affecting the NAL. In that circumstance, request d would be a request for the Court to rule on a hypothetical future DMO decision that might never be issued and whose content and reasoning is unknown. Such a ruling would violate both the principle that only final agency action is subject to judicial review and the requirement that agency action must be "ripe" before a court can address it under the APA. *See Air Prods. and Chems., Inc. v. Gen. Servs. Admin.*, No. 2:23-CV-147-Z, 2023 WL 7272115, at *5-6 (N.D. Tex. Nov. 2, 2023). And while the bases for DMO's preliminary determination may be subject to disagreement, at a minimum there is no justification to take them off the table without DMO ever having reached its own conclusions in light of Victoria's response to the 2023 letter.

3. Request f is inconsistent with Supreme Court and Fifth Circuit Precedent and otherwise legally infirm.

Plaintiffs' relief item f asks the Court to enjoin the CFTC from liquidating open contracts on PredictIt before they expire on their own terms and from prohibiting the addition of new contracts or deterring trading in any existing or new contracts. To the extent this requested relief

is aimed at the DMO Letters challenged in the SAC, its purpose would be accomplished by vacatur of the DMO Letters because there would then be no existing DMO or CFTC issuance calling into question the NAL. To the extent the requested relief seeks to enjoin DMO or the CFTC from taking any future action with respect trading on PredictIt, it is inconsistent with cases such as *Calcutt* and *Wages and White Lion Investments*, discussed above, because it calls upon the Court to resolve the underlying merits issues. It also is inconsistent with cases such as *Nat'l Ass'n of Manufacturers*, 2024 WL 3175755 and *Cargill*, 57 F.4th 447, discussed above, holding that vacatur is the standard remedy for APA violations. *See also Franciscan All.*, 47 F.4th at 374-75 (stating that once a regulation was vacated, the district court lacked authority to grant additional relief as a remedy for APA violations because "[v]acatur is the only statutorily prescribed remedy for a successful APA challenge to a regulation").[13]

As with relief request d, request f would be even more improper if the Court grants the requests of Plaintiffs and the CFTC to vacate the DMO Letters. The request would then be asking the court to enjoin hypothetical future DMO or CFTC action, in violation of the ripeness doctrine and the requirement for final agency action as a prerequisite for judicial review; and without the Court even knowing the specifics of the future action or the evidence and reasoning supporting it. *Air Prods.*, 2023 WL 7272115, at *5-6.

4. Requests g and h improperly ask the Court for an anticipatory preliminary injunction against a hypothetical future administrative ruling.

Plaintiffs' relief request g asks the Court to enjoin the CFTC from liquidating open contracts on PredictIt before they expire on their own terms or prohibiting the issuance of new

[13] While *Franciscan Alliance* referred specifically to an APA challenge to a regulation, the APA provision on which it relied, 5 U.S.C. § 706(2)(A), applies to all APA challenges to agency action.

contracts or deterring trading in any existing or new contracts until Plaintiffs have had the opportunity to be heard and to present evidence before the Court in support of its claims that the revocation of the NAL violates the APA. To the extent this relief is aimed at protecting Plaintiffs from the effects of the DMO Letters, its purpose would be served by grant of this motion vacating the DMO Letters.

To the extent this relief is intended to apply to a possible future ruling affecting trading on PredictIt, Plaintiffs, in effect, are asking this Court to grant them an anticipatory preliminary injunction against a hypothetical future agency action that has not yet occurred. Under the language of the request, this injunction would be in effect until Plaintiffs have been heard in a hypothetical future judicial review proceeding, that has not yet been filed. As with request f, a request for an injunction against agency action that has not yet occurred is unripe and outside the jurisdiction of this Court. *See*, *e.g.*, *South Carolina v. United States*, 912 F.3d 720, 730-31 (4th Cir. 2019) (reversing grant of preliminary injunction where claims were not ripe because decision process was incomplete and outcome uncertain); *Air Prods.*, 2023 WL 7272115, at *15 (denying preliminary injunction based, in part, on lack of ripeness); *AstraZeneca Pharms. LP v. FDA*, 850 F. Supp. 2d 230, 248, 250-51 (D.D.C. 2012) (denying preliminary injunction where claim by drug company was unripe because FDA "may or may not decide to give final approval to competing generics"). Request g is also improper because it asks the Court to hear evidence, in violation of well-established precedent that the role of courts in APA cases is to review agency action based on the record before the agency. *See Delta Talent*, 448 F. Supp. 3d at 650 (internal citation omitted).

Request h asks the Court to enter an order providing for the Court's continued jurisdiction over this case and permanently enjoining the CFTC from prohibiting or deterring

trading of PredictIt contracts or otherwise to impede the operations of PredictIt, until 60 days after a final order disposing of any challenge to such CFTC action, provided a Plaintiff files a challenge to that action within 60 days of it becoming final. This request, like request g, asks the Court to enter what amounts to an anticipatory preliminary injunction against hypothetical future agency action; and is insupportable for the same reasons.

In addition, if the Court grants this motion to vacate, there would be no reason for the Court to retain jurisdiction. The challenged DMO Letters would no longer have effect and Plaintiffs would be returned to whatever rights they originally had under the NAL. Any potential future action on the NAL would take place in light of the *Clarke* precedent. If Plaintiffs are unhappy with the result, they can seek judicial review at the appropriate time. Courts usually retain jurisdiction only in cases "alleging unreasonable delay of agency action or failure to comply with a statutory deadline, or for cases involving a history of agency noncompliance." *Mercy Gen. Hosp. v. Azar*, 410 F. Supp. 3d 63, 82 (D.D.C. 2019). None of these considerations is relevant here because a vacatur order would be self-enforcing and would return the NAL to its original status—and Plaintiffs to whatever rights they originally had under the NAL—without the need for any further implementing action by DMO or the CFTC.

5. Plaintiffs' other requests for relief lack merit.

Plaintiffs' request i seeks costs and attorneys fees. The CFTC understands that Plaintiffs may move for an award of costs if this motion is granted. Plaintiffs are not entitled to attorneys' fees because the CFTC's position with respect to the DMO Letters challenged in this case was "substantially justified" under the precedent existing at the time the letters were issued. 28 U.S.C. § 2412(d)(1)(A). In addition, it is possible that some or all Plaintiffs are not entitled to attorneys' fees based on their net worth pursuant to 28 U.S.C. § 2412(d)(2)(B). This would have

to be determined in further proceedings under 28 U.S.C. 2412(d)(1)(B), though such proceedings are not warranted where, as here, the agency's position was substantially justified. Request j seeks such other relief as the Court deems just and proper. No relief beyond vacatur is just and proper for the reasons explained above.

CONCLUSION

For the foregoing reasons, Defendant CFTC respectfully requests that the Court grant its Motion for Judgment on the Pleadings with Vacatur of the DMO Letters at issue in this litigation, enter final judgment consistent with the relief sought in this motion, and close this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 16, 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