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

CFTC REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

Contrary to Plaintiffs' assertions, the CFTC filed its Motion for Judgment on the Pleadings, Dkt. 82, ("Motion" or "Mot.") with the understanding that granting it would constitute a substantive ruling deciding the case. The CFTC initially challenged justiciability based on well-established law, but its arguments were rejected in *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023) ("*Clarke*"). *Clarke*, for the first time, applied Administrative Procedure Act ("APA") standards to no-action letters; and found the Division of Market Oversight ("DMO") letters at issue likely wanting under those standards. The CFTC also filed a transfer motion that persuaded some jurists but did not prevail. With these issues decided, it simply makes sense to conclude the litigation with a judgment for Plaintiffs based on *Clarke* and Plaintiffs' own pleading, the Second Amended Complaint ("SAC"), Dkt. 55.

Plaintiffs insist on dragging out this litigation for reasons that are unclear. Further proof

of Plaintiffs' allegations is unnecessary since the CFTC admits their accuracy for purposes of the Motion and will be subject to judicial estoppel if the Motion is granted. The Motion gives Plaintiffs all the relief they can get under the APA and relevant precedent. The Court should avoid further waste of government, private, and judicial resources and grant the Motion.

I. The Motion gives Plaintiffs all the relief to which they are entitled.

The Motion gives Plaintiffs all the relief to which they are entitled. It observed that vacatur is the standard APA remedy so additional relief requires justification. Mot. 11-12. Plaintiffs' arguments that courts can grant other relief, Resp. 13-16, are beside the point—the issue is whether such relief is justified *in this case*. The Motion demonstrated that the declarative and injunctive relief requested in the SAC is either duplicative or unjustifiable, even if Plaintiffs, in further proceedings, proved every allegation in their complaint.[1] Mot. at 12-20.

Plaintiffs list three categories of relief they seek, beyond vacatur of the two DMO letters: (1) the Court should "hold unlawful" the DMO letters; (2) declarations; and (3) injunctions. Resp 15-17. None of these precludes grant of the Motion.

1. The CFTC agrees that courts commonly "hold unlawful" agency action that violates the APA. The Motion presumed this possibility, stating that the Court should enter judgment based on "the rulings" in *Clarke* and vacate the DMO letters "for the reasons set forth in *Clarke*." Mot. 1, 4. If the Court determines that *Clarke* and the SAC allegations justify holding the DMO letters to be unlawful, it can do so as part of granting the Motion.

Relatedly, Plaintiffs suggest that future issues may arise regarding the definitiveness of

[1] Plaintiffs state, "The CFTC makes no meaningful argument that the particular forms of declaratory or injunctive relief are inappropriate in the circumstances of this case, but instead incorrectly argues they are legally unavailable as a general matter." Resp. 18. This ignores pages 12-20 of the Motion. *See* additional discussion below.

the APA rulings in *Clarke* since *Clarke* involved a preliminary injunction. Resp. 17. This contradicts their own characterization of the decision. *E.g.*, Resp. 5-6. More importantly, the Motion asks *this* Court to enter final judgment so whatever rulings this Court makes in support of judgment on the pleadings will have the binding force that goes with a final judgment.

2. The declarative relief requested in the SAC is impermissible in the circumstances of this case. Plaintiffs' prayer for relief asks for "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." This seeks a declaration resolving the underlying factual and policy issues of whether Victoria University violated the terms of the 2014 no-action letter and whether those violations, if they occurred, justify revocation of the letter. It thus seeks a declaration going far beyond the statements in *Clarke* that DMO made errors involving procedure, inadequate explanation, and inadequate consideration of relevant factors. *See* Mot. 9-10, 15. As explained in the Motion, such a declaration violates the principle that, when a court finds that an agency has violated APA procedures or has failed to justify its decision because of an inadequate record, inadequate explanation, or similar failures, the reviewing court should not reach out to decide the underlying merits issues but should vacate and remand to the agency. Mot. at 13, 16.

> 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, 598 U.S. 623, 628-29 (2023) (cleaned up). Plaintiffs incorrectly argue that *Calcutt*, and the similar *Wages and White Lion Investments, L.L.C. v. FDA* decision, 90 F.4th 357, 390 (5th Cir. 2024) (en banc), stand only for the proposition that courts cannot affirm flawed agency decisions by inventing new justifications. Resp. 14-15. However, while the facts

of *Calcutt* involved affirmance of an agency, the "well-established maxim of administrative law" quoted above is stated in general terms and is not confined to cases where a court affirms an agency decision. For example, *Calcutt* cites *Gonzales v. Thomas*, 547 U.S. 183 (2006). In *Gonzales*, the Supreme Court applied the identical maxim and ordered remand to the agency in a case where a lower court reached the merits and ruled *against* the agency. *Id*. at 184-7; *see also*, *e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (stating principle without reference to affirmance of agency); *FPC v. Idaho Power Co.*, 344 U.S. 17, 19-21 (1952) (holding that lower court erred when, after finding error in Federal Power Commission license, it modified license to benefit licensee rather than remanding to agency).

The Fifth Circuit adhered to the same principle in *Wages*. In *Wages*, the Court reviewed the FDA's denial of certain applications for permission to market liquids used in e-cigarettes. 90 F.4th at 363, 369-71. The decision harshly criticized the FDA and found multiple APA violations. *Id*. at 362, 371-386. The Court nevertheless made no effort to address the merits of the applications, but simply "set aside," *i.e.*, vacated, the FDA's denial of the applications and remanded to the agency. *Id*. at 390.

The principles of *Calcutt* and similar cases are particularly compelling here because DMO never completed the fact-finding and deliberation process initiated by the 2023 letter. *See* Mot. 9, 16. In addition, to the extent the requested declaration applies to possible future proceedings regarding PredictIt, it is unripe. Mot. 16. Moreover, if applied to possible future proceedings, the Prayer for Relief effectively asks the Court to hold in advance that violations of a license—even if proven on the record in a proceeding that complies with APA requirements—cannot possibly justify license revocation, a patently unreasonable proposition. *See P & R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984) (stating "A licensee may not accept only the

benefits of the license while rejecting the corresponding obligations.")

Plaintiffs assert that "declaratory judgment is necessary to avoid recurrence of the CFTC's procedural and substantive violations of the APA." Resp. 18. But, as just explained, the declaration requested in the SAC, by addressing the underlying merits, goes far beyond identifying APA violations and far beyond what is permitted under established law.

3. For injunctions, the Response does not address—and thus implicitly concedes—any of the analysis in the Motion showing that the particular injunctive relief requested in the SAC either is legally impermissible or is unnecessary if the Court grants vacatur. *Compare* Mot. 16-18 *with* Resp. 18-19. Plaintiffs assert summarily that "a permanent injunction is necessary to curb the CFTC's history of repeated APA violations." Resp. 19. But the APA violations alleged by Plaintiffs or discussed in *Clarke* took place at a time when all existing precedent held that no-action letters were *not* subject to normal APA requirements. Mot. 2-3. They therefore provide no reason to believe that the CFTC or DMO would not comply with the APA in any future proceedings involving PredictIt since such proceedings, if any, would take place after *Clarke*—and, potentially, a ruling by this Court—have clarified the law governing the no-action letter in this case.[2] In any event, Plaintiffs' vague assertion about "curb[ing]" the CFTC cannot excuse the specific legal problems with Plaintiffs' requested injunctions identified in the Motion.

Plaintiffs cite two APA cases where courts granted declarations and injunctions. Resp. 16. Both are distinguishable. In each, an agency misinterpreted a substantive statute (as opposed to APA procedural provisions). As a result, vacating agency rules or guidance documents left

[2] This is particularly true because the outcome of the venue proceedings in this case suggests that, if there is future agency action regarding PredictIt, judicial review, if any, would likely take place in the Fifth Circuit.

open the possibility that the statute itself might still be misapplied, for example in enforcement proceedings. This justified declarative and injunctive relief. *See State v. Cardona*, 2024 WL 3658767, at *28-35 (N.D. Tex. Aug. 5, 2024) (holding that agency misinterpreted Title IX of Civil Rights Act); *Nat'l Ass'n for Gun Rights, Inc. v. Garland*, 2024 WL 3517504, at *19-22 (N.D. Tex. July 23, 2024) (holding that agency misinterpreted statutory definition of "machine gun"). In this case, no substantive statute authorizes PredictIt. Mot. 8. Plaintiffs' substantive rights rest solely on the 2014 no-action letter, whose status and force would be restored to exactly what it was when it was issued if this Court vacates the 2022 and 2023 DMO letters.

Plaintiffs' Response asks for one injunction not clearly requested in the SAC: an extension of the existing preliminary injunction, Dkt. 48, for sixty days after final judgment. This is unnecessary if the Court grants vacatur since a new proceeding to withdraw the 2014 letter, if it occurred, would take at least sixty days, especially in light of *Clarke*. However, in the interest of resolving this case, the CFTC would not object to an order barring withdrawal of the 2014 letter until sixty days after a final judgment if the Court grants the Motion.[3]

II. The Court can grant judgment on the pleadings without requiring the CFTC to amend its Answer.

Plaintiffs incorrectly argue that judgment on the pleadings cannot be granted unless the CFTC amends its answer to remove language denying some allegations in the SAC. Resp. 9-10. In the circumstances here, the Court can properly enter judgment based on Plaintiffs' pleading (the SAC) without an amended answer. Doing so would serve the purpose of judgment on the pleadings, which is to efficiently resolve cases where there is no material dispute of fact. *See*

[3] However, language in the preliminary injunction barring the CFTC from "deterring" or "impeding" PredictIt trading should be removed because it is ambiguous. For example, it is unclear whether this language would prohibit gathering facts about PredictIt to inform decision making.

Garza v. Escobar, 972 F.3d 721, 727 (5th Cir. 2020) (stating purpose to dispose of cases where facts are undisputed and judgment can be rendered based on "substance" of pleadings).

The Motion stated, "For purposes of this motion only, the CFTC assumes the accuracy of factual allegations in the SAC." Mot. 1 n.1. The CFTC thus explicitly admitted, for purposes of the Motion, Plaintiffs' factual allegations, regardless of whether the Answer previously denied some of them. This admission thus serves the same purpose as formally amending the Answer. It creates a situation, for purposes of the Motion, where there are no disputed facts.

Plaintiffs describe this statement as a "throw away" but it was filed in court; and admissions relied on by the Court will be binding if the Motion is granted. *NGM Ins. Co. v. Bexar County*, 211 F. Supp. 3d 923, 931-32 (W.D. Tex. 2016) (stating party is bound by judicial estoppel to positions it took in court if the court adopted those positions). And the CFTC asked the Court to rule in favor of Plaintiffs based on *Clarke*, thereby waiving, for purposes of the Motion, affirmative defenses inconsistent with that decision. Mot. 1, 4. There are thus, as a practical matter, no disputed issues of fact and the Court can grant judgment on the pleadings.

Hebert Abstract Co. v. Touchstone Properties., Ltd., 914 F.2d 74 (5th Cir. 1990), cited by Plaintiffs, is distinguishable, since it did not involve, or discuss, the effect of admissions incorporated in a motion for judgment on the pleadings. The same is true of the passage from Wright & Miller cited by Plaintiffs. *See* 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367 (3d ed., June Update).[4]

Even without an explicit admission, a party moving for judgment on the pleadings is deemed, for purposes of the motion, to admit the truth of factual allegations in the opposing party's pleadings and the falsity of contradictory allegations in their own pleadings.

[4] Plaintiffs cite Vol. 5A, apparently by mistake.

> In considering motions under Federal Rule 12(c), district courts frequently indicate that a party moving for a judgment on the pleadings impliedly admits the truth of its adversary's allegations and the falsity of its own assertions that have been denied by that adversary. As is true in other motion contexts, these implied admissions are effective only for purposes of the motion and do not in any way bind the moving party in other contexts of the litigation or constitute a waiver of any of the material facts that will be in issue if the motion addressed to the pleadings is denied.

5C Wright & Miller, *Federal Practice & Procedure* § 1370; *see*, *e.g.*, *Smith v. McMullen*, 589 F. Supp. 642, 644 (S.D. Tex 1984). These implied admissions can enable judgment on the pleadings in cases where there is disagreement between the parties' pleadings. *See Romero v. Frank's Casing Crew & Rental Tools, Inc.*, 229 F. Supp. 41, 43, 45 (W.D. La. 1964) (stating that defendants had not admitted certain relevant facts but that, for purposes of defendants' motion for judgment on the pleadings, plaintiffs' allegations "are taken as true;" and granting the motion). The CFTC's statement that it is assuming the accuracy of the allegations in the SAC for purposes of the Motion is thus consistent, as a practical matter, with established practice in motions for judgment on the pleadings.

III. The Court should rule on the Motion without first requiring production of the Administrative Record.

The court can, and should, rule on the Motion without first requiring production of the administrative record. In an APA case, the administrative record substitutes for the fact-finding normally engaged in by the district court. *E.g.*, *Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020). Where there are no disputed facts, district courts, in the interest of efficiency and expedition, can decide APA cases without requiring production of the record. *See*, *e.g.*, *PETA, Inc. v. USDA*, 194 F. Supp. 3d 404, 408-409 (E.D.N.C. 2016) (stating judgment on the pleadings on issues of law can be granted without production of administrative record); *Animal Legal Def. Fund v. USDA*, 789 F.3d 1206, 1213, 1224 n.13 (11th Cir. 2015) (affirming

summary judgment without production of administrative record); *State v. BLM*, 277 F. Supp. 3d 1106, 1115-16 (N.D. Cal. 2017) (deciding motion for summary judgment without production of administrative record).[5]

As explained above, there are no disputed factual issues for purposes of the Motion; and this Court can decide whether the DMO letters violated the APA and grant appropriate relief based on Plaintiffs' allegations. If the Motion is granted, the administrative record will not be needed. If the Motion is denied, the CFTC will promptly complete compilation and production of the record.

IV. Scheduling issues raised by Plaintiffs do not preclude judgment on the pleadings.

Contrary to Plaintiffs' assertion, Resp. 2, 10, the agreed schedule does not preclude grant of the Motion. The schedule specifies that briefing on the Motion will be completed on September 23, 2024, implying that a ruling can then proceed. Scheduling Order, Dkt. 94 at 1. Remaining schedule items are from the Court's standard form scheduling order, which sets deadlines for cases in general without implying that all listed events must occur. *See* August 16, 2024, Order by Magistrate Judge Lane requiring use of standard form; Joint Scheduling Recommendations, Dkt. 93 at 2 n.1 (observing that some listed events may be unnecessary).

Plaintiffs say they expect to move "in the coming weeks" to amend the complaint "to address intervening events in the nine months since the filing of the [SAC]," Resp. 10-11, but that does not justify further delay in this case. A motion for judgment on the pleadings can be filed any time after the answer, even if amendments to the complaint are possible. *Mandujano v.*

[5] Plaintiffs note that U.S. District Court for the District of Columbia Local Civil Rule 7(n)(1) requires filing of a record index 30 days after the answer. Resp. 12. But this Court has no similar rule and the CFTC is aware of no similar rule in any district in this circuit.

City of Pharr, Tex., 786 F. App'x. 434, 436 (5th Cir. 2019). Events since the filing of the SAC are extremely unlikely to be material, or justify a third complaint amendment, because the challenged DMO letters must be justified (or not) by their rationale as of their issue date, *see Clarke*, 74 F.4th at 642 (stating reliance on later grounds is impermissible); and because the CFTC concedes judgment should be entered based on the SAC. [6] If Plaintiffs believe the CFTC has done something *else* wrong in the intervening year and a half, it clearly has nothing to do with PredictIt, which has been operating unimpeded. At most, whatever Plaintiffs claim the CFTC did since would be the basis for a new lawsuit, not an excuse to drag this one out.[7]

Discovery, Resp. 10-11, also does not justify delay. Discovery outside the administrative record is generally not available in APA cases, *e.g.*, *Medina Cnty. Env't. Action Ass'n v. Surface Transp. Bd.,* 602 F.3d 687, 706 (5th Cir. 2010), and Plaintiffs identify no exception here. And discovery for the purpose of expanding the scope of the claims in an existing complaint is simply impermissible. *Torch Liquidating Tr. ex rel. Bridge Assocs. v. Stockstill*, 561 F.3d 377, 392 (5th Cir. 2009); *Durand v. Hanover Ins. Grp.*, 294 F. Supp. 3d 659, 687-88 (W.D. Ky. 2018).

Scheduled settlement procedures, Resp. 11, similarly do not justify delay. The parties have repeatedly discussed settlement without result; and the Motion gives Plaintiffs all the relief they can reasonably expect in either settlement or further litigation.

CONCLUSION

The motion for judgment on the pleadings should be granted.

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[6] The recent decision in *Kalshiex LLC v. CFTC*, No. 1:23-cv-03257-JMC (D.D.C. Sept. 12, 2024) is irrelevant because it turned entirely on the interpretation of 7 U.S.C. § 7a-2(c)(5)(C)(i), which is not relied upon in the challenged DMO letters.

[7] Alternatively, the Court could order the filing of any motion for leave to amend the complaint within "weeks," as stated in the Response at 10-11, and stay other proceedings until it has first ruled on the motion to amend and then on this Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 23, 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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