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

KEVIN CLARKE, et al. *Plaintiffs*, v. COMMODITY FUTURES TRADING COMMISSION, *Defendant*.	§ § § § § § § § § § §	Cause No. 1:24-cv-00614-DAE The Honorable David A. Ezra

CFTC'S MOTION FOR A PROTECTIVE ORDER FROM ABUSIVE DISCOVERY REQUESTS

Defendant, United States Commodity Futures Trading Commission ("CFTC"), requests pursuant to Federal Rule of Civil Procedure 26(c) that the Court enter a protective order forbidding, limiting, or, in the alternative, staying Plaintiffs' discovery requests. The CFTC seeks a protective order for three main reasons: (1) the CFTC's pending (and dispositive) Motion for Judgment on the Pleadings (ECF No. 82) makes Plaintiffs' discovery requests moot; (2) the Administrative Procedure Act ("APA") limits the scope of review to the "Administrative Record," which the CFTC has already produced to Plaintiffs; and (3) Plaintiffs' discovery requests are overbroad, unduly burdensome, and oppressive given the scope of issues the Court needs to decide in this case.

The undersigned counsel for the CFTC certifies pursuant to Rule 26(c) and Local Rule CV-7(g) that counsel for the CFTC has in good faith conferred with counsel for Plaintiffs in a good faith effort to resolve this discovery dispute by agreement and without court action. The parties fundamentally disagree about the propriety of discovery while the CFTC's Motion for

Judgment on the Pleadings remains pending, and fundamentally disagree that any discovery beyond the Administrative Record already produced by the CFTC is appropriate in this Administrative Procedure Act ("APA") proceeding. The CFTC has attached Plaintiff's requests for documents and the CFTC objections and responses as Exhibits 1-4 to this Motion.

I. A ruling by the Court on the CFTC's pending Motion for Judgment on the Pleadings makes Plaintiffs' requests for documents moot.

The CFTC's pending Motion for Judgment on the Pleadings (ECF No. 82) asks the Court to enter a judgment in this case ***in favor of the Plaintiffs***. It is undoubtedly an unusual procedural posture for a defendant to ask the Court to enter judgment in favor of a plaintiff, but given the ruling of the United States Court of Appeals for the Fifth Circuit in this case that the CFTC's Division of Market Oversight's revocation of the no-action letter was likely arbitrary and capricious[1], the CFTC is asking this Court to enter an order giving Plaintiffs what they are seeking[2] by vacating the two letters issued by the CFTC's Division of Market Oversight (the "DMO Letters") that are the subject of Plaintiffs' complaint. The CFTC's Motion for Judgment on the Pleadings is a dispositive motion. If the Court enters a judgment vacating the DMO Letters, that order would conclude this litigation, making Plaintiffs' discovery requests moot.

The CFTC's goal in filing this motion - and its goal in filing the Motion for Judgment on the Pleadings - is efficiency, both for the Court and for the parties. Why expend the Court's (and the parties') valuable time and resources by conducting unnecessary discovery (and litigating the propriety of discovery) when the Court can end this litigation immediately by entering an order

[1] *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023).

[2] As explained in further detail in the CFTC's Motion for Judgment on the Pleadings and associated Reply brief (ECF Nos. 82 and 97) Plaintiffs' arguments that they are entitled to more in a judgment than the APA allows are meritless. The Court should reject Plaintiffs' argument that the Court, through supposed additional injunctive relief requested in Plaintiffs' complaint, should effectively become the regulator of the PredictIt market.

vacating the DMO Letters? "A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined." *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) (holding that district court properly stayed discovery pending disposition of motion to dismiss); *see also Fund Texas Choice v. Deski*, No. 1:22-CV-859-RP, 2023 WL 8532404, at *2 (W.D. Tex. Dec. 8, 2023) (staying discovery pending determination of dispositive motion); see also *Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 436 (5th Cir. 1990), opinion modified on denial of reh'g (Apr. 27, 1990) (affirming stay of discovery pending resolution of summary judgment motion "that might preclude the need for the discovery altogether thus saving time and expense."). Once a final judgment is entered on a claim, any outstanding discovery disputes related to that claim become moot because the information is no longer needed to decide the case. *See, e.g., Ctr. For Biological Diversity v. U.S. Dep't of Hous. & Urb. Dev.*, 241 F.R.D. 495, 505 (D. Ariz. 2006) (granting an agency's motion for a protective order from moot discovery requests after disposing of claims by granting a motion for judgment on the pleadings).

II. To the extent that any discovery is appropriate, it should be limited to the Administrative Record.

Although a ruling by this Court on the pending CFTC Motion for Judgment on the Pleadings should resolve this case, the CFTC nonetheless has made efforts to cooperate with Plaintiffs on discovery issues without the need for this Court's intervention. Specifically, on November 14, 2024, the CFTC produced to Plaintiffs the Administrative Record for the issuance of the DMO Letters at issue in this case.[3] The CFTC filed the list of documents contained in this Administrative Record with the Court.[4] (ECF No. 98 and 98-1.) To the extent that any

[3] The CFTC's notice to the Court of the production has a typographical error regarding this date.

[4] The CFTC will provide the Court with a copy of the Administrative Record at the Court's request.

discovery is appropriate in this APA case, the Court should limit discovery to the Administrative Record that the CFTC has already produced to Plaintiffs.

Plaintiffs have brought this case pursuant to the Administrative Procedure Act. *See* Second Amended Complaint, ECF No. 55, ¶ 28 ("Plaintiffs' causes of action arise under the Administrative Procedure Act, 5 U.S.C. § 701 et seq.") In APA cases, a court "is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Commerce v. New York*, 588 U.S. 752, 780 (2019). "[F]urther judicial inquiry" into an agency's motivation "should normally be avoided." *Id*. at 781. There is thus a "general presumption that review is limited to the record compiled by the agency." *Medina County Environmental Action Association v. Surface Transportation Board*, 602 F.3d. 687 706 (5th Cir. 2010). This is sometimes called the "record rule." *OnPath Federal Credit Union v. U.S. Dep't of Treasury*, 2021 WL 57669468 at *2 (E.D. La. Dec. 6, 2021) *aff'd* 73 F.4th 291 (5th Cir. 2023).

The presumption against discovery beyond the agency record follows logically from the principle that, in an APA case, the district court is not the finder of fact. Instead, "the district court judge sits as an appellate tribunal" determining "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020). And the agency's "designation of the administrative record, like any established administrative procedure, is entitled to a presumption of administrative regularity." *La Union del Pueblo Entero v. FEMA*, 141 F. Supp. 3d 681, 693 (S.D. Tex. 2015). A party seeking to go beyond the designated record bears a "significant" burden to justify such a course. *Id*. at 695.

Based on these principles, discovery in APA cases is strictly limited. Discovery beyond

the administrative record is generally held to be permissible only "when there has been a strong showing of bad faith or improper behavior or when the record is so bare that it prevents effective judicial review." *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 339 (D.C. Cir. 2011). Some courts allow discovery in slightly broader circumstances, but even these cases tightly limit those circumstances and impose a "strong" burden of proof on parties seeking discovery, one that Plaintiffs cannot meet here. *La Union*, 141 F. Supp. 3d at 695. This is not a case in which the Record is so "bare" that is impossible to discern the agency's reasoning and review it based on the existing record. In fact, the 2023 DMO Letter being challenged in this case spells out the reasoning underlying DMO's earlier decision to withdraw its 2014 no-action letter. See Ex. 3 to Plaintiff's Second Amended Complaint, ECF No. 55-3 at page 3. It also spells out the reasoning underlying DMO's subsequent preliminary determination that Victoria University appeared to be in violation of the 2014 DMO No-Action Letter, *id*. at 3-7, and references some of the key evidence underlying the two DMO letters, *id*. at 3-4. Whether or not Letter No. 23-03 and the other documents in the Administrative Record justified DMO's actions, the Record in the case is clearly not so "bare" as to make it impossible for the Court to discern DMO's reasoning and review it.

To the extent that this Court deems it necessary to review any evidence to issue a judgement in this case, the documents in the Administrative Record that the CFTC has produced to Plaintiffs are sufficient, and the Court should limit Plaintiffs' discovery to the Administrative Record.

III. The burden to the CFTC of responding to Plaintiffs' document requests vastly outweighs any potential benefit.

A third reason the Court should limit CFTC's obligation to respond to Plaintiffs' discovery requests to the previously produced Administrative Record is that the burden of

additional discovery vastly outweighs any potential benefit given the current posture of the case. Under Fed. R. Civ. P. 26(b)(1), discovery must be "proportional to the needs of the case" and the Court must consider "whether the burden or expense of the proposed discovery outweighs its likely benefit." These requirements parallel the balancing standard under Rule 26(c), under which "the district judge must compare the hardship to the party against whom discovery is sought against the probative value of the information to the other party." *Cazorla v. Koch Foods of Mississippi, L.L.C.*, 838 F.3d 540, 555 (5th Cir. 2016), quoting 6 James Wm. Moore et al., Moore's Federal Practice ¶ 26.101[1][c] (3d ed. 2011).

The highly burdensome discovery sought by Plaintiffs is not proportional to the needs of this case in its current posture. The Court can enter a final judgment *without any further discovery* by ruling on the CFTC's pending Motion for Judgment on the Pleadings. Alternatively, the Court can enter a final judgment in this case *without any further discovery* after reviewing the Administrative Record. Requiring the CFTC to respond to Plaintiffs' broad discovery requests would impose a significant burden on the CFTC with no benefit to Plaintiffs or to the Court. None of the broad categories of documents sought by Plaintiffs' document requests are needed for the Court to enter judgment on Plaintiffs' APA claims. There is no need for Plaintiffs to search for additional support for their claims because the CFTC has asked the Court to enter judgment *in favor of Plaintiffs*. By granting the CFTC's Motion for Judgment on the Pleadings, the Court can give Plaintiffs all the relief to which they are even potentially entitled with no need for further expenditure of resources by the parties or the Court.

It appears that one purpose of Plaintiffs' discovery requests is to fish for information to construct new or additional claims. But that is not a proper purpose of discovery. "[T]he role of discovery…is to find support for properly pleaded claims," not to add new claims to an existing

complaint. *Torch Liquidating Trust v. Stockstill*, 561 F.3d 377, 392 (5th Cir. 2009).

Plaintiffs' document requests include broad, opened-ended requests to search an entire government agency's files for any document "concerning, referring or relating to" the PredictIt Market[5] or the No-Action letter[6]; documents plainly protected by the attorney-client privilege or deliberative process privileges[7]; documents related to a separate application for registration with the CFTC that affiliates of Plaintiff Aristotle Inc. are pursuing[8]; and documents related to the CFTC's communications with third parties that are not involved in this litigation[9]. The burden of attempting to collect these categories of documents and navigate complex privilege issues is extreme. Meanwhile, there is no benefit to requiring the CFTC to undertake such an effort given the case can be decided immediately with no further discovery with an order by the Court granting Plaintiffs' judgment on their claims and vacating the DMO Letters at issue in Plaintiffs' Complaint.

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[5] Plaintiff's First Requests for Documents # 1 ("Produce all documents and communications concerning, referring, or relating to the PredictIt Market.")

[6] Plaintiffs' Second Request for Documents, # 7 ("Produce all documents and communications concerning, referring, or relating to the No-Action letter.")

[7] Plaintiff's First Requests for Documents # 4 ("Produce all communications between persons inside the Agency concerning, referring, or relating to efforts to revoke the no-action relief . . .") and #5 ("Produce all communications between persons inside the Agency concerning, referring, or relating to the March 2023 letter . . ."). Plaintiffs' Second Requests for Documents # 11 ("Produce all documents and communications concerning, reflecting, or relating to Defendants' motivations, policy considerations or concerns, discussions, deliberations, or decision-making process related to potential withdrawal or cancellation of the No-Action Letter.")

[8] Plaintiffs' Second Request for Documents # 12 ("Produce all documents relating to both Aristotle International, Inc.'s application for a designated contract market pending before the CFTC and the role of Aristotle International, Inc. and its subsidiaries (including PredictIt Inc.) with respect to the operation of the PredictIt Market.") and Request # 13 ("Produce all documents and communications concerning, referring, or relating to the consideration of any political event contract market operated or sought to be operated by PredictIt.")

[9] Plaintiff's Second Request for Documents # 17 ("Produce all communications with Kalshi, Inc. or its employees or agents . . ."); Plaintiffs' Second Request for Documents # 18 ("Produce all documents regarding or communications with FTX Trading Ltd. or its employees or agents . . .").

IV. CONCLUSION

Federal Rule of Civil Procedure 26(c) states in relevant part: "Upon motion by a party ... the court ... may [for good cause shown] make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense ..." Fed.R.Civ.P. 26(c) (a court may order that "certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters.").

For the foregoing reasons, Defendant CFTC respectfully requests that the Court enter a protective order pursuant to Federal Rule of Civil Procedure 26(c) limiting the CFTC's obligation to produce documents in this case to the previously produced Administrative Record, and forbidding Plaintiffs' from issuing further discovery requests to the CFTC. In the alternative, the CFTC requests that the Court stay discovery until it has decided the CFTC's dispositive Motion for Judgment on the Pleadings (ECF No. 82).

Respectfully submitted,

/s/ *Carlin R. Metzger*

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CERTIFICATE OF SERVICE

I certify that on November 29, 2024, I filed the foregoing document with the Court using the Court's CM/ECF system, which will send notice and a link to the document in the Court's file to all counsel of record in this case.

/s/ *Carlin R. Metzger*

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