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

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-00614-DAE The Honorable David Alan Ezra

PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF COMPLETE ADMINISTRATIVE RECORD

Michael J. Edney
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
T: (202) 778-2204
medney@huntonak.com

Attorney for Plaintiffs

INTRODUCTION

The Defendant Commodity Futures Trading Commission ("CFTC" or the "Commission") has refused to produce anything approximating the administrative record in this case. It has produced instead fewer than four dozen communications exchanged among the CFTC and entities associated with the PredictIt Market. To plug the holes in the record, Plaintiffs requested specific categories of easily-identifiable documents from the CFTC, but the CFTC has stated to the Plaintiffs it will produce neither those categories of documents nor anything other than what already has been produced. Plaintiffs file this motion to compel the CFTC to produce the administrative record leading to the agency decisions challenged in this case.

BACKGROUND

A. The CFTC Tries to Close the PredictIt Market

In 2022, the CFTC abruptly attempted, without any explanation, to revoke the PredictIt Market's license to operate, which had been granted in 2014. *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627, 634-35 (5th Cir. 2023). On March 2, 2023, in an attempt to avoid an unfavorable ruling by the Fifth Circuit, the Commission issued CFTC Letter 23-03 ("2023 Letter") as replacement for its 2022 decision to close the Market, offering a series of reasons why closing the Market in the very near future was appropriate, including (1) that Aristotle, rather than Victoria University, is operating the Market; (2) that Victoria University has received, and permitted Aristotle to receive, separate compensation for operating the Market; and (3) that Victoria University has offered contracts falling outside the scope of the categories of submarkets approved in the license. Dkt. 55-3 at 3. The Fifth Circuit held that the CFTC's effort to withdraw and replace its 2022 decision to close the Market "violate[d] the injunction pending appeal" and was an effort "to game the system." *Clarke*, 74 F.4th at 641.

On November 27, 2023, Plaintiffs filed their Second Amended Complaint ("SAC"), adding allegations challenging the 2023 Letter, including that "[e]ach of these alleged violations is invalid and contrary to the text, context, and history of the No-Action Relief decision and extensive subsequent communications with CFTC staff. Taken together, the alleged violations cannot justify the preliminary conclusion that the No-Action Relief is void and should be withdrawn." Dkt. 55 at 28 ¶ 93.

B. The CFTC Seeks Judgment on the Pleadings, and the Court Issues a Scheduling Order Governing Discovery and Further Amendment of the Pleadings

Following the case's return from the District of Columbia, this Court requested scheduling recommendations from the parties. Dkt. 81. Shortly before those recommendations were due, the CFTC filed a motion for judgment on the pleadings. Dkt. 82.

Days later, the parties jointly submitted scheduling recommendations. Dkt. 84. Plaintiffs recommended that the CFTC file the administrative record by October 1, 2024, and reserved the right to seek discovery after reviewing the record. Dkt. 84 at 3 ¶ 7 & n.3. The CFTC recommended that it delay filing the administrative record until "30 days after Court rules on [its] motion for judgment on the pleadings" because, in its view, "the motion must be decided on the pleadings and the Court's ruling may make record filing unnecessary." Dkt. 84 at 3 ¶ 7. On August 16, 2024, the parties jointly submitted revised scheduling recommendations, including deadlines for briefing the CFTC's motion, and also that "[t]he parties shall complete all discovery on or before December 1, 2024." Dkt. 93 at 3 ¶ 6.

The Court adopted the parties' recommendations in a scheduling order issued on August 19, 2024. Dkt. 94. The scheduling order sets December 1, 2024, as the deadline to complete discovery and gives the parties until January 6, 2025, to file any further motions to amend or supplement the pleadings. *Id.* ¶¶ 4, 7. The scheduling order ***does not*** adopt the CFTC's prior

request to delay filing of the administrative record, nor does it restrict Plaintiffs from seeking that record, or any other documents, in discovery.

C. Plaintiffs Seek Production of the Administrative Record and Specific Documents that Should be Included Therein, but the CFTC Refuses to Produce Anything

As envisioned by the schedule, and based on the CFTC's refusal to voluntarily file the administrative record, Plaintiffs requested production of the administrative record under Rules 26 and 34 of the Federal Rules of Civil Procedure on August 26, 2024. *See* App. in Supp. of Pls.' Mot. to Compel Production of Complete Administrative R. ("App.") at 3. Specifically, Plaintiffs requested that the CFTC: (1) "Produce the Administrative Record underlying the Revocation letter [CFTC Letter 22-08, dated August 4, 2022]"; and (2) "Produce the Administrative Record underlying the March 2023 letter [CFTC Letter 23-03, dated March 2, 2023]." Out of an abundance of caution, Plaintiffs also requested documents on three topics that should have been subsumed within the administrative record: (3) "communications between the Agency and persons outside the Agency concerning, referring, or relating to the PredictIt Market from January 1, 2021 to March 31, 2023"; (4) "communications between persons inside the Agency concerning, referring, or relating to efforts to revoke the no-action relief and/or license for the PredictIt Market from January 1, 2021 to March 31, 2023"; and (5) "communications between persons inside the Agency concerning, referring, or relating to the March 2023 letter from January 1, 2021 to March 31, 2023."

In response to the CFTC's motion for judgment on the pleadings, Plaintiffs explained that the administrative record is necessary for a fair appraisal of the alleged facts of this case. Dkt. 96 at 12. In its reply, the CFTC argued that the Court should rule on the motion "without first requiring production of the administrative record." Dkt. 97 at 8.

A month after having been served with Plaintiffs' document requests, the CFTC formally announced its refusal to provide the administrative record unless and until this Court denies its motion for judgment on the pleadings. *See* App. at 10. The CFTC did not seek a protective order, nor did it seek a stay of discovery while its motion is pending. Instead, the CFTC asserted "General Objections," including that:

> Plaintiffs' Requests are unreasonable and unduly burdensome in the circumstances of this action because all claims and issues raised by Plaintiffs' Second Amended Complaint can be resolved by granting the CFTC's pending Motion for Judgment on the Pleadings or, if that Motion is denied, by proceedings for summary judgment without the need for discovery.

Id. at 11 ¶ 6. The CFTC also asserted objections specific to the requests for the administrative record:

> The CFTC incorporates by reference its General Objections as if fully set forth in response hereto. The CFTC further objects to this Request because the Administrative Record is not needed for the Court's consideration of the CFTC's pending Motion for Judgment on the Pleadings (Dkt. 82) and if the CFTC's Motion is granted, production of the Administrative Record would be unnecessary. Notwithstanding said objections, if the Court denies the CFTC's Motion, the CFTC will produce a copy of the certified Administrative Record within 30 days of said ruling.

Id. at 12-13. The CFTC thus effectively granted itself a stay of discovery while its motion for judgment on the pleadings is pending, despite having expressly agreed to a December 1, 2024 discovery deadline.

As for the requests for specific communications that should have been included in the administrative record, the CFTC objected to each request, among other grounds, "to the extent i[t] seeks information outside of the certified Administrative Record in this APA action . . . ." *Id*. at 12.

D. Faced with a Motion to Compel, the CFTC Agrees to Produce the Administrative Record

Based on the CFTC's continued refusal to produce the administrative record, Plaintiffs' counsel informed counsel for the CFTC on October 11, 2024, that Plaintiffs intended to move to compel production of documents sought in its first request for production. In response, the CFTC finally agreed to produce the administrative record, but not until November 14, 2024.

E. To Preserve Their Rights, Plaintiffs Serve Additional Document Requests

Because the CFTC's production of the administrative record would occur after the deadline to serve discovery requests based on the December 1, 2024 discovery cutoff, to preserve their rights Plaintiffs served a second set of document requests. *See* App. at 16. Each of the requests sought documents or communications related to the PredictIt Market or Plaintiffs in this action, and any responsive documents should have been included in the administrative record.

F. The CFTC Produces an Incomplete Administrative Record

On November 14, 2024, the CFTC produced 43 communications between the CFTC's Division of Marlet Oversight ("DMO") and entities associated with the PredictIt Market (some through their counsel). The CFTC certified that these documents "constitute the record pertaining to the issuance of CFTC Letters No. 22-08 and 23-03 by the Commodity Futures Trading Commissions' Division of Market Oversight." *See* Dkt. 98-1. The CFTC produced no internal and no other external communications or other documents. Nor did the CFTC produce a privilege log or any other listing of documents that were omitted or withheld from the record.

G. The CFTC Refuses to Produce Documents Responsive to Plaintiffs' Second Requests

Four days before its responses to Plaintiffs' second set of document requests were due, on November 25, 2024, the CFTC requested that Plaintiffs withdraw their document requests and

stated its intention to seek a protective order. On November 27, 2024, the parties' counsel conferred. The CFTC confirmed that it would not produce documents in response to any of Plaintiffs' requests, and also confirmed its intention to seek a protective order. Plaintiffs informed the CFTC's counsel that they would be filing a motion to compel.

On November 29, 2024, the CFTC formally refused to produce documents responsive to Plaintiff's second requests. *See* App. at 25. The CFTC objected to each request as "overbroad and unduly burdensome, especially considering the CFTC's pending Motion to Judgment on the Pleadings." *Id.* at 27-34. The CFTC also made the blanket assertion that judicial review in this case "is limited to the administrative record filed by the CFTC," *id.* at 25, but did not explain why the requested documents were excluded from that record in the first place.

ARGUMENT

For the reasons explained below, the Court should compel the CFTC to complete the administrative record.

A. The CFTC Has Not Produced the Administrative Record

The Court's role in a challenge to agency action under the Administrative Procedure Act is to determine whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" by "review[ing] the whole record or those parts of it cited by a party." 5 U.S.C. § 706(2). Agencies are thus obligated to provide the whole administrative record in challenges brought under the APA. *E.g.*, *Cherokee Nation v. U.S. Dep't of the Interior*, 531 F. Supp. 3d 87, 94 (D.D.C. 2021) ("The agency must set forth the entire record, which includes all materials directly or indirectly relied on to make all decisions, not just final decisions.").

The Supreme Court has defined "whole record" for purposes of review under the APA as "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971). The whole

administrative record "consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981). *See also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) ("The complete administrative record consists of all documents and materials directly or indirectly considered by the agency."). "A complete administrative record should include all materials that might have influenced the agency's decision, and not merely those upon which the agency relied in its final decision." *La Union del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 141 F. Supp. 3d 681, 694 (S.D. Tex. 2015) (quotations and citations omitted). Thus, "the 'whole record' is not necessarily those documents that the agency has compiled and submitted as 'the' administrative record." *Exxon Corp.*, 91 F.R.D. at 32.

The record produced by the CFTC, consisting solely of communications between the DMO and entities (or counsel for entities) associated with the PredictIt Market, does not include all materials that might have influenced the CFTC's decision or all documents and materials directly or indirectly considered by the agency. Tellingly, the CFTC has not denied the existence of documents and communications responsive to any of Plaintiffs' document requests. To the extent responsive documents exist, they were "before the [CFTC] at the time [it] made [its] decision," and thus should be included in the record. *Citizens to Pres. Overton Park, Inc.*, 401 U.S. at 419-20.

A record containing only "correspondence between [entities associated with the PredictIt Market] and the agency concerning administrative matters" is incomplete on its face. *Exxon Corp.*, 91 F.R.D. at 34. Here, as in *Exxon Corp.*,

> It strains the [] imagination to assume the administrative decision-makers reached their conclusion without reference to a variety of internal memoranda, guidelines, directives, and manuals, and without considering how arguments similar to [the plaintiff]'s were evaluated in prior decisions by the agency. [The agency] may not

> unilaterally determine what shall constitute the administrative record and thereby limit the scope of this Court's inquiry.

Id. (quoting *Tenneco Oil Co. v. Dep't of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979)).

It is impossible that the CFTC did not have internal communications about its attempts to close the PredictIt Market. Discussion must have preceded issuance of both the 2022 and 2023 letters, yet none appears in the administrative record certified by the CFTC. Moreover, Plaintiffs understand that the CFTC had external conversations about the PredictIt Market as well, having relayed the sentiment to PredictIt that the *real* reason the CFTC wanted to close the PredictIt Market was that it did not intend to issue further no-action letters related to political event contracts and was "tired of having to tell others they can't do what you're doing." Plaintiffs thus expressly requested documents and communications concerning, referring, or relating to the PredictIt Market for a limited time period (under three years), but no such documents or communications—which might have influenced the CFTC's decision or been directly or indirectly considered by the agency—are included in the record certified by the CFTC. "[I]t is axiomatic that documents created by an agency itself or otherwise located in its files were before it." *Cnty. of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 76 (D.D.C. 2008). Thus, all documents responsive to Plaintiffs' requests should be included in the administrative record. Because they are not, the administrative record is incomplete.

If the CFTC asserts that certain documents would be covered by a privilege, it must either produce or log those documents. "To be complete, an [administrative record] must include or otherwise account for '*all* documents ... considered by [the] agency,' not just the non-privileged ones." *Exxon Mobil Corp. v. Mnuchin*, No. 3:17-CV-1930-B, 2018 WL 4103724, at *2 (N.D. Tex. Aug. 29, 2018) (quoting *Exxon Corp.*, 91 F.R.D. at 33). "If a privilege applies, the proper strategy isn't pretending the protected material wasn't considered, but withholding or redacting the

protected material and then logging the privilege." *Id.* (citing *Inst. for Fisheries Res. v. Burwell*, No. 16-CV-01574-VC, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017)). Moreover, where, as here, there is a question about whether improper political pressure influenced the agency decision, documents related to that influence are not covered by the deliberative process privilege, and thus must be produced. *Louisiana v. Becerra*, No. 3:21-CV-04370, 2022 WL 1716243, at *5 (W.D. La. May 16, 2022).

B. The CFTC Should be Required to Complete the Administrative Record to Make it "Whole"

1. Completion is Necessary Where the Agency Omits Documents from the Administrative Record

Courts order production of additional documents "when a[n administrative] record is incomplete." *La Union del Pueblo Entero*, 141 F. Supp. 3d at 694. *See also Exxon Corp.*, 91 F.R.D. at 33 ("[L]imited discovery to complete the record is also proper where the Court determines the agency has failed to file the 'whole record.'"). "Succinctly put, to require less [than the whole record] denies effective judicial review, and leaves the agency unaccountable, contrary to congressional purpose. It would be a hypocritical scheme indeed to hand to a decision-maker the power to control review of its decision." *Id*. at 39.

This Court should order the CFTC to complete the administrative record with each of the categories of documents that Plaintiffs have requested—each of which was before the CFTC when it made its decision, and were thus directly or indirectly considered by agency decision-makers and might have influenced the agency's decision.

2. Plaintiffs are Entitled to Discover the Administrative Record

Although Plaintiffs should not have been forced to resort to document requests to require production of the complete administrative record, they have a right to serve such requests. Despite agreeing to a discovery deadline, the CFTC now contends that Plaintiffs are entitled to no

discovery at all. In its "General Objections" to Plaintiffs' document requests, the CFTC asserts that Rule 26 "exempt[s] administrative-record litigation, which includes this APA action, from discovery-based obligations." App. at 10-11 & 25-26. Not so. An action for review on an administrative record is not exempt from discovery as a whole, but rather only from the two requirements that specifically exempt it: (1) having to provide initial disclosures and (2) participation in a scheduling conference among the parties. Fed. R. Civ. P. 26(a)(1)(B), 26(f)(1). Why did the CFTC agree to a discovery deadline only to then contend that no discovery can be had in this case?

CONCLUSION

For the reasons set forth above, the Court should compel the CFTC to complete the administrative record underlying this action, without delay, to include the categories of documents requested by the Plaintiffs.

Dated: December 2, 2024

Respectfully submitted,

/s/ Michael J. Edney
Michael J. Edney
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
T: (202) 778-2204
medney@huntonak.com

Attorney for Plaintiffs Kevin Clarke, Trevor Boeckmann, Harry Crane, Corwin Smidt, Aristotle International, Inc., Predict It, Inc., Michael Beeler, Mark Borghi, Richard Hanania, James D. Miller, Josiah Neeley, Grant Schneider, and Wes Shepherd

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 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
Michael J. Edney