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

KEVIN CLARKE, PREDICT IT, INC., ARISTOTLE INTERNATIONAL, INC., et al. *Plaintiffs*, v. COMMODITY FUTURES TRADING COMMISSION, *Defendant*.	§ § § § § § § § § § §	Cause No. 1:24-cv-00614-DAE The Honorable David A. Ezra Magistrate Judge Mark Lane

CFTC RESPONSE TO PLAINTIFFS' MOTION TO COMPEL

Plaintiffs' Motion to Compel should be denied for the same reasons that the Court should grant the Commodity Futures Trading Commission's ("CFTC") Motion for a Protective Order: (1) the CFTC's pending 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 in this administrative appeal to the "Administrative Record," which the CFTC has already produced to Plaintiffs; and (3) Plaintiffs' discovery requests are overbroad, unduly burdensome, and oppressive in light of the scope of issues the Court needs to decide.

Given that the CFTC has offered to resolve this case by having a judgment entered vacating the two CFTC Division of Market Oversight letters (the "DMO Letters") that are the subject of Plaintiffs' APA claims, Plaintiffs' goals appear to have shifted away from obtaining relief under the APA and towards an attempt to drive up litigation costs and extend the preliminary injunction that has allowed Predict It and Aristotle International to operate an unregistered (and unsupervised) event contract trading platform during the litigation. The Court should reject Plaintiffs' efforts to prolong this case through unnecessary discovery.

I. A ruling by the Court on the CFTC's pending Motion for Judgment on the Pleadings makes discovery unnecessary.

The CFTC's Motion for Judgment on the Pleadings asks the Court to enter a judgment in in favor of the Plaintiffs. There is no need for discovery because the CFTC's requested judgment gives Plaintiffs all the relief they are entitled to under the APA. If the Court enters a judgment vacating the DMO Letters, that order would conclude this litigation, making Plaintiffs' discovery requests moot. 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).

In their motion, Plaintiffs ask why the CFTC agreed to a discovery deadline in the August Scheduling Order. The answer is simple: because a discovery deadline was part of the court's template scheduling order, and because the discovery deadline was effectively a placeholder that would be moot once the Court entered the CFTC's requested judgment. It was unnecessary to reiterate and relitigate in the scheduling order what the CFTC had already said in its Motion for Judgment on the Pleadings – that this case can be resolved immediately without further litigation. The sensible approach is to end this case now by vacating the DMO Letters, which will make this discovery dispute moot.

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

A. Plaintiffs assert APA claims that ask the Court to vacate the two DMO Letters.

Plaintiffs' complaint is an APA administrative appeal, asking the Court to vacate the DMO Letters, which had sought to withdraw a 2014 "no action letter" issued by the CFTC's

Division of Market Oversight to non-party Victoria University of Wellington.[1] The University sought the No Action Letter so that it could operate what it described as a "not-for-profit, event futures market" that would "offer event futures contracts to U.S. persons without registering as a designated contract market under Section 5 of the Commodity Exchange Act."[2] (*See* Victoria University No-Action-Letter Request, Exhibit 4 to Plaintiff's Second Amended Complaint, ECF No. 55-4.) The market, known as "PredictIt," is now owned and operated by the two corporate plaintiffs in this case, Predict It, Inc., and Aristotle International, Inc. (*See* Plaintiffs' Second Amended Complaint, ECF No. 55, ¶¶ 37-38; see also www.predicit.org.)

Plaintiffs assert two claims under the Administrative Procedure Act. In Count 1 Plaintiffs assert that the DMO Letters are "arbitrary and capricious" agency actions in violation of 5 U.S.C. § 706(2)(A).[3] (See ECF No. 55, ¶¶ 110 and 114.) In Count 2 Plaintiffs claim that the DMO Letters violate 5 U.S.C. §§ 558 and 706 because the DMO Letters purportedly withdrew a license without an opportunity to demonstrate or achieve compliance. (See ECF No. 55, ¶¶ 127-28.) The core relief sought by the complaint is the vacatur of the DMO Letters. That is the default remedy in APA cases of this nature. S*ee, e.g., Nat'l Ass'n of Manufacturers v. United States SEC*, 105 F.4th 802, 2024 WL 3175755 (5th Cir. June 26, 2024) at *9 (vacating rescission

[1] Victoria University's request for a no action letter, the no action letter, and the two DMO Letters are attached to Plaintiffs' complaint as Exhibits 1-4. See ECF No. 55-1 through 4.

[2] Section 5 of the Commodity Exchange Act, 7 U.S.C. § 7, provides the statutory framework for boards of trade seeking designation by the CFTC as a contract market. In general, it is illegal to offer futures without doing so on an exchange registered with the CFTC. 7 U.S.C. 6(a).

[3] 5 U.S.C. § 706(2)(A) provides, in relevant part, "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall … (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

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.").

B. The CFTC provided the Administrative Record to Plaintiffs, which contains the factual basis for the issuance of the DMO Letters.

Although a ruling by this Court on the pending CFTC Motion for Judgment on the Pleadings should resolve this case, the CFTC nonetheless compiled and produced to Plaintiffs the Administrative Record for the issuance of the DMO Letters.[4] To the extent that the Court wants to review the factual basis for the issuance of the DMO Letters at issue, it can do so by reviewing the Administrative Record.

Plaintiffs argue that the record should include more, but 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). The reason review is ordinarily limited to the Administrative Record in an APA case is that the district court is not a finder of fact. Instead, "the district court judge sits as an appellate tribunal" determining "whether or not as a matter of law the evidence

[4] The CFTC filed the list of documents included in the Administrative Record with the Court (see ECF No. 98-1) and will provide a courtesy copy to this Court.

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.

Plaintiffs cannot meet that burden because the Administrative Record that the CFTC compiled and produced to Plaintiffs contains the information evaluated by the CFTC's DMO in first granting Victoria University no-action relief in 2014, and the CFTC DMO's reasoning for attempting to withdraw that relief in the 2022 and 2023 DMO Letters. In fact, the 2023 DMO Letter Plaintiffs are challenging (and which is attached to Plaintiffs' complaint) spells out the reasoning underlying the CFTC DMO's 2022 decision to withdraw the 2014 No-Action Letter. See Ex. 3 to Plaintiff's Second Amended Complaint, ECF No. 55-3 at page 3. It explains DMO's assessment that Victoria University appeared to be in violation of the 2014 No-Action Letter, *id*. at 3-7, and references some of the key evidence supporting this assessment, *id*. at 3-4. The 2023 DMO Letter identified three primary bases for the withdrawal of the 2014 No Action Letter:

1. Aristotle, a for-profit corporation—not the University or its faculty—is operating the PredictIt Market.
2. The University has received, and permitted Aristotle to receive, separate compensation for Aristotle's operation of the Market.
3. The University has offered numerous contracts that are outside the scope of the submarkets addressed in the 2014 No Action Letter.[5]

[5] Examples of event contracts PredictIt offered for trading on its platform identified in the 2023 DMO Letter as outside the scope of the 2014 No Action Letter are: "Will Caitlyn Jenner address the 2016 Republican National Convention?" "Will accused lion poacher Walter Palmer be extradited to Zimbabwe this year?" "How many tweets will @realDonaldTrump post from noon May 27-June 3?" and "Will the U.S. indict FIFA president Sepp Blatter in 2015?"

The question for the Court in this case is whether the CFTC DMO Letters were arbitrary and capricious in violation of the APA. The Court can make this determination without reviewing any record at all by ruling on the CFTC's Motion for Judgment on the Pleadings, or by reviewing the Administrative Record which contains the factual basis for the CFTC DMO's decisions. Further, whether the CFTC Division of Market Oversight's attempt to withdraw the 2014 No-Action Letter was justified (or instead arbitrary and capricious), the Administrative Record is clearly not so "bare" as to make it impossible for the Court to discern the reasoning articulated in the DMO Letters and review them to enter a judgment under the APA. To the extent that this Court deems it necessary to review any documents to enter 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 discovery in this case to the Administrative Record.

C. Internal deliberative documents are not part of the Record in APA cases.

Plaintiffs argue that the CFTC should produce privileged internal deliberative documents, apparently so Plaintiffs can explore the CFTC DMO's motivations in withdrawing the 2014 No Action Letter. This is like demanding that a court produce internal law clerk memos or communications between judges on a panel to explore whether those communications could shed additional light on the ultimate decision and opinion issued by a court. It is unnecessary to examine these internal privileged communications to assess the court's ultimate decision, and it is similarly unnecessary to review internal CFTC communications and deliberations to assess the DMO Letters at issue here. The Court can make its determination of whether the DMO Letters were justified without the need for further litigation about the privileges that apply to internal CFTC documents.

In APA cases, internal agency deliberative documents generally are not part of the

administrative record unless the agency explicitly designates them as such and relies on them in support of its action. *See*, *e.g.*, *Emuwa v. U.S. Dept. of Homeland Security*, 113 F.4th (D.C. Cir. 2024) (stating deliberative documents are not part of administrative record "just as a law clerk's bench memorandum" is not part of record of a judicial decision); *Oceana, Inc. v. Ross*, 920 F.3d 855, 865-866 (D.C. Cir. 2019); *Save the Colorado v. U.S. Dept. of the Interior*, 517 F. Supp. 3d 890, 896-98 (D. Arizona 2021); *South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers*, 611 F. Supp. 3d 1366, 143 (D.S.C. 2020). Internal agency deliberative documents are not part of the administrative record because, under basic administrative law principles, they are "immaterial" to the district court's judicial review function. *Oceana*, 920 F.3d at 865. This is because "the Court's task is to assess the lawfulness of the agency's action *based on the reasons offered by the agency*," not to "probe the mental processes of agency decision makers." *Save the Colorado*, 517 F. Supp. 3d at 897 (cleaned up) (emphasis added). *See also*, *e.g.*, *Dept. of Commerce v. New York*, 588 U.S. 752, 780-81 (2019) (stating court should normally avoid inquiry into "executive motivation" beyond agency's "contemporaneous explanation" and "existing record").

Plaintiffs point out that there must be internal CFTC documents referring or relating to PredictIt that are not part of the Administrative Record the CFTC produced. There are, but these documents are beyond the factual record the Court needs to consider in order to decide whether the DMO Letters violate the APA. They are irrelevant to the ultimate decision the Court must make in this APA case. Even if there were reasons beyond those articulated in the 2023 DMO Letter for seeking to withdraw the 2014 No Action Letter, it is permissible and even "routine" for an agency to have unstated as well as publicly stated reasons for acting. *Dept. of Commerce*, 588 U.S. at 781. Unstated reasons cannot justify an agency's actions on judicial review and

therefore are immaterial for that purpose. Discovery inquiring into unstated reasons is impermissible without compelling evidence that the stated reasons played essentially no role in the agency decision. *See id*. at 781-82 (finding discovery order premature when based on "prima facie showing" that agency's stated reasons were pretextual, though later justified by overwhelming evidence that stated reason played "insignificant role in the decision-making process"). Plaintiffs' assertion that there were other reasons, such as a broader concern about excessive use of no-action letters for event contract markets, for the DMO Letters beyond those articulated in the Administrative Record, is not a sufficient basis to require a fishing expedition into every internal CFTC mention of PredictIt or other proposed event contract markets.

Plaintiffs point out that there are certain courts that have found that internal deliberative documents can be part of the administrative record. *E.g., Exxon Mobil Corp. v. Mnuchin*, 2018 WL 4103724 at *2 (N.D. Tex. Aug. 29, 2018). These courts acknowledge that the documents in question may be privileged but require a normal assertion of privilege including a privilege log. *Id.* The CFTC is aware of no binding Fifth Circuit appellate decision to this effect; and Plaintiffs cite none. The approach taken by the D.C. Circuit in the *Oceana* case is the better approach, especially in the circumstances of this case. There is no reason to burden the parties and the court with the additional work and delay that the creation and review of a privilege log would inevitably entail, especially where any such documents would have no likelihood of affecting the outcome of the case.

The Court should reject Plaintiffs' improper attempt to compel the production of privileged internal agency documents beyond the Administrative Record already produced to Plaintiffs.

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

Plaintiffs' discovery requests – and their motion to compel additional documents responsive to these requests – do not seek documents that will aid the court in the determination of Plaintiffs' claims. Indeed, the Court can enter a judgment vacating the DMO Letters without reviewing any documents at all. Yet Plaintiffs ask this Court to order the CFTC to comb through potentially thousands of records to respond to broad, opened-ended requests for documents "concerning, referring or relating to" the PredictIt Market or the No-Action letter; documents plainly protected by the attorney-client privilege or deliberative process privileges; documents related to a separate application for registration with the CFTC Plaintiff Aristotle is pursuing; and documents related to the CFTC's communications with third parties not involved in this litigation. The burden of attempting to collect and review these categories of documents, and to navigate complex privilege issues for internal CFTC documents, 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.

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 Motion for Judgment on the Pleadings. Alternatively, the Court can enter a final judgment in this case without any discovery after reviewing the Administrative Record. Requiring the CFTC to collect, review and potentially produce (depending on potentially applicable privileges) additional documents to Plaintiffs in response to their 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 are

needed for the Court to reach a decision on the merits of this case.

IV. Conclusion.

It is odd that Plaintiffs are continuing to pursue this litigation and discovery despite the CFTC's offer to resolve the case through the entry of a judgment in favor of Plaintiffs. Why continue to pursue litigation and discovery when the CFTC has already offered a judgment in favor of Plaintiffs? The motive may be to prolong the litigation to keep the preliminary injunction in place. Plaintiffs Aristotle and Predict It have been able to operate their event contract market without any supervision as this case continues, and continued litigation and discovery ensures that remans the case.

The CFTC requests that the Court deny Plaintiffs' Motion to Compel. In addition, the CFTC request that the Court enter a protective order 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*

Anne W. Stukes (D.C. Bar. No. 469446)
Deputy General Counsel
Martin B. White (D.C. Bar. No. 221259)
Senior Assistant General Counsel
Carlin R. Metzger (Illinois Bar No. 6275516)
Assistant General Counsel
U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581
Phone: (312) 596-0536

Fax: (202) 418-5567
cmetzger@cftc.gov

CERTIFICATE OF SERVICE

I certify that on December 13, 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*

Carlin R. Metzger,
Assistant General Counsel
U.S. COMMODITY FUTURES TRADING COMMISSION