

**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' OPPOSITON TO CFTC'S MOTION FOR RELIEF FROM
REQUIREMENT THAT PARTIES ENGAGE IN
ALTERNATIVE DISPUTE RESOLUTION**

The Court should deny the CFTC's Motion for Relief from Requirement that Parties Engage in Alternate Dispute Resolution, Dkt. 105.

The long and the short of the agency's position is this: This Court should get to work on a complicated motion resolving the case, instead of the agency spending a few hours engaging in mediation. This Court has an alternative dispute resolution requirement precisely to spare this busy Court the work of deciding motions *when the parties can resolve their differences*. Local Rule CV-88(a) ("In *all* civil cases, unless specifically ordered otherwise, the parties *shall* agree upon a method of ADR, an ADR provider, the method of compensating the provider, and a date for completing the ADR proceeding.") (emphasis added); Fact Sheet for Senior Judge David Alan Ezra ¶ 14; *see also* Dkt. 106 (ordering parties to "participate in a meet and confer to attempt to

resolve” this very motion (and two others) “without court intervention”). And this Court’s rules do not ask the parties to self-diagnose whether a resolution is possible or likely. That is for a neutral mediator to assess. This Court should reject the Government’s self-serving assertion that the parties are just too far apart to spend time before a mediator seeking a resolution, so the Court should expend its time instead resolving the merits.

Indeed, alternative dispute resolution is just as important, if not more important, in civil cases where a government agency is a party as where all the parties are private. That is because, in our governmental system, government lawyers have all the authority in the world to make arguments and fire off motions defending a case. But those government litigation counsel have no authority to settle a case, only the agency’s senior officials do. Mediation requires those agency decisionmakers with authority to focus on an issue and truly decide whether there is room for consensus rather than dispute, in a way court filings do not. That is why, when those policymakers have to show up for mediation, cases against government agencies regularly settle. *See, e.g., Gapontsev v. Dep’t of Treasury*, Case No. 1:18-cv-02826-RC-GMH, Dkt. 38 (D.D.C. Sept. 12, 2019).

All the more so here, where the agency has been claiming time and time again that it was not required to permit the PredictIt Market to be founded or to close it, but all those decisions were a matter of agency official “discretion.” *See* Dkt. 17 at 1-2, 12; Dkt. 19 at 15-16; *Clarke v. Commodity Futures Trading Comm’n*, No. 22-51124 (5th Cir.), ECF No. 54 at 41-43. *Why should those same officials be excused from coming before a neutral mediator and exercising that same alleged discretion to narrow the issues disputed in this case or resolve it entirely?*

The only possible explanation is that the agency is valuing its time higher than that of the judges of this Court. The agency offers no reason why a senior policymaker at the CFTC should

not have to spend a few hours in mediation, but instead an Article III judge should have to spend dozens of hours resolving a very substantive and dispositive motion.

And why is the Court just getting this motion now? The CFTC filed the instant request to be excused from mediation on December 6, 2024, just nine days before the scheduling order's December 15 deadline for the parties to report on alternative dispute resolution. *See* Dkt. 94 at 1. That deadline will pass before the Court has a chance to decide the motion, mooting half of the relief the CFTC seeks. *See* Dkt. 105 at 2 (asking, in addition to exemption from alternative dispute resolution altogether, an exemption “from the requirement in the Scheduling Order . . . that the parties report on alternative dispute resolution by December 15, 2024”). Indeed, the motion has already been set for hearing on January 7, 2025, Dkt. 106, weeks after the December 15 reporting deadline.

The CFTC's belated motion is all the more perplexing because, four months ago, the agency agreed to alternative dispute resolution and the corresponding reporting deadline—the deadline exists only because the parties jointly submitted a motion acknowledging the requirement of alternative dispute resolution to the Court and scheduling a report on it in August. Dkt. 93 at 2. The CFTC does not explain why it thought alternative dispute resolution appropriate then but not now. It contends only that pursuing a non-judicial settlement is a waste of time because the agency has filed a motion for judgment on the pleadings. But it filed that motion on July 16, 2024, *before* it committed to mediation in the proposed scheduling order.

The Court should not tolerate the CFTC's outright refusal to engage in the alternative dispute resolution process. The Motion should be denied.

Dated: December 13, 2024

Respectfully submitted,

/s/ Michael J. Edney

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 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