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

CFTC REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Plaintiffs respond to the CFTC's Motion for Protective Order as if the CFTC's pending Motion for Judgment on the Pleadings seeks judgment in favor of the CFTC, when in fact the CFTC is asking the Court to enter judgment in favor of ***Plaintiffs***. They base their quest for unnecessary document discovery on the fictitious premise that the CFTC is contesting liability. Plaintiffs also misunderstand the purpose of the Record in the context of an administrative appeal pursuant to the Administrative Procedure Act ("APA"). Their demand for extensive, unnecessary discovery is based on this misunderstanding. A protective order is warranted.

I. Plaintiffs ignore that the CFTC's Motion for Judgment on the Pleadings asks the Court to enter judgment in favor of ***Plaintiffs***.

Discovery is unnecessary because the Court can end this case today by entering a judgment in favor of Plaintiffs that vacates the DMO Letters that are the subject of Plaintiffs' complaint. That is what the CFTC has asked the Court to do in its Motion for Judgment on the Pleadings. In entering judgment on the pleadings, the Court can make whatever rulings it finds necessary based on Plaintiffs' allegations in the complaint, which the CFTC admits specifically for that purpose. Plaintiffs brush that issue to the side, insisting that the parties and the Court should continue to devote resources to discovery and document production. But to what end? There is no need for discovery to support claims that the CFTC is conceding.

Plaintiffs cite *No Casino in Plymouth v. Jewell*, 2014 WL 3939585, at *5 (E.D. Cal. Aug. 11, 2014), which denied a motion for judgment on the pleadings because the court found it necessary to review the administrative record before deciding the case. *No Casino*, however, is distinguishable from this case in the most dramatic way possible. In *No Casino*, the plaintiffs sought judgment on the pleadings in *their* favor and the defendant government agency *opposed* such a judgment. *Id*. at *1, *3. In this case the CFTC has moved for judgment in favor of *Plaintiffs*. In addition, in *No Casino*, the government disputed plaintiffs' factual allegations. *Id*.

at *5. In this case the CFTC has admitted the factual allegations in the complaint for purposes of judgment on the pleadings. Finally, in this case, unlike *No Casino*, the CFTC has produced the Administrative Record to Plaintiffs and can file it with the Court if needed.

Plaintiffs mistakenly accuse the CFTC of "gaming the system" based on a misunderstanding of the CFTC's admission of the accuracy of Plaintiffs' complaint allegations for purposes of judgment on the pleadings. Plaintiffs say that the CFTC believes it would not be bound by its admissions in the future even if the Court grants the motion for judgment on the pleadings. That is the *opposite* of the CFTC's position. Under principles of judicial estoppel, if the Court grants the CFTC's Motion for Judgment on the Pleadings, the CFTC will be bound in the future by any admission on which the Court relies. *See* CFTC Reply in Support of Motion for Judgment on the Pleadings, ECF No. 97 at 7 (citing *NGM Ins. Co. v. Bexar County*, 211 F. Supp. 3d 923, 931-32 (W.D. Tex. 2016)). More broadly, any rulings by this Court as part of a judgment on the pleadings will have the force of a final judgment just like any judgment this Court would issue, whether the judgement occurs now or after further litigation.

II. The Administrative Record produced by the CFTC contains the factual information relied on by the CFTC's Division of Market Oversight in issuing the DMO Letters that are the subject of Plaintiffs' complaint.

Plaintiffs misunderstand the purpose of the "record" in the context of an administrative appeal. Their demand for extensive, unnecessary discovery appears to be based on this misunderstanding. Plaintiffs complain that they already have the documents that comprise the Administrative Record. There is a simple reason for this: the CFTC's Division of Market Oversight ("DMO") based its decision to withdraw its 2014 no-action letter on facts obtained from PredictIt and associated persons. This is unsurprising since both the original no-action letter and the later DMO Letters being challenged by Plaintiffs dealt solely with the PredictIt market and its conduct. Since the CFTC's DMO based its decision on information from

PredictIt, the fact that Plaintiffs, who operate PredictIt, already have this information is no justification for further discovery beyond the Administrative Record.

Plaintiffs ignore the extensive caselaw holding that internal agency deliberative documents are not part of the administrative record for purposes of judicial review of agency action. *See Emuwa v. U.S. Dept. of Homeland Security*, 113 F.4th (D.C. Cir. 2024) (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). Plaintiffs also ignore the persuasive reasoning of these cases, *i.e.*, that internal agency deliberations are immaterial in APA cases because the job of the Court is to evaluate agency action based on (a) the facts relied upon by the agency; and (b) the agency's publicly stated reasons for acting. *Oceana*, 920 F.3d at 865; *Save the Colorado v. U.S. Dept. of the Interior*, 517 F. Supp. 3d 890, 897 (D. Arizona 2021). Plaintiffs' own cases hold that "inquiry into the mental processes of administrative decisionmakers is usually to be avoided" except in unusual circumstances. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The reasoning of these cases is particularly persuasive in this case where the CFTC has asked the Court to enter judgment for Plaintiffs and there is no need further inquiry.

Plaintiffs cite *Dep't of Commerce v. New York*, 588 U.S. 752, 780-84 (2019) for the proposition that an agency decision supported by a pretextual explanation cannot stand under the APA. Contrary to Plaintiffs' assertion, discovery in hope of finding evidence of pretext is an improper attempt to use discovery to expand the scope of this case since the existing complaint contains no allegation, or even suggestion, that DMO's stated reasons for acting were pretextual. *See* Second Amended Complaint, ECF No. 55. In any event, the Supreme Court has made clear that agencies can have unstated as well as stated reasons for acting; and that discovery is not

permissible based on a mere suspicion—or even less-than-very-strong evidence—of pretext. 588 U.S. at 781-83. The Supreme Court also observed that an administrative record as extensive as that in *Dep't of Commerce* is "rare" and "should be" rare. *Id*. at 785. In this case, Plaintiffs have presented no evidence—no affidavits, documents, or anything else—establishing that DMO's stated reasons for acting were not its actual reasons.

Plaintiffs' assertions that their discovery requests are not burdensome or overly broad are false. The burden is apparent from the face of the requests. Plaintiffs request "all" of broad categories of documents without limitation to documents considered as part of the decision-making process for the issuance of the DMO Letters at issue. In doing so, Plaintiffs ignore the extensive precedent that in APA cases there is a strong presumption against any discovery, that in the unusual APA case where discovery is warranted it is strictly limited, and that the party seeking discovery has a strong burden of proof to justify it. Plaintiffs' assertion that discovery can be accomplished through a small number of computer searches is wrong. It ignores the fact that the CFTC has had a relationship with the PredictIt Market and related persons extending over ten years, involving issues beyond revocation of the 2014 no-action letter.

The CFTC is a federal agency with more than six hundred employees. It is led by four commissioners and a chairman, and organized into various divisions and offices, including not just the Division of Market Oversight, but also a Division of Enforcement, Division of Clearing and Risk, and other operating divisions.[1] Event contract markets like PredictIt have been the subject of debate within and outside of the CFTC. For example, in May of 2024, the CFTC issued a Notice of Proposed Rulemaking relating to the types of event contracts that fall within

[1] See https://www.cftc.gov/About/CFTCOrganization/index.htm for further background information.

the scope of Commodity Exchange Act section 5c(c)(5)(C) and are contrary to the public interest.[2] As stated in that Notice, the CFTC has recently received applications for exchange registration, and expression of interest regarding registration, from various entities indicating that they are interested in listing event contracts for trading. In fact, Plaintiff Aristotle itself has applied with the CFTC for designation as a "contract market" and "clearing organization," and Plaintiffs are seeking to have the CFTC produce internal documents related to that application process in their discovery requests. A word search across the electronic files of hundreds of agency employees over a period of years where various divisions and offices have been actively addressing issues relating to event contract markets including PredictIt but unrelated to the decision-making process leading to the DMO Letters at issue is no simple task. Such a search would undoubtedly result in hits on thousands of completely irrelevant documents far beyond the scope of the issues the Court needs to decide, not to mention the problems of navigating privilege issues for internal agency communications and deliberations for all such internal documents. All of this would serve no purpose, as the factual basis for the issuance of the DMO Letters at issue is already in the Administrative Record.

Finally, even if discovery—contrary to fact—turned up some improper motive, that would not put Plaintiffs in a better position than the pending Motion for Judgment on the Pleadings. It might justify vacatur, a result already conceded by the CFTC. The admitted factual allegations in the Second Amended Complaint provide an ample factual basis for the Court to decide any other relief or liability issues it finds necessary to resolve the case.

CONCLUSION

The CFTC's Motion for a Protective Order should be granted.

[2] See https://www.cftc.gov/PressRoom/PressReleases/8907-24 (last visited 12/19/2024).

Respectfully submitted,

/s/ *Carlin R. Metzger*

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CERTIFICATE OF SERVICE

I certify that on December 20, 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/ *Carlin R. Metzger*

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