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' REPLY IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF COMPLETE ADMINISTRATIVE RECORD

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The CFTC's attempt to skirt the requirement to produce the record underlying the decision being challenged in this action is deeply flawed. Remarkably, the CFTC never claims that the record already produced by the agency is complete, meaning that it "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). Nor does the CFTC explain why the documents requested by Plaintiffs should not have been included in the administrative record in the first place. Rather, the CFTC unilaterally deems the documents it produced to be "sufficient" and urges this court to "presume" that the record is thus complete. Dkt. 107 at 5-6. The CFTC also argues that it needs not produce internal documents or even produce a privilege log of the documents it is withholding. All three of these arguments are contrary to law, as is the CFTC's argument that its motion for judgment on the pleadings renders unnecessary the fundamental, basic obligation of any agency to produce a complete administrative record in an APA case.

A. The CFTC Must Produce the "Whole Record."

It is irrelevant whether the documents produced by the CFTC "are sufficient" to "spell[] out the reasoning underlying" the CFTC's attempted shuttering of the PredictIt Market. Dkt. 107 at 5-6.[1] What matters is whether those documents comprise the "whole record," as required by the APA. 5 U.S.C. § 706. As the courts of this Circuit have long made clear, "a record may be 'adequate' because it fully articulates the agency's reasoning, yet at the same time be 'inadequate' because it fails to provide the court all documents, memoranda and other evidence" that were

[1] The CFTC falsely contends that the PredictIt Market is owned by the corporate plaintiffs in this case. Dkt. 107 at 3. The cited paragraphs of the operative Complaint (Dkt. 55 ¶¶ 37-38) make clear that "Plaintiff Predict It, Inc., . . ., services the PredictIt Market" and "Plaintiff Aristotle International, Inc. . . . serves as the clearing house for trades on the PredictIt Market . . . ." Indeed, the market's website, cited by the CFTC, states: "A project of Victoria University of Wellington, PredictIt has been established to facilitate research into the way markets forecast events."

before the agency when it rendered its decision. *Exxon Corp.*, 91 F.R.D. at 33. The CFTC should be ordered to produce the materials that were before it when it made the decisions challenged here, including the documents Plaintiffs have requested.

Relatedly, the CFTC admits that its *stated* reasons for attempting to revoke the Market's license might not be its *actual* reasons for doing so (Dkt. 107 at 7), but argues that parties are not allowed to take discovery on those *actual* reasons unless the stated reasons "played essentially no role" in the agency's decision. Dkt. 107 at 8 (citing *Dep't of Commerce v. New York*, 588 U.S. 752, 781–82 (2019)). The CFTC misses the point: the complete record is needed to determine ***whether*** the stated reasons played any role in the agency's decision. *Id.* at 782. In *Department of Commerce*, the plaintiffs moved for both (1) completion of the administrative record, and (2) extra-record discovery into the agency's unstated reasons for its actions, and the district court granted both requests. *Id.* The agency then completed the record, but appealed the order authorizing extra-record discovery. The Supreme Court held that the order to complete the administrative record was proper. *Id.* And although the order for extra-record discovery was premature, the complete record "showed that the [stated reasoning] played an insignificant role in the decisionmaking process," thus justifying discovery into the agency's unstated reasons for acting. Accordingly, the record must be ***complete*** to determine whether the agency's stated reasoning is pretextual. By their Motion to Compel, Plaintiffs seek an order compelling the CFTC to ***complete*** the record with documents that were before the CFTC when it made its decisions; Plaintiffs seek no ***extra-record*** discovery at this time.

B. No Legal Principle Requires the Court to Defer to the Agency on Whether the Record is Complete.

Contrary to the CFTC's argument, there is no legal authority for the proposition that courts must somehow defer to what the agency says the record underlying the challenged decision is.

Dkt. 107 at 4. "[T]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. Instead, an agency "'may not unilaterally determine what shall constitute the administrative record and thereby limit the scope of this Court's inquiry.'" *Id*. at 34 n.11 (quoting *Tenneco Oil Co. v. Dep't of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979)).[2] The record is, rather, what was before the agency when the challenged decision was made that is pertinent to that decision. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971).

Any hope that the CFTC was trying to properly produce the administrative record was dashed by what happened in this case. The agency produced *only communications between itself and the market operators* that the Plaintiffs already had. This is a transparent effort to produce *nothing at all*, and far from any good faith endeavor to produce the information pertinent to the decision that was before the agency.

C. The Record Underlying the Decision Plainly Includes Internal Documents.

The CFTC makes two critical concessions, as it must: First, that there are internal CFTC documents referring or relating to PredictIt that are not included in the administrative record the CFTC produced; and second, that "certain courts" have found such documents to be part of the administrative record. Dkt. 107 at 7-8. Among those "certain courts" are those in this Circuit. *E.g.*, *Exxon Mobil Corp. v. Mnuchin*, No. 3:17-CV-1930, 2018 WL 4103724, at *2 (N.D. Tex. Aug. 29, 2018); *Club v. Angelle*, No. 19-CV-13966, 2021 WL 9526861, at *2 (E.D. La. Mar. 4, 2021); *Sana Healthcare Carrollton, LLC v. Dep't of Health & Human Servs.*, No. 4:23-CV-738, 2024 WL 2723873, at *10 (E.D. Tex. May 28, 2024); *Coastal Conservation Ass'n v. Gutierrez*, No. 05-CV-

[2] As explained in Plaintiffs' Opposition to the CFTC's Motion for a Protective Order (Dkt. 108 at 3-4), each of the cases cited by the CFTC demonstrates that when what has been produced is not the full set of materials that were before the agency when making relevant decisions, the agency should be required to complete the record.

1214, 2006 WL 8445127, at *2 (S.D. Tex. Feb. 17, 2006). As these courts have explained:

> The D.C. Circuit's approach [of excluding from the administrative record internal documents allegedly protected by the deliberative process privilege] conflicts with [5 U.S.C.] § 706, which requires that the [administrative record] be made up of everything the agency considered and does not create an exception for privileged materials. And it is obvious that in many cases internal comments, draft reports, inter- or intra-agency email, revisions, memoranda or meeting notes will inform an agency's final decision . . . .[3]

Exxon Mobil Corp., 2018 WL 4103724, at *2 (quotation and citations omitted).

In the Fifth Circuit, therefore, agencies must either produce internal documents or include them on a privilege log such that any privilege claim can be properly evaluated. *See Nat'l Council of Negro Women v. Buttigieg*, No. 1:22-CV-314, 2024 WL 1287611, at *5 (S.D. Miss. Mar. 26, 2024) (requiring production of a privilege log "allow[s] oversight into whether the 'whole record' is before the Court" and "is a practical and meaningful way to allow a party and ultimately a court to assess whether an agency has properly characterized a document as part of the deliberative process") (quotation omitted).

The CFTC has blown through these principles here. It has produced only communications with Plaintiffs and their partners, which Plaintiffs had long before this case started. The CFTC engaged in *no analysis* of internal documents or communications with third parties to determine whether they were covered by any privilege. And it has refused to produce a log of what internal or other documents it withheld from production and why, despite repeated requests to do so.

D. The CFTC Refuses to Engage In Discussions Regarding Scope of Plaintiffs' Document Requests.[4]

[3] The court also noted that "[m]any district courts have rejected the D.C. Circuit's approach." *Id.* (collecting cases).

[4] "A party resisting discovery must show how the requested discovery is overly broad, unduly burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden." *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 580 (N.D. Tex. 2018) (quotation and citations omitted). The CFTC has offered no evidence substantiating its argument that the

When the recipient of document requests contends that producing responsive documents would be burdensome, there is a process to be followed: Object. Meet and confer with the requesting party to narrow the requests. Provide a search term hit count. Propose custodians. Propose a narrower timeframe (although here, many of Plaintiffs' document requests are already limited to a narrow time period). The CFTC has refused to engage in any discussion of the scope of Plaintiffs' document requests, instead flatly refusing to produce any documents at all.

E. Plaintiffs' Motives in Seeking to Complete the Administrative Record Are Not Improper.

In sum, the CFTC's response to the Motion to Compel adds nothing new besides unfounded and offensive allegations about Plaintiffs' motivations. Plaintiffs have been transparent about why the *complete* administrative record is needed in this case: So the parties can present arguments to the Court based on what was before the agency and can ask the Court to issue a ruling that will bind the agency going forward regarding its arbitrary and capricious behavior.[5] Plaintiffs should not be subject to an endless loop of litigation where the CFTC acts arbitrarily and capriciously and then just agrees to vacate its actions only to take the same arbitrary and capricious actions again.

CONCLUSION

The CFTC did not produce the documents that were before it and pertinent to its decisions when made. Plaintiffs' discovery requests sought precisely this information, and the agency should be compelled to produce responsive documents.

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burden of collecting and producing the requested documents would be "extreme." Dkt. 107 at 9.

[5] This is especially true here, given the CFTC's brazen admission that it will disclaim the allegations in the operative complaint despite admitting them for purposes of its motion for judgment on the pleadings (Dkt. 97 at 8), which is plainly contrary to law. *See* 5C Fed. Prac. & Proc. § 1370 (3d Ed.) (admissions made for purposes of a motion for judgment on the pleadings are nonbinding only "if the motion addressed to the pleadings is denied"). The CFTC is intentionally squirrely on this issue, arguing that it will be bound only by express rulings made by this Court in an order on the CFTC's motion judgment on the pleadings. *See* Dkt. 97 at 3.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 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
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