

**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 FOR LEAVE TO FILE THIRD AMENDED COMPLAINT**

Plaintiffs Kevin Clarke, Trevor Boeckmann, Harry Crane, Corwin Smidt, Michael Beeler, Mark Borghi, Richard Hanania, James D. Miller, Josiah Neeley, Grant Schneider, Wes Shepherd, Predict It, Inc. (“PredictIt”), and Aristotle International, Inc. (“Aristotle”), and prospective Plaintiff *The Washington Free Beacon* (“*The Free Beacon*”), by and through their undersigned counsel and pursuant to Fed. R. Civ. P. 15(a)(2), hereby move for leave to amend the Second Amended Complaint for Declaratory and Injunctive Relief (Dkt. 55) against Defendant Commodity Futures Trading Commission (“CFTC” or the “Commission”) to address issues and information arising from the discovery process and to add claims based on violations of the First and Fifth Amendments to the United States Constitution against the Commission, its Chairman, Rostin Behnam, and the Director of the Commission’s Division of Market Oversight, Vincent McGonagle, stemming from the Commission’s actions to shut down the PredictIt Market

challenged in this matter. The Commission's attempts to shut down the PredictIt Market violate the rights to freedom of speech, freedom of the press, and due process afforded to Plaintiffs and *The Free Beacon* by the Constitution of the United States. Justice requires that claims based on these violations, arising from the same facts as the existing claims in this action, be added to this action. Pursuant to Local Rule CV-7(B), an executed copy of the proposed Third Amended Complaint is attached hereto as Exhibit A.<sup>1</sup> For the convenience of the Court and the CFTC, a redline showing the changes between the Second Amended Complaint and Third Amended Complaint is attached as Exhibit B.<sup>2</sup>

### **BACKGROUND**

In 2022, the CFTC abruptly attempted 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 a replacement for its 2022 decision to close the Market, alleging a series of violations that, in its view, justified closing the Market in the very near future. 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

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<sup>1</sup> The exhibits to the Third Amended Complaint are identical to those of the Second Amended Complaint (Dkt. 55) and will be filed together with the Third Amended Complaint should leave be granted.

<sup>2</sup> Counsel for the Plaintiffs conferred with counsel for the CFTC. Counsel for the CFTC indicated that the Commission intends to review the proposed Third Amended Complaint before deciding whether to consent to or oppose its filing. For their part, Plaintiffs were hoping that the parties would resolve certain discovery issues that would bear on the content of the amended complaint, a process of conciliation that definitively concluded in a lack of success on Thursday, January 2, 2025. Plaintiffs are amenable to a reasonable extension of time of the CFTC's deadline to respond to this motion to allow time for that review and are hopeful that the CFTC will consent to the amendment, obviating the need for the Court to resolve this motion. Plaintiffs file this motion in order to timely comply with the Court's scheduling order, which set a January 6 deadline for motions to amend—a timing that was designed to follow the completion of discovery.

appeal,” was an effort “to game the system,” and itself included arbitrary reasoning for closing the Market. *Clarke*, 74 F.4th at 641-43.

On November 27, 2023, Plaintiffs filed their Second Amended Complaint, adding allegations regarding 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.

On July 16, 2024, the CFTC filed a motion for judgment on the pleadings, stating that “[f]or the purposes of this motion only, the CFTC assumes the accuracy of factual allegations in the [Second Amended Complaint]” but seeking not to be bound by those admissions in any future proceedings. Dkt. 82 at 1 n.1. Throughout the process, the Commission has appeared committed to exiting this litigation and then repeating its efforts to close the Market, with no tethers or limitations arising from the judicial disapproval of its actions leading to this litigation. The motion for judgment on the pleadings should be denied for the reasons set forth in the Plaintiffs’ opposition. Dkt. 96.

On August 16, 2024, the parties jointly submitted scheduling recommendations, including that “[t]he parties shall file all motions to amend or supplement pleadings or to join additional parties by January 6, 2025.” Dkt. 93 ¶ 3. The parties proposed this timing for seeking amendments of pleadings, in line with this Court’s model scheduling order, to follow the discovery process. The Court adopted the parties’ recommendations in a scheduling order issued on August 19, 2024, which gives the parties until January 6, 2025, to file motions to amend or supplement the pleadings or to join additional parties. Dkt. 94 ¶ 4. Plaintiffs and *The Free Beacon* bring this motion in

compliance with that deadline.

Plaintiffs and *The Free Beacon* seek to add four counts to the complaint: two counts seeking to remedy the violation of rights to free expression and to the press guaranteed by the First Amendment to the United States Constitution, and two counts designed to remedy violations of due process rights guaranteed by the Fifth Amendment to the United States Constitution. *See* Ex. A ¶¶ 143-174. In short, *The Free Beacon* is among the many media organizations that rely on the PredictIt Market as a source of information for reporting on political topics and events. The Commission's efforts to shut down the PredictIt Market will restrict the flow of this information to the press and restrict the press's ability to focus on topics that are part of the First Amendment's core protections, including national politics and the operation of our Nation's Government.

The manner of closing the PredictIt Market also has violated the constitutional due process rights of several Plaintiffs, including the requirements of adequate notice or opportunity to be heard. The amendment seeks a permanent injunction against future violations of the Plaintiffs' constitutional rights.

The amendment further seeks to add detail to the existing claims arising from the discovery process. The amendment alleges that the Commission's stated reasons for ending the PredictIt Market, articulated in its March action, are unsupported by the administrative record produced in discovery and are pretextual cover for the agency's true motivations. Some of these allegations arise from the agency's refusal to produce documents relevant to the decisions to end the PredictIt Market that were before the agency at the time it made those challenged decisions, but were not produced as part of the administrative record. These documents include communications from other institutions seeking authorization to offer political event contracts and citing PredictIt's ability to do so. Those documents would show that PredictIt's continued operation was creating a

political problem for Commission leadership, leading to the instruction to attempt to find grounds to cancel PredictIt's license to operate. *See* Ex. A ¶¶ 20-24.

## ARGUMENT

### A. Plaintiffs Are Entitled to Amend the Complaint

Federal Rule of Civil Procedure 15(a)(2) provides that a party may amend its pleading with the consent of all parties or “with the court’s leave,” which “should [be] freely give[n] when justice so requires.” Fed. R. Civ. P. 15(a)(2). The language of Rule 15(a) “evinces a bias in favor of granting leave [to amend].” *Jamieson By & Through Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985) (quotation and citation omitted). Indeed, unless there is a “**substantial reason** to deny leave to amend, the discretion of the district court is not broad enough to permit denial.” *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 598 (5th Cir. 1981) (emphasis added). “The policy of the federal rules is to permit liberal pleading and amendment, thus facilitating adjudication on the merits while avoiding an excessive formalism.” *Jamieson*, 772 F.2d at 1208 (citing *Dussouy*, 660 F.2d at 598).

Accordingly, the Court must possess a “substantial reason” to deny a request for leave to amend. *Id.* Courts in the Fifth Circuit examine five factors in considering motions to amend: “(1) undue delay; (2) bad faith or dilatory motive on the part of the movant; (3) repeated failure to cure deficiencies by amendments previously allowed; (4) undue prejudice to the opposing party by allowing the amendment, and (5) futility of amendment.” *Jack v. Evonik Corp.*, 79 F.4th 547, 565 (5th Cir. 2023). “If none of those factors is present, the leave sought should be ‘freely given.’” *Id.* (quotation and citation omitted).

There is no substantial justification for denying Plaintiffs leave to file their Third Amended Complaint. First, this motion is brought in compliance with the agreed upon and court-ordered deadline for seeking leave to amend, so there has been no undue delay. That timing was designed

to follow discovery, and the amendments arise in part from what the Commission has produced and is withholding from production.

Second, Plaintiffs and *The Free Beacon* are not acting in bad faith or with a dilatory motive. As set forth in the previous paragraph, the goal of Plaintiffs is to remedy the illegal aspects of the Commission's efforts to close the PredictIt Market and to obtain injunctive relief against their repetition.

Third, Plaintiffs have not repeatedly failed to cure deficiencies in the complaint; no deficiencies have ever been found.

Fourth, the filing of this amendment will not cause any undue prejudice to the CFTC, Behnam, or McGonagle. There is no undue prejudice where, as here, "the challenged conduct . . . is essentially the same as that challenged in the initial pleadings." *Dussouy*, 660 F.2d at 599 (holding that leave to amend should have been granted one week before trial date). Instead, the amendment provides more detail on the alleged illegality of the Commission's actions, challenged from the beginning of this case and to bring greater granularity to existing claims from information gleaned from the discovery process.

Finally, the amendment is not futile. Plaintiffs' existing claims are far from flawed, as the Fifth Circuit has held that the Plaintiffs are likely to succeed on them to the point that a preliminary injunction is warranted. The added claims identify incremental legal defects in the Commission's actions and seek a durable remedy against illegal government action, through permanent injunctions against future violations of the Plaintiffs' constitutional rights.<sup>3</sup>

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<sup>3</sup> Denying leave to amend would also result in duplicative litigation. *The Free Beacon* has the right to sue the CFTC, Behnam, and McGonagle in a new action, which would be "the functional equivalent of granting the motion to amend." *Dussouy*, 660 F.2d at 600. The Federal Rules of Civil Procedure must be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

**B. Plaintiffs Are Entitled to Join Additional Parties**

“On motion or on its own, the court may at any time, on just terms, add or drop a party.” Fed. R. Civ. P. 21. The appropriate mechanism for adding parties to the case is through amendment of the complaint, and the scheduling order expressly envisions joining additional parties to this action. Dkt. 94 ¶ 4. Federal Rule of Civil Procedure 20 provides that:

Persons . . . may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

Fed. R. Civ. P. 20(a)(2). Both factors are present here. The constitutional claims asserted against Behnam and McGonagle arise out of the same series of occurrences as the claims against the CFTC, and questions of law and fact are common to the CFTC and its newly-named officials. *See* Ex. A. Moreover, the Third Amended Complaint seeks forward-looking injunctive relief against federal government officials in their official capacity, which is the appropriate mechanism to bring direct constitutional claims and to seek remedies for them. *See, e.g., Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015) (noting that Supreme Court has “long held” that federal courts may grant injunctive relief against federal officials alleged to have violated constitutional provisions to prevent future violations thereof). Accordingly, the Court should add them to this action.

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Fed. R. Civ. P. 1. Denial of leave to amend would result in an additional case on the Court’s docket, “and disposition of the merits delayed, a result that rule 1 directs us to avoid and that undercuts the policy of the federal rules in favor of consolidating litigation to facilitate an efficient and expeditious resolution of disputes.” *Dussouy*, 660 F.2d at 600.

## CONCLUSION

For the reasons set forth above, the Court should allow Plaintiffs and *The Free Beacon* to file the Third Amended Complaint.

Dated: January 6, 2025

Respectfully submitted,

/s/ Michael J. Edney

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and Wes Shepherd and prospective Plaintiff  
The Washington Free Beacon*



**CERTIFICATE OF SERVICE**

I hereby certify that on January 6, 2025, 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