

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

KEVIN CLARKE, PREDICT IT, INC.,	§	
ARISTOTLE INTERNATIONAL, INC., <i>et</i>	§	
<i>al.</i>	§	
	§	Cause No. 1:24-cv-00614-DAE
<i>Plaintiffs,</i>	§	
v.	§	The Honorable David A. Ezra
	§	
COMMODITY FUTURES TRADING	§	
COMMISSION,	§	
	§	
<i>Defendant.</i>	§	

**MOTION TO MODIFY SCHEDULING ORDER TO EXTEND THE DEADLINE FOR
DISPOSITIVE MOTIONS**

Defendant Commodity Futures Trading Commission (“CFTC”) respectfully moves pursuant to Fed. R. Civ. P. 16(b)(4) to modify the current Scheduling Order (ECF No. 94) to extend the deadline for the parties to file dispositive motions until further order of the Court or, in the alternative, until six months after the current deadline of March 10, 2025. As explained in further detail below, the CFTC requests this modification to allow the Court sufficient time to consider two pending substantive motions that necessarily impact the need for and scope of dispositive motions: the CFTC’s Motion for Judgment on the Pleadings (ECF No. 82) and Plaintiffs’ Motion for Leave to File a Third Amended Complaint (ECF No. 117).

The parties conferred in a good faith attempt to reach an agreement to modify the current schedule but were unable to reach an agreement. Plaintiffs advise the CFTC that they are amenable to a thirty-day extension of the dispositive motion deadline but oppose a longer extension. The CFTC is concerned that a thirty-day extension of the dispositive motion deadline

will not be enough time and will result in the parties seeking additional extensions of the dispositive motion deadline within a few weeks.

Federal Rule of Civil Procedure 16(b) provides that “[a] schedule may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). The Fifth Circuit has identified four factors that trial courts must consider when determining whether good cause exists to allow a deviation from the court’s scheduling order: (1) the explanation for the failure to [complete the discovery within the deadline]; (2) the importance of the [modification of the deadline]; (3) potential prejudice in allowing the [modification]; and (4) the availability of a continuance to cure such prejudice. *Reliance Ins. Co. v. The Louisiana Land & Exploration Co.*, 110 F.3d 253, 257 (5th Cir. 1997); *Geiserman v. MacDonald*, 893 F.2d 787, 791 (5th Cir. 1990).

Applying these four factors here, there is good cause to amend the Scheduling Order and to extend the current dispositive motion deadline. First, extending the dispositive motion deadline will give the Court time to decide two pending motions that impact (a) the need for further dispositive motions and (b) the issues that need to be addressed in any such motions. Second, extending the dispositive motion deadline will allow the parties to ensure the administrative record is complete.

I. The March 10, 2025, dispositive motion deadline should be extended to allow the Court time to rule on two pending substantive motions that will impact the need for or scope of dispositive motions.

The CFTC’s pending Motion for Judgment on the Pleadings (ECF No. 82) (“Motion for Judgment”) asks the Court to end this case by entering a judgment in favor of Plaintiffs. If the Court grants this motion, no further dispositive motions are needed because the Court will have entered judgment, and the case would be over.

Plaintiffs’ pending Motion for Leave to File Third Amended Complaint (ECF No. 117) (“Motion for Leave”) seeks to expand the case to include four new constitutional claims, a new

plaintiff, and two new individual defendants. Plaintiffs filed their Motion for Leave on January 6, 2025, the CFTC filed an opposition on February 3, 2025, (ECF No. 122), and Plaintiffs' reply is now due February 18, 2025. This leaves limited time for the Court to rule on Plaintiffs' Motion for Leave before the current deadline of March 10, 2025, for dispositive motions. If Plaintiffs' Motion for Leave is granted, the Plaintiffs' Third Amended Complaint would add four new counts claiming violations of the First and Fifth Amendments. Proposed Third Amended Complaint, Redline Version (ECF No. 117-2 at Counts III-VI), as well as a new plaintiff and two individual defendants. If Plaintiffs' Motion for Leave is denied, the case—and any future dispositive motions—would be confined to the administrative law claims asserted in Plaintiffs' three previous complaints. *See, e.g.*, Proposed Third Amended Complaint, Redline Version (ECF No. 117-2) at Counts I-II. Because the legal and factual standards for First and Fifth Amendment claims are different from those for conventional administrative law claims, the content of any future dispositive motions and associated briefing would be substantially different depending on whether Plaintiffs' Motion for Leave is granted or denied. For the same reason, if the Motion for Leave is granted, the CFTC, to adequately defend itself against the new constitutional claims, is likely to have to ask the Court to amend the current Scheduling Order to reopen discovery. *See* Opposition at 10 (giving examples of the need for discovery if the amendment is allowed).

As a result, until the Court rules on these motions, it will be difficult or impossible for the parties to know what issues they need to address in any future dispositive motions. Work on such motions is likely to be wasted or substantially less helpful to the Court than it otherwise would be. Since the March 10, 2025, date for dispositive motions is approaching, it should be extended to avoid these problems. Extending the deadline for dispositive motions until after the Court has had time to rule on these motions would contribute to the efficiency of this proceeding.

II. The March 10, 2025 dispositive motion deadline should be extended to allow the parties to ensure the administrative record is complete.

The dispositive motion deadline also should be extended to allow the parties additional time to ensure that the administrative record is complete in accordance with the recent orders entered by Magistrate Judge Lane. Judge Lane entered an order on January 8 requiring the CFTC to certify that the administrative record is complete, and recently extended the time for the CFTC to complete its review and certification process to March 7, 2028. (ECF Nos. 119 and 126.)

CONCLUSION

The current Scheduling Order should be modified to extend the deadline for dispositive motions until further order of the Court or, in the alternative, until six months after the due date in the current Scheduling Order. The Scheduling Order also provides deadlines for designation of witnesses and exhibits of April 15 and May 15, 2025, respectively. The CFTC does not expect that a trial is likely in this case. However, for completeness, if court grants this motion and extends the deadline for dispositive motions, the CFTC requests that the deadline for designation of witnesses and exhibits should be adjusted in the same manner. The attached proposed order does this.

Respectfully submitted,

/s/ Martin White

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CERTIFICATE OF SERVICE

I certify that on February 11, 2025, 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/ Martin White