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 FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

The CFTC's attempts to shut down the PredictIt Market violate Plaintiffs' constitutional due process rights. The CFTC is also violating the free expression rights of the trader Plaintiffs and the free expression and free press rights of the media reporting on political affairs, including *The Washington Free Beacon*, that are guaranteed by the First Amendment to the United States Constitution. The request for leave to amend to add these constitutional claims is right on time, filed before the deadline set by this Court. And the federal rules command that leave to amend sought prior to trial "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a)(2). The CFTC has come nowhere close to satisfying the high burden for resisting a timely filed motion for leave to amend, so the Plaintiffs' motion should be granted. *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 598 (5th Cir. 1981).

A. Plaintiffs Did Not Unduly Delay in Seeking Leave to Amend.

The Government remarkably argues that Plaintiff's motion for leave to amend is somehow untimely. Dkt. 122 ("Opp.") at 5-8. To the contrary, the parties agreed on a sensible deadline for seeking leave to amend claims and add parties and placed the deadline in the proposed scheduling order, which the Court adopted. Dkt. 94. That deadline was sensibly set just after the close of discovery. The Plaintiffs, not eager to barrage the Court with successive amendments, moved to do so at the end of that period—in the unfortunately unfulfilled hope that the CFTC would have abided by its discovery obligations by that time and produced the administrative record, which would fill in additional facts that would shape the ultimate amendment. Through no fault of the Plaintiffs, the CFTC did not do so and its compliance had to be compelled by Court order. *See* Dkt. 119.

The CFTC did not produce the administrative record at the beginning of this case, as is customary. It refused to produce the administrative record during discovery. Two weeks before the end of the discovery period, the CFTC produced a deficient "record" that included only correspondence that the Plaintiffs already had. Dkt. 98. Following a hearing on Plaintiffs' Motion to Compel (Dkt. 102), the Court ordered the CFTC to complete and certify the record by February 7, 2025. Dkt. 119. The CFTC did not meet this deadline, instead obtaining an extension through March 7, 2025. Dkt. 126.

Ignoring the old adage that people who live in glass houses shouldn't throw stones, the CFTC now half-heartedly argues that it is irrelevant that Plaintiffs ***met*** the Court-ordered deadline to seek leave to add claims and parties. Opp. at 6. But "many courts have explained that there is a presumption of timeliness when a party moves for leave to amend before a court-ordered deadline in a Scheduling Order." *Greco v. Nat'l Football League*, 116 F. Supp. 3d 744, 755 (N.D. Tex. 2015) (collecting cases); *see also Potter v. Bexar Cnty. Hosp. Dist.*, 195 Fed. Appx. 205, 209 (5th

Cir. 2006) ("[Plaintiff]'s motion for leave to amend was filed before both the original and extended deadlines for amending pleadings; therefore, on its face, the motion was timely."). Because it was filed in compliance with the Court-ordered deadline, Plaintiffs' motion for leave to amend is timely on its face.[1]

Not all relevant facts were known to Plaintiffs at the time of the original complaint and the

[1] The cases cited by the CFTC—each of which presents unusual circumstances not present here—only demonstrate that Plaintiffs did not unduly delay in seeking leave to amend. In two of the cases, the plaintiffs seeking leave to amend had declined to assert claims that they had already been advised they could assert, or had already asserted in a separate case, before ever filing the case. In *US Capital Glob. Inv. Mgmt. LLC v. Noble Capital Grp., LLC*, No. 1:22-CV-00626-DAE, 2023 WL 11867023, at *2 (W.D. Tex. Sept. 1, 2023), "Plaintiffs had already pled the same facts and asserted the same claims in a different case before this action commenced." Likewise, in *Matter of Southmark Corp.*, 88 F.3d 311, 315 (5th Cir. 1996), "before filing its original complaint, [Plaintiff] Southmark had the benefit of an Examiner's Report which analyzed causes of actions that Southmark may possibly have, including this one." There is no suggestion that Plaintiffs had either filed or been advised that they could file constitutional claims when this case was filed; they had not.

In another of the cases cited by the CFTC, the "most important" fact to this Court was that the plaintiffs had "repeatedly failed to cure their pleading deficiencies." *Guzman v. Bank of New York Mellon*, No. 5:16-CV-1210-DAE, 2018 WL 8061011, at *3 (W.D. Tex. Feb. 23, 2018). Additionally, the motion for leave to amend was filed more than four months after the deadline to amend pleadings. *Id.* Finally, the case was dismissed in whole for failure to state a claim upon which relief could be granted, and amending would be futile because the proposed amendment would also not state a claim. *Id.* None of these circumstances is present here.

The claims asserted in *United States ex rel Gage v. Rolls-Royce N. Am., Inc.*, 760 Fed. Appx. 314, 315 (5th Cir. 2019), were barred by issue preclusion because identical claims had already been dismissed with prejudice in a prior case. Given this, and because the plaintiff "fail[ed] to point out how he would amend his complaint," leave to amend was properly denied. *Id.* at 318. Here, Plaintiffs do not seek to assert claims that have already been dismissed, and filed their proposed amended complaint.

Leave to amend was denied in *Moore v. Performance Pressure, Pumping Servs., LLC*, No. 5:15-CV-346, 2016 WL 11547154, at *2 (W.D. Tex. Mar. 7, 2016), because an extension of the amendment deadline was specifically to allow members of a class to join the case as opt-in plaintiffs, not to allow addition of defendants. The scheduling order in this case was not designed to constrain the addition of parties on either side.

Finally, leave to amend was denied in *Robertson v. Intratek Computer, Inc.*, 976 F.3d 575, 584 (5th Cir. 2020), because the plaintiff was attempting to evade an agreement to arbitrate his claims against his former employer by adding as a co-plaintiff a company he owned. By contrast, Plaintiffs here have no improper motive in seeking to protect their constitutional rights.

timing of the proposed amendment is not unexplained, so there is no undue delay that could warrant denial of leave. *See* Opp. at 5. As to the facts, Plaintiffs could not have predicted that the CFTC would persist in its illegal crusade against the PredictIt Market, including by purporting to vacate the letter that precipitated this litigation in an effort "to game the system." *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627, 641 (5th Cir. 2023). Moreover, new facts came to light in late 2024 in conjunction with the presidential election regarding how important the PredictIt Market is as a resource for media organizations. *See* Dkt. 117-2 ¶¶ 7, 31, 55, 66 ("*The Free Beacon* views PredictIt data as an important complement to polling information, which takes days to assemble and can suffer from inaccuracies that small investments in predictions can correct."), 67, 113, 147. The CFTC's continuing misconduct, aimed squarely at the constitutional rights of the Plaintiffs and *The Free Beacon*, precipitated the requested amendment.

Moreover, that Plaintiffs' original complaint alleged that news outlets rely on political-events markets in reporting on projected political outcomes weighs in *favor* of allowing the amendment—not *against* it. "[A]mendments which 'merely propose alternative legal theories for recovery on the same underlying facts should be permitted.'" *Hammond v. United States*, No. 1:21-CV-00686-DAE, 2023 WL 8113860, at *4 (W.D. Tex. June 6, 2023) (citation omitted).

And the timing of the proposed amendment is fully explained: as set forth above, Plaintiffs sought to address all remaining issues, including those coming out of discovery, in one ultimate amendment. No principle of law requires a plaintiff to serially amend their operative complaint every time an incremental issue comes to its attention, especially when there is a scheduling order addressing the topic. Indeed, "[m]erely because a claim was not presented as promptly as possible, [] does not vest the district court with authority to punish the litigant." *Carson v. Polley*, 689 F.2d 562, 584 (5th Cir. 1982).

Additionally, the CFTC does not contend that *The Free Beacon* knew of the facts underlying the constitutional claims when this case was originally filed or unduly delayed in bringing its claims. *The Free Beacon* has the right to sue the CFTC and its officials in a new action, which would be "the functional equivalent of granting the motion to amend." *Dussouy*, 660 F.2d at 600. 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 [of the Federal Rules of Civil Procedure] 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." *Id*.

Finally, the CFTC's pending motion for judgment on the pleadings also does not render the proposed amendment untimely. As an initial matter, the motion is itself an odd bird. It is not a motion for summary judgment, which must be filed by a specified time under this Court's scheduling order, and even such a motion "'does not in itself extinguish a plaintiff's right to amend a complaint.'" *Clark v. Am.'s Favorite Chicken Co.*, 896 F. Supp. 611, 616 (E.D. La. 1995) (quoting *Little v. Liquid Air Corp.*, 952 F.2d 841, 846 n.2 (5th Cir. 1992)). Rather, it is a Rule 12 motion addressed to the Second Amended Complaint. Motions filed under Rule 12 addressing issues in the pleadings are generally points of departure for amending the operative pleading, not reasons to deny leave. This is so much so that the Federal Rules give a party the *right* to amend, without the need to seek leave of Court, after certain Rule 12 motions are filed. *See* Fed. R. Civ. P. 15(a)(1)(B).[2]

[2] Nor does the pendency of the CFTC's motion render the proposed amendment unduly prejudicial. *See* Dkt. 122 at 8-9. Unlike in *Squyres v. Heico Companies, L.L.C.*, 782 F.3d 224 (5th Cir. 2015), where the plaintiff sought leave to amend eight months after the deadline and after the defendant sought summary judgment, here Plaintiffs sought leave to amend within the deadline and well in advance of the then-deadline, much less the extended deadline of September 10, 2025, deadline to file motions for summary judgment. Dkt. 128. That the CFTC does not feel like confronting its constitutional violations is not a substantial reason to deny leave to amend.

B. The Proposed Amendment Would Not Be Unduly Prejudicial to the CFTC.

The CFTC's argument regarding undue prejudice evinces no actual prejudice to the CFTC, but instead reflects a desire not to have to confront the unconstitutionality of its actions. The CFTC complains that the proposed amendment "would require additional briefing" and might require the reopening of discovery, purportedly "imposing burdens on both the CFTC and the Court." Opp. at 10. But even if true, those activities do not constitute undue prejudice.

First, regarding discovery, the CFTC's position has been throughout the last six months that there should be no discovery of any kind. The CFTC did not seek any discovery—no document, no interrogatory answer, nothing—from the Plaintiffs during the discovery period. The CFTC gives the Court no reason to believe that the amendment will cause it to change course and seek discovery. In any event, that a defendant might choose to respond to an amendment by engaging in additional (or, in this case, any) discovery, at additional cost, does not constitute undue prejudice. *Anzures v. Prologis Texas I LLC*, 886 F. Supp. 2d 555, 568–69 (W.D. Tex. 2012).

The same is true of additional briefing. Here, as in *Anzures*, "a continuance of the Scheduling Order deadlines would cure any alleged prejudice to" the CFTC. *Id.* at 569; *see also Mailing & Shipping Sys., Inc. v. Neopost USA, Inc.*, 292 F.R.D. 369, 376 (W.D. Tex. 2013) (prejudice to Defendant "can be cured by postponing trial and providing additional opportunities for limited discovery, dispositive motions, and ADR in this case").[3] And, indeed, the Court already has granted a six month extension of the Scheduling Order's remaining deadlines. Dkt. 128.

[3] The three cases relied on by the CFTC do not support its argument that leave to amend should be denied because the new claims would expand the scope of the case. Rather, in each case, the plaintiff sought leave to amend after the scheduling order deadline for doing so had passed: six months late in *Holman-Farrar Holdings, LLC v. Old Republic Nat'l Title Ins. Co.*, No. 1:22-CV-00937-DAE, 2024 WL 5357176, at *3 (W.D. Tex. Apr. 26, 2024); eight months late in *Squyres*; and more than a year late in *Rainbow Energy Mktg. Corp. v. DC Transco*, No. 1:21-CV-313-RP, 2023 WL 11991180, at *1 (W.D. Tex. Jan. 5, 2023)). Thus, the plaintiffs in those cases

In short, the CFTC is complaining simply about having to defend new claims. That is not undue prejudice. *See Hammond*, 2023 WL 8113860, at *4 ("[N]one of these arguments support a prejudicial nature of [plaintiffs]'s amendment; rather, they are substantive allegations reaching the merits of the claims [plaintiff] seeks to raise.").

C. The Proposed Amendment is Not Futile.

"'[I]f a proposed amendment is not *clearly* futile, then denial of leave to amend is improper.'" *Greco*, 116 F. Supp. 3d at 756 (quoting *Moore v. Dallas Indep. Sch. Dist.*, 557 F. Supp. 2d 755, 759–60 (N.D. Tex. 2008)) (emphasis original). Even when a "proposed amendment borders on failing to state a claim[,] … the best course is to allow the amendment to be filed under the liberal principles of Rule 15(a) but then make a close examination of this issue should a motion to dismiss for failure to state a claim be filed …." *Clark*, 896 F. Supp. at 617. Plaintiffs' proposed amendment easily clears this low bar.

On Plaintiffs' First Amendment claim, the CFTC does not even dispute the crux of the proposed amendment—that the agency's forced shutdown of the Market trenches on the press rights of media organizations like *The Free Beacon*. Dkt. 117-2 ¶ 147. Instead, the CFTC spends several pages discussing the difference between speech and conduct, Opp. at 11-13, but it never explains why Plaintiffs' expression qualifies as conduct rather than speech. The trader and media Plaintiffs' expression is speech. Indeed, participation in a prediction market and reporting on it involve the archetypal form of speech—speech related to political elections and events. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs…. of course includ[ing] discussions of candidates."). When the Investor Plaintiffs participate in the

---

had to show good cause for missing the deadline under Rule 16(b)—a hurdle they were unable to overcome and an issue that is not present here.

Market, they are sharing their knowledge, skills, and insights about the likelihood of political events with the rest of the Market. Dkt. 117-2 ¶ 146. That expression is nothing like the unprotected conduct of engaging in on-campus recruiting or playing competitive sports. Opp. at 11 (discussing these examples). If an Investor Plaintiff were to write a letter to a newspaper expressing an informed opinion about the likely outcome of an election, or share his views with a pollster, that prediction would undoubtedly qualify as "speech." *See Mills*, 384 U.S. at 218-19; *Cox v. State of Louisiana*, 379 U.S. 559, 564 (1965). The fact that the Individual Plaintiffs present their predictions on the Market does not transform the opinion into unprotected conduct.

Nor does the CFTC explain why the aggregated predictions of individual participants in the Market are not "speech" worthy of First Amendment protection. They surely are. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment.") (collecting cases). The main reason why the Market was formed was to "collect . . . results data for academic and educational use." Dkt. 55 ¶ 81. And "the Market has been found to be a remarkably accurate predictor of [political event] outcomes." Dkt. 55 ¶ 4. The data that the Market provides—aggregated from individual speakers—thereby advances the "truth-seeking function of the marketplace of ideas," and merits First Amendment protection. *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52, 108 (1988). "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell*, 564 U.S. at 570.

The CFTC argues that the involvement of money disqualifies Plaintiffs' expression from First Amendment protection. Opp. at 12-13. But "a great deal of vital expression" "results from an economic motive," and Plaintiffs' expression is no exception. *Sorrell*, 564 U.S. at 567

(collecting cases).[4] The fact that the Investor Plaintiffs back their informed predictions with monetary investments does not negate the expressive element of the predictions. In fact, the wager enhances the expression and forms an integral part of the speaker's message by telling others on the Market (and those following the Market) the strength of the prediction. *See* Dkt. 55 ¶ 2.

The CFTC is therefore incorrect to suggest that "'viewers' are [not] highly likely to perceive PredictIt traders or the PredictIt Market as trying to express something rather than trying to make money or providing a venue for others to do so." Opp. at 12. Instead, as the CFTC itself stated in the No Action Letter, the Market is explicitly designed to serve "educational," "research," and "academic purposes." Dkt. 55-1 at 2, 5.[5]

As for Plaintiffs' Due Process claim, the CFTC claims the amendment is just "largely futile" (Opp. at 11), not the "clear futility" required to deny leave to amend. *Greco*, 116 F. Supp. 3d at 756. At the very least, the Plaintiffs have a property interest in the existing contracts that the CFTC attempted to revoke without notice or any opportunity to be heard. Dkt. 117-2 ¶¶ 164-65; Opp. at 15 (conceding this interest). The CFTC's arguments regarding other aspects of Plaintiffs' due process rights are wrong in any event. The CFTC's argument that the Plaintiffs' liberty interest in contracting with the Market is not infringed because other prediction markets are available ignores the unique characteristics of the Market—its academic purpose, limited participants, and wager caps—that substantially differentiate it from other markets. *See* Dkt. 55 ¶ 3. And the Fifth

[4] Notably, Plaintiffs' financial motives are tempered by the Market's $850 per contact investment limits. *See* Dkt. 55 ¶ 3.

[5] For similar reasons, the CFTC's attempts to analogize Market activities to the purchase of stocks or real estate are inapt. Dkt. 122 at 13. Although purchases in those other contexts are informed by opinions about future events, they are not *themselves* predictions about whether a specific event is likely to occur. And, unlike those examples, the entire purpose of the Market is to produce data about future political events; the data is not just a useful by-product.

Circuit has already rejected the CFTC's characterization of the Plaintiffs' interest in the Market's license to operate as merely "indirect" or "incidental[]." Opp. at 14; *Clarke*, 74 F.4th at 640, 643.

The CFTC's remaining arguments fall well short of demonstrating clear futility. Opp. at 15-17. As the CFTC acknowledges, its argument that Plaintiffs' constitutional claims do not alter the scope of relief sought in previous complaints is neither true, *see* Opp. at 15, nor relevant to whether leave to amend should be granted. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) (courts "must not shrink from their obligation to enforce . . . constitutional rights" because of practical concerns). And the addition of CFTC officials as defendants both adds to the relief sought by Plaintiffs, in particular with respect to the need for an injunction that survives the pendency of this case and guards against additional substantive and procedural constitutional violations. Dkt. 117-2 at Prayer for Relief. The entitlement to that remedy has been a focus of the CFTC's opposition arguments (even in its motion for judgment on the pleadings) and is the natural subject of an amendment. *See* Dkt. 82 at 17-19; Dkt. 97 at 5-6.

In the end, the CFTC comes nowhere close to meeting the clear futility standard. While some of Plaintiffs' constitutional claims may be "novel" or present issues of "first, or near-first, impression," Opp. at 7, 10, that is no reason to deny amendment. To the contrary, it militates in favor of deciding the fate of these important constitutional claims at a later stage, with the benefit of full briefing, not just a fraction of a ten-page reply brief on a procedural motion. *See* L.R. CV-7.

CONCLUSION

For the reasons set forth in Plaintiffs' Motion for Leave to File Third Amended Complaint (Dkt. 117) and above, the Court should allow Plaintiffs and *The Washington Free Beacon* to file the Third Amended Complaint.

Dated: February 18, 2025

Respectfully submitted,

/s/ Michael J. Edney
Michael J. Edney
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
T: (202) 778-2204
medney@hunton.com

Attorney for Plaintiffs Kevin Clarke, Trevor Boeckmann, Harry Crane, Corwin Smidt, Aristotle International, Inc., Predict It, Inc., Michael Beeler, Mark Borghi, Richard Hanania, James D. Miller, Josiah Neeley, Grant Schneider, and Wes Shepherd and prospective Plaintiff The Washington Free Beacon

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 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