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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KALSHIEX, L.L.C.,)	
Plaintiff,)	Case No. 2:25-cv-00575-APG-BNW
vs.)	Las Vegas, Nevada
KIRK D. HENDRICK, et al.,)	August 22, 2025
Defendants.)	Courtroom 3D
)	MOTION HEARING
)	C E R T I F I E D C O P Y
)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE BRENDA WEKSLER
UNITED STATES MAGISTRATE JUDGE

DIGITALLY RECORDED: Liberty Court Recorder (LCR)
3:38 - 5:15 p.m.

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APPEARANCES

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1 LAS VEGAS, NEVADA; AUGUST 22, 2025; 3:38 - 5:15 P.M.

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3 P R O C E E D I N G S

4 COURTROOM ADMINISTRATOR: This is the time set in
5 the case of 2:25-cv-575-APG-BNW, KalshiEX, L.L.C., versus
6 Hendricks, et al.

7 Plaintiff's counsel, please enter your appearance
8 for the record.

9 MR. KENNEDY: Good afternoon, Your Honor. Dennis
10 Kennedy and my partner Paul Williams from Bailey Kennedy on
11 behalf of the plaintiff. My co-counsel from the Milbank firm
12 are also here. I'll let them introduce themselves.

13 MR. MAINLAND: Good afternoon, Your Honor. Grant
14 Mainland of Milbank, L.L.P., on behalf of the plaintiff. I'm
15 joined by my partner Joshua Sterling and my colleague Victor
16 Hollenberg.

17 THE COURT: All right. Good afternoon to all of
18 you.

19 MS. WHELAN: Good afternoon, Your Honor. Jessica
20 Whelan, Chief Deputy Solicitor General for the State of Nevada
21 here on behalf of defendants.

22 THE COURT: Good afternoon.

23 MR. HOSMER-HENNER: Adam Hosmer-Henner, McDonald
24 Carano on behalf of intervenor Nevada Resort Association.

25 THE COURT: Good afternoon. We also have Ms.

1 Susskind on Zoom; is that correct?

2 MS. SUSSKIND: Yes.

3 THE COURT: All right. And also I believe we have
4 Mr. Havemann on Zoom?

5 MR. HAVEMANN: That's correct.

6 THE COURT: Do we have Mr. Hollenberg?

7 MR. HOLLENBERG: Victor Hollenberg.

8 THE COURT: All right. Wonderful.

9 All right. So just for purposes of knowing who to
10 refer to, who is going to be arguing on behalf of plaintiffs?

11 MR. MAINLAND: I will, Your Honor, Grant Mainland.

12 THE COURT: All right. Very well. The defendants
13 are easy enough.

14 All right. Excellent. We are here on the
15 plaintiff's motion to stay discovery. This is at Docket 87.
16 The Nevada Resorts Association opposed at Document 90. The
17 State defendants joined the Nevada Resort Association's
18 opposition at Document 91. They also prepared an opposition at
19 Document 89. And, lastly, we have the plaintiff's reply at
20 Document 94.

21 First I'm going to turn to some preliminary issues,
22 and that is, are there any objections to the different requests
23 for remote access? Mr. Mainland?

24 MR. MAINLAND: No objection, your Honor.

25 THE COURT: Ms. Whelan?

1 MS. WHELAN: No, Your Honor.

2 THE COURT: Mr. Hosmer-Henner?

3 MR. HOSMER-HENNER: No, Your Honor.

4 THE COURT: All right. Wonderful. I just want to
5 remind those of you who are joining by Zoom that you cannot
6 record or take any screen shots of today's hearing.

7 All right. Turning to some of the preliminary
8 matters regarding the motion, the State defendants request that
9 I deny the motion on the grounds that it does not qualify as an
10 emergency under the local rules. The Court agrees that the
11 motion does not qualify as an emergency, especially when
12 plaintiff wasn't noticed as far as July 2nd that a motion to
13 stay discovery would be needed. Nevertheless, this case is
14 proceeding on a shortened discovery plan and scheduling order,
15 and it made sense to expedite somewhat the briefing schedule
16 and today's hearing. So for purposes of addressing that
17 specific request, Ms. Whelan, that is denied, and we can go
18 ahead and go forward.

19 As both parties know, I employ the Schrader test
20 which requires showing the discovery is not necessary to
21 determine the pending motion for summary judgment, and there is
22 good cause.

23 It seems to me based on the briefing that the
24 dispositive issue here is whether discovery is needed or not,
25 so most of my questions are focused on that, but first I'm

1 going to go ahead and just get rid of the very last question of
2 the test, which is whether there is good cause. And my first
3 questions are for Mr. Mainland.

4 So there are three questions that I'm going to pose
5 to you regarding good cause. One, assuming that I agree with
6 you that discovery is not necessary, what kinds of specifics
7 have you presented regarding the anticipated costs of
8 discovery?

9 You also mention in your brief that discovery would
10 expose you to other competitors having sensitive information.
11 Why can't a protective order cure that?

12 And, lastly, what rule should the preliminary peek
13 test play, if any, in this case? And I suppose you might as
14 well argue -- excuse me -- also mentioned the District of
15 Maryland case and how that might affect the ultimate decision
16 here.

17 With regard to good cause, the only similar question
18 that I have for the defendants here is what the rule of the
19 preliminary peek test should be, if any. Okay? So I'm just
20 going to hear arguments on good cause, and then we can turn to
21 discovery.

22 Mr. Mainland, whenever you're ready.

23 MR. MAINLAND: Sure, Your Honor. Thank you. Thanks
24 again, Your Honor. And we appreciate your doing this on an
25 urgent basis and in particular on a Friday afternoon at the end

1 of August, so we very much appreciate that. I'll address your
2 questions in the order you presented them.

3 The specifics regarding costs of discovery, we
4 haven't -- the time period to actually respond and object to
5 the requests that were served at the beginning of August hasn't
6 arrived yet, and I think in order to formulate any sort of
7 reasonable estimate as to what discovery is going to cost, we
8 would need to know --

9 THE COURT: Let me just stop you right there.

10 MR. MAINLAND: Sure.

11 THE COURT: You're telling me that because you've
12 not responded to the ten requests for productions and ten
13 interrogatories, you can't estimate what the cost is going to
14 be?

15 MR. MAINLAND: Well, where I was going with that is
16 we don't know what the scope is of what we would be able to
17 work out with the other side. We are going to be objecting
18 very strenuously to virtually all, if not all, of their
19 requests, and so if what comes out of that -- in my experience,
20 what can come out of that is a bunch of fights before a Court
21 or it can come -- it can result in some sort of modification or
22 resolution. That can have a very material impact on the cost.

23 I honestly -- my honest answer to Your Honor is I
24 don't know and I don't have a specific estimate of what the
25 costs will be. That said, in my experience in complicated

1 litigation of this nature, discovery is where things get
2 expensive. I think it could easily be in the seven figures
3 fairly quickly if we're talking -- and particularly if we're
4 talking about responding to the nature of the requests that
5 we've received so far, which are extremely broad.

6 THE COURT: Okay. But that goes to my point, right?
7 So you've received those requests already. You have read
8 *Schrader* because you've cited it in your briefs.

9 MR. MAINLAND: Yes.

10 THE COURT: So why not actually talk about the seven
11 figures that you're mentioning right now and explain how you
12 come about that specific number?

13 MR. MAINLAND: Again, I really feel like it's not
14 knowable. I'm negotiating a discovery fight in another case
15 right now, and the parties are going back on search terms and
16 everything, and it can make the difference between reviewing a
17 hundred thousand documents and a thousand documents. That's
18 obviously going to be a significant delta in terms of the
19 actual costs.

20 So I really feel like that exercise at this point
21 would be essentially making it up, but I am confident that if
22 Your Honor were to say, discovery is going forward and go deal
23 with these ten requests that you've received from each side --
24 and I just want to say, ten requests is a little misleading.
25 Each one of those requests is extremely broad. One of them is

1 literally for every communication the company has ever had with
2 the Federal Government. I mean, these are not -- each one of
3 those requests is going to be a lot of documents to look at,
4 and so I think very quickly we're in seven figures. Is that a
5 million dollars or is that \$10 million? I would think an
6 expedited discovery where there's still an October 31st cutoff
7 that we're closer to seven figures, not eight figures, but in
8 my experience, this can get expensive very fast.

9 THE COURT: Okay.

10 MR. MAINLAND: On the sensitive information question
11 that you had, I do agree that the typical approach to dealing
12 with that is a protective order, and certainly if discovery
13 were to proceed here, we would insist on, not just an ordinary
14 protective order, but one that has protections relating to that
15 attorneys eyes only provision and the like. But our point on
16 that was less that there is no possible way to produce
17 information to the intervenor that could deal with those
18 issues -- people do have to deal with those issues in
19 litigation, I appreciate that -- I think that what we were
20 really getting at there is, this is already a situation where
21 we're fighting off information requests from a regulator that
22 we very firmly believe does not have jurisdiction over our
23 client.

24 And then we have an intervenor that represents our
25 competitors, our purported competitors, seeking to rummage

1 around in our documents as well. So it's like piggybacking on
2 a regulator that itself doesn't have authority and they have
3 competitive interests of their own.

4 THE COURT: But your argument is that they don't
5 have authority to regulate, which to me is very different from
6 having authority to inquire.

7 MR. MAINLAND: Well, and that's certainly their
8 argument, that there is a difference between, say, civil
9 discovery and regulating, but if we take a step back at what
10 really occurred here -- and I do think it's important to see
11 the bigger picture -- we received an aggressive cease and
12 desist letter from a regulator that knows that we are a
13 CFDC-registered entity, that we are a CFDC-regulated entity.
14 They certainly are aware that the CFDC -- that there is
15 language in the Commodity Exchange Act that says the CFDC has
16 exclusive jurisdiction over us. They nonetheless said, on pain
17 of criminal enforcement, on threat of criminal enforcement with
18 no stays of enforcement, no extensions, "Take down these
19 contracts now or we're going to proceed with enforcement."

20 And then we had to run into court to get a PI, we
21 got the PI, and now they're asking a lot of questions that feel
22 a lot like a regulator inquiring into how we run our business.
23 What are the consumer protection efforts that we have? What
24 are the various ways in which the Federal regulatory scheme is
25 superior to the Nevada regulatory scheme?

1 THE COURT: So I don't want you sort of going into
2 some of the discovery requests that they're saying are
3 important --

4 MR. MAINLAND: Sure.

5 THE COURT: -- and we're going to get into that
6 later, but I guess my question that I think you've answered the
7 question is, why can't a protective order cure it? Your answer
8 is, it can subject to certain provisions like attorney eyes
9 only.

10 MR. MAINLAND: That --

11 THE COURT: However, there are other concerns that
12 have to do with the nature of the discovery?

13 MR. MAINLAND: Correct.

14 THE COURT: Okay. Understood. And then I guess the
15 last question regarding good cause is the role of the Maryland
16 decision.

17 MR. MAINLAND: I think it has no role at all. I
18 think it's as simple as that.

19 THE COURT: Expand on that.

20 MR. MAINLAND: Look, we disagree with the decision.
21 We respect the decision but disagree with it; we're appealing
22 it, but the only decision that matters for these purposes is
23 the decision that Chief Judge Gordon has already entered a
24 preliminary injunction order, a very thoughtful one where he
25 engaged with a lot of the same issues that are going to be

1 identical on summary judgment, and that's all that should
2 matter here.

3 And, frankly, you know, look, there are other --
4 they're going to point to and they like to point to Maryland.
5 There are other jurisdictions in which we've had successes.
6 We've had success in this Court so far --

7 THE COURT: I guess the reason why I'm talking about
8 Maryland is because that came out after the decision on the
9 preliminary injunction, right?

10 MR. MAINLAND: Yeah, but not because of -- I mean,
11 look, it's just a different -- different Courts are going to
12 have different views of the issues and --

13 THE COURT: I guess I don't know the answer to this
14 because I've not studied the Maryland decision in any kind of
15 detail: Has Judge Gordon not addressed -- I guess let me put
16 it this way: Has the District Court in Maryland addressed all
17 of the same issues that Judge Gordon already addressed and, in
18 your position, in your favor? Or are there other issues that
19 Judge Gordon has still not addressed?

20 MR. MAINLAND: I want to be careful on this, Your
21 Honor, because coming into this hearing, I wasn't preparing to
22 argue sort of the let's compare and contrast how Maryland dealt
23 with it and how Chief Judge Gordon dealt with it, and so what I
24 don't want to do is represent that they're totally co-extensive
25 and just come out in different ways, but at a high level, I

1 mean, they're dealing -- they're grappling with the same basic
2 issues. And we think all of the arguments that we are putting
3 to -- that we are presenting on summary judgment to Chief Judge
4 Gordon are the same issues that have already been addressed in
5 the PI proceedings, and we don't think they've changed in any
6 material way. The fact that another Court might have, you
7 know, considered some different case because it's in a
8 different Circuit or what-have-you, that, I can't -- I can't
9 vouch that there isn't something like -- like a detail like
10 that, but I don't think it's somehow upending how Chief Judge
11 Gordon should be thinking about it, and I certainly don't think
12 it opens up factual issues that maybe hadn't occurred to Chief
13 Judge Gordon.

14 THE COURT: Understood. All right. Thank you so
15 much.

16 On good cause, is there anything else that you would
17 like me to know?

18 MR. MAINLAND: No, Your Honor.

19 THE COURT: All right. Thank you. Go ahead and
20 have a seat. I'm just going to turn to the defendants for
21 purposes of good cause, and then I'll come right back to you
22 for the discovery issue.

23 MR. MAINLAND: And just to clarify one thing, you
24 had mentioned the preliminary peek test and the relevance of
25 that. Is that -- are we holding on that or --

1 THE COURT: No. You can go ahead and address that
2 now so --

3 MR. MAINLAND: Because I do have thoughts on that.

4 THE COURT: Go ahead.

5 MR. MAINLAND: Well, so it's funny you mentioned it
6 because I was reviewing your own *Schrader* decision, which I
7 know you authored, in preparing for this, and it was really
8 interesting to me because you advanced a critique of the
9 preliminary peek structure or concept in that, in, I thought, a
10 very cogent way in that case, and what was interesting is, I
11 think this case is very fundamentally different from the
12 dilemma that you were spotting there.

13 One of the dilemmas you were spotting there is, at
14 the outset of a case, a Magistrate Judge is asked to take a
15 preliminary peek at the pleading and form your own view as, is
16 this case destined to make it past a motion to dismiss? Does
17 this case have real life in it or is it destined for dismissal?
18 And what -- but it's a different judge, the District Judge,
19 who's actually going to decide whether it gets dismissed or
20 not.

21 I think here, importantly, we're in a very different
22 landscape. We have a preliminary injunction order. We have an
23 extensive transcript that makes clear all of the different
24 thoughts and ways of analyzing the issues Chief Judge Gordon
25 was having. We have a summary judgment brief that in many ways

1 is not that different from the PI brief. I think the
2 procedural posture is obviously different, but the issues
3 remain the same.

4 And so there is a lot more for you to look at, Your
5 Honor, in deciding what the fate of this case is than the
6 ordinary case that you are struggling with in the *Schrader*
7 decision where, you know, it's the outset of the case, you're
8 looking at a complaint, and who knows whether it can really
9 pass muster or not? It's a hard thing to do.

10 THE COURT: Two comments on that. One, the Nevada
11 Resort Association mentions that the preliminary peek test is
12 really dealing with the defendant coming in and asking to stay
13 discovery and asks whether you've sufficiently pleaded specific
14 accounts for (indiscernible) of a complaint. That's not the
15 case here, right? So do you want to address that?

16 MR. MAINLAND: Sure. I think it's ultimately a
17 distinction without a difference. I do think it explains sort
18 of the dilemma that you were struggling with in *Schrader*, which
19 is you're at the outset of a case and a defendant is saying, no
20 way, no how, this case can't -- they can't state a claim and
21 you know shouldn't even allow discovery to happen, even though
22 there's no automatic stay, for example, like under the PSLRA or
23 a particular statute.

24 But here we are -- I think what the real insight
25 there is, if there are situations, and sometimes there are,

1 where the Court can look at the current state of play, whether
2 it's at the outset of a case with a complaint or much further
3 into the case where the District Judge has already expressed
4 strong views -- and not just strong views but held that this
5 State law is field preempted. I get it was a PI posture -- go
6 ahead, Your Honor.

7 THE COURT: Yes. So -- which brings me to my second
8 point, which is, yes, I have reviewed the order that Chief
9 Judge Gordon authored, but to the defendant's point, that order
10 sort of assumes certain facts that lead to the conclusions that
11 you are making --

12 MR. MAINLAND: Uh-huh.

13 THE COURT: -- and on which Judge Gordon is relying,
14 right?

15 MR. MAINLAND: Uh-huh.

16 THE COURT: So to the extent that there needs to be
17 some sort of challenge to some of the conclusions there,
18 couldn't he change his mind?

19 MR. MAINLAND: Well, certainly, it could help --

20 THE COURT: We're going to get into this shortly,
21 right, but --

22 MR. MAINLAND: Right. Well, I would take issue with
23 the idea that he was assuming a lot of facts. He may have
24 assumed a fact here and there, but a lot of these facts are
25 not, let's just assume this is the case. A lot of these are

1 just completely objective, undisputable facts. For example --

2 THE COURT: Are you a DCM --

3 MR. MAINLAND: -- are you a DCM? You're just --
4 you're a DCM if the CFTC says you are. And Exhibit 1 to our
5 summary judgment brief says you're a DCM, so I can't imagine a
6 world where we're going to engage in discovery on whether
7 Kalshi is a DCM. It just is.

8 And there are a lot of -- do event contracts trade
9 on its platform? Well, they're telling us to take down these
10 event contracts. So, I mean, there are a lot of -- a lot of
11 what they're sort of creating fact issues over are things like,
12 is the sky really blue? I need some discovery to test whether
13 the sky is really blue. It might be green. You need to prove
14 it to me. That's not the kind of stuff that -- those don't
15 present genuine issues of fact, of material fact, that would
16 prevent a judge from entering summary judgment.

17 So, I mean, I do have a lot more to say on that
18 topic, but I don't want to go too far at this stage. I know
19 you have other questions for the other side.

20 THE COURT: Understood. Wonderful. Thank you so
21 much. I appreciate it.

22 MR. MAINLAND: Of course.

23 THE COURT: All right. So let me start with you,
24 Ms. Whelan, on good cause. Anything you'd like to add?

25 MS. WHELAN: Good afternoon. I think the first

1 thing I'd like to add on good cause is, the strongest thing
2 weighing against their argument that they have good cause to
3 stay discovery is the fact that there's a preliminary
4 injunction in place. And so there's no prejudice to them by
5 having to go forward and engage in the normal -- you know,
6 normal act of discovery that happens in virtually every civil
7 litigation case. I mean, this is -- this is simply a case of
8 Kalshi wanting to rush to judgment and get something -- you
9 know, get a decision from this Court before proceedings in the
10 other Courts, right, Maryland, New Jersey, there's a case
11 pending in California, they want to get a judgment here, a
12 final judgment.

13 They want to ignore the Maryland decision and say,
14 well, that doesn't have anything to do with our case, but the
15 fact is that we've already -- this Court has already entered an
16 expedited discovery schedule. Discovery is set to close on
17 October 31st. There has been a dozen or so, you know, a few
18 dozen discovery requests going on. The scope of depositions
19 that we would want is quite limited. We haven't noticed those
20 yet because we've been interrupted sort of by this emergency
21 motion and haven't wanted to proceed any further because of it.

22 So the fact that there's a preliminary injunction in
23 place, which means that they're operating in Nevada, you know,
24 they're making revenue in Nevada, they're benefiting in Nevada,
25 they shouldn't be allowed to just skirt discovery and have this

1 Court and defendants assume the facts that they are alleging
2 are true without us being able to test those factual assertions
3 and inquire more deeply into them.

4 THE COURT: Do you want to address the argument that
5 discovery could go into the 1 million or \$10 million figure?
6 What kind of discovery are you intending on propounding?

7 MS. WHELAN: So I think, granted, I'm a government
8 lawyer so my rates are not quite as high as, you know, big law
9 lawyers, I would find that to be a bit specious to say that
10 this could go into the seven figures, given that we're at the
11 end of August already, so we're looking at September and
12 October, two months of discovery. That would mean \$500,000 at
13 a minimum per month.

14 THE COURT: Well, what other discovery are you
15 planning on propounding at this time?

16 MS. WHELAN: Sure. So I'm sure that there will be
17 some additional requests for production or interrogatories that
18 maybe haven't already been propounded. I would suspect
19 depositions, maybe three to four depositions. We may conduct
20 some non-party discovery if necessary from, you know, one to
21 two non-parties.

22 THE COURT: Like?

23 MS. WHELAN: CFTC, which I expect we would get a
24 fight from them. But, you know, if we're not getting what we
25 need from Kalshi, like communications and things like that,

1 then of course we're going to go and look and try and get it
2 from the other side. That third-party discovery shouldn't be
3 too intensive on Kalshi's part, right? They probably would
4 object to a notice to serve a subpoena duces tecum or something
5 like that, but, you know, I wouldn't expect that to be a
6 six-figure fight for them.

7 THE COURT: What other non-party were you thinking?

8 MS. WHELAN: Possibly a geolocation company or
9 something to that extent, because they are claiming that it
10 would be unduly burdensome and costly for them to engage in
11 geolocation.

12 THE COURT: All right.

13 MS. WHELAN: I guess one other point I'd like to
14 make -- well, you asked about the Maryland -- the District of
15 Maryland decision and whether that Court had already sort of
16 covered the ground that Chief Judge Gordon had, and I think if
17 you look at that decision, it's Document 70 in that case and
18 it's on Page 15, the Court sort of addresses some of these
19 preliminary arguments in saying that -- you know, Kalshi's
20 argument is that the Commodity Exchange Act says exclusive
21 jurisdiction and we can sort of end the argument there, right?
22 If there's exclusive jurisdiction, Kalshi has contracts that
23 are listed on its exchange, then it's up to the CFTC to say
24 whether those are okay or not. The CFTC hasn't pulled those
25 contracts down and so, boom, Nevada, you can't touch our

1 contracts.

2 And the Court says, "Kalshi would have this Court
3 end the analysis here, and that is where the two other District
4 Courts that have considered Kalshi's preemption claims and held
5 that field preemption likely applies ended their analysis."
6 And then it cites to Chief Judge Gordon's opinion and the
7 District Court of --

8 THE COURT: I'm sorry. This is Page 15 of the
9 opinion itself? I have the opinion right here with me.

10 MS. WHELAN: Yes. And it's the -- it's the -- from
11 the PACER docket. It's not the Westlaw, so that might be --

12 THE COURT: Okay.

13 MS. WHELAN: That might be the discrepancy.

14 THE COURT: All right. I'll look --

15 MS. WHELAN: But it's about halfway through.

16 THE COURT: Okay.

17 MS. WHELAN: And then the Court goes on and says,
18 "But the fact that the CEA has some field preemptive effect
19 does not mean that the field Congress intended for the CEA to
20 occupy includes State gambling laws and specifically sports
21 wagering laws." And then it goes on to talk about, you know,
22 how do we -- how do we construe what the field is?

23 And so while I think the District of Maryland -- you
24 know, I think the District of Maryland did cover all the ground
25 that Chief Judge Gordon did but that it went further. And, you

1 know, Kalshi likes to say over and over again that, well, Chief
2 Judge Gordon has already found that, you know, it's field
3 preempted and Your Honor, you know, made them take a timeout
4 and say, listen, that's a preliminary injunction, we have a
5 different standard. And I'd just like to note that, you know,
6 when that preliminary injunction was filed and once we got the
7 order to -- with the briefing schedule, we had, like, a week or
8 less to respond. We were gathering our resources, we were
9 doing our research, and so that motion was decided on a very
10 expedited basis.

11 And so I don't think that Your Honor can look too
12 much into, well, the preliminary -- the preliminary injunction
13 order because it was on a very limited record, it was assuming
14 that everything Kalshi said was true, and we just don't know if
15 everything Kalshi is saying is true because we haven't had a
16 chance to test those factual assertions. And we're entitled to
17 test those factual assertions and also to develop our
18 affirmative defenses.

19 THE COURT: We'll get into that next.

20 MS. WHELAN: Sure.

21 THE COURT: Okay. Anything else on good cause?

22 MS. WHELAN: I think -- oh, the only other thing I
23 would say is we, of course, would have no objection to entering
24 a stipulated protective order with an attorneys-eyes-only
25 designation. The goal here is not to expose Kalshi to harm or

1 allow competitors to see it. The goal really is to get to the
2 right result here, and so if that means only the lawyers can
3 look at it, then only the lawyers can look at it and we have no
4 objection to that.

5 THE COURT: All right. Mr. Hosmer-Henner?

6 MR. HOSMER-HENNER: Thank you, Your Honor. I'm
7 going to just go over the good cause issues and questions that
8 you raised and try not to be duplicative of my colleague.

9 First, on the question of cost and burden, we
10 believe they failed at this gate because they haven't
11 identified any cost or burden of discovery. Specifically,
12 their position in their briefing was any discovery is harmful.
13 We don't think that satisfies the good cause standard in Nevada
14 and certainly doesn't show any basis that this Court would
15 be -- or has stayed discovery on the basis that discovery is
16 uniquely harmful just by the function of going through it.

17 With the question of saying that they could not
18 possibly argue for why discovery is burdensome because they
19 hadn't objected to our discovery requests, obviously you
20 pointed out the flaw in that argumentation, but it's not unique
21 to this District. The parties engage in the motion to stay
22 discovery practice before any discovery is served and make
23 those arguments on the nature of the case rather than specific
24 discovery requests. They have more information than most cases
25 where parties are arguing that discovery should be stayed.

1 Simply failed to articulate that, and the reason is because
2 they really can't.

3 We actually asked about whether they were interested
4 in limited -- in limiting discovery or phase-in discovery to
5 address certain questions, received a blanket refusal during
6 the meet-and-confer over this process, and they said that any
7 discovery was objectionable and refused to engage in any
8 discovery whatsoever. This is a rush to judgment from a party,
9 not from a position of strength, but from one that's arguments
10 are as gradually weakening day-by-day as they are being vetted
11 and scrutinized in Courts across the country.

12 With respect to the issue of a protective order,
13 obviously as potential competitors or competitors of this
14 organization, protective orders are entered all the time and
15 there's no real argument of rebuttal to that, but it's the
16 regulator argument where they really trip over themselves.
17 What they argue is that it would be irreparably harmful to
18 disclose documents to the Nevada gaming regulators because the
19 Nevada gaming regulators -- and this isn't necessarily true --
20 wouldn't have access to those sort of interrogatories in the
21 standard regulation process.

22 But this is something where they really need to put
23 their money where their mouth is. If their argument is so
24 strong that there's no doubt that field preemption applies,
25 they will never be subject to the jurisdiction of the Nevada

1 gaming regulators, so how could that possibly be a basis to
2 find irreparable harm from the disclosure of that information
3 from their perspective? It goes circular back to the question,
4 and we think it shows, again, weakness in their position.

5 And the third argument is about the Maryland
6 decision and the preliminary peek standard. I think you saw
7 our briefing with respect to preliminary peek, but it's unusual
8 for a party to be the one to initiate an action, to file it, to
9 come to court seeking relief and then say, don't look behind
10 the curtain, all discovery should be shut, even though they are
11 the ones seeking the jurisdiction -- to invoke the jurisdiction
12 under relief of the Court.

13 We don't think the preliminary peek standard is
14 especially applicable here, but just to disabuse their -- any
15 notion with respect to what Judge Gordon found, I want to
16 specifically call out three things that he said during the
17 preliminary injunction hearing. One, "I'm loathe to make a
18 final definitive ruling on these legal issues today beyond just
19 likelihood of success because it is an emergency-type basis."
20 Two, "It seems like we might need an evidentiary hearing on a
21 longer injunction." And, three, "I'm going to grant a limited
22 injunction, minor limited injunction." That doesn't show Judge
23 Gordon has made up his mind for all time. It shows that he
24 reviewed the information and the allegations and assumptions
25 that were provided to him by Kalshi on that expedited briefing.

1 The decision in Maryland is a different Court
2 addressing the same issues, but what it shows, if you take a
3 preliminary peek, is at least reasonable minds can differ on
4 different briefing schedules but the same set of facts, same
5 sort of law, that different outcomes could result, which we
6 think under the preliminary peek test, at a minimum, shows that
7 there is not an absolute basis to stay discovery because it
8 would be impossible for, in the case of a defendant, for
9 plaintiff to stay the claim or, here, for that motion for
10 summary judgment be granted without any factual dispute.

11 THE COURT: Well, I mean, if I were to apply the
12 preliminary peek in its purest form, right, it would require
13 the defendant bringing the motion to stay discovery. It would
14 also require me to take a preliminary peek and be convinced.
15 On that basis alone, I can tell you right away that it would
16 be -- I myself cannot take a preliminary peek at this type of
17 argument and be convinced of anything. Nevertheless, the
18 question is whether I should contemplate the degree to which
19 Judge Gordon has found that the arguments made by the
20 plaintiffs make sense, right?

21 MR. HOSMER-HENNER: Correct.

22 THE COURT: All right. So, Mr. Mainland, anything
23 else you want to say on good cause?

24 MR. MAINLAND: Could I just respond to a couple of
25 points that were made?

1 THE COURT: You can. You may. And if you want to
2 remain seated, no need for any of you to come up to the podium
3 each and every time. Just make sure that the mic --

4 MR. MAINLAND: Sure. Just very briefly, on --

5 THE COURT: Speak into the mic, please.

6 MR. MAINLAND: On the issue that Ms. Whelan referred
7 to about the Maryland decision and the Court's conclusion there
8 that even if there is some field preemptive effects, that
9 there's a question in that judge's mind as to the scope, either
10 does it extend to State wagering laws, that's all good and
11 fine, Chief Judge Gordon had a different view of things, but
12 the real question for purposes of today is whether that's a
13 legal issue or a factual issue. We think it's very clearly a
14 legal issue, and the issue here is whether there are any facts
15 that need to be explored for the Court to consider summary
16 judgment.

17 THE COURT: All right. Anything else? Because I'll
18 go right into discovery --

19 MR. MAINLAND: That was really all I had on it, but
20 I'd love to dive into my broader argument if you'll indulge me.

21 THE COURT: Go ahead. Do you want to know what
22 questions I have before you go into it?

23 MR. MAINLAND: Of course. Yes. I always do.

24 THE COURT: All right. So one of the questions is,
25 obviously, the nature of the event contracts to see whether

1 they do indeed qualify as swaps. The other question is whether
2 discovery is needed to determine whether there is conflict
3 preemption, specifically, should plaintiffs -- excuse me --
4 should the defendants not be able to pursue discovery as to
5 whether it is impossible for plaintiff to comply with both
6 Federal and State laws or to the degree -- or the degree to
7 which State legislation interferes with Federal law.

8 So if the idea here is that these are purely legal
9 questions, then the follow-up question that I would have is,
10 why are you listing Xavier Sottile, I'm not sure, your 30(b)(6)
11 witness, as a witness --

12 MR. MAINLAND: Yeah, Xavier Sottile.

13 THE COURT: Okay, Sottile. Why are you listing him
14 in your Rule 36 disclosures for purposes of describing the
15 difficulties of complying with the State law? And then I would
16 like you to address the affirmative defenses and, of course,
17 the injunctive relief and harm.

18 MR. MAINLAND: Okay. Thank you, Your Honor. I just
19 want to make sure I have them all down. And the last one being
20 the irreparable harm piece?

21 THE COURT: Uh-huh.

22 MR. MAINLAND: Okay. So if that's everything, then
23 I'm happy to jump in.

24 THE COURT: And not just the irreparable harm but
25 also public interest.

1 MR. MAINLAND: Public interest, okay. So the
2 injunction factors?

3 THE COURT: Uh-huh.

4 MR. MAINLAND: Great. Well, why don't I start with
5 the nature of the event contracts. I do think that is the one
6 that really looms largest in terms of the contemplated
7 discovery program. I should say at the outset, we're talking
8 about many thousands of contracts, and so when I saw in their
9 papers that they think discovery here should include
10 understanding what the nature of these contracts is, you know,
11 I sort of scratched my head, but I also am just thinking in
12 terms of we've got two months of discovery here and they want
13 to understand effectively our entire business. It's
14 egregiously overbroad. In fact, NRA says they don't want to
15 just understand all the contracts; they want to understand the
16 ones we intend to offer in the future. So this is completely
17 unlimited. Everything you're hearing about this is going to be
18 super-targeted, it's not going to be expensive, there's no way
19 it's going to be seven figures, it's just not believable.

20 The NRA also complains that we haven't disclosed --
21 they don't know what these contracts are. I don't know what
22 they're talking about. These are all available on our website.
23 In fact, you see in their own brief they poke fun at some of
24 the contracts that they don't think are sufficiently serious to
25 warrant preemptive effects, so --

1 THE COURT: Well, I don't know that they're saying
2 that they're not sufficiently serious. I think that their
3 argument here is whether they have, in your words, an
4 independent, real-world consequence in a way that a coin flip
5 would not, to go back to the argument that you presented before
6 Judge Gordon.

7 MR. MAINLAND: Yeah. And my colleague did use those
8 words, and that is the distinction that was being drawn there,
9 but I do want to focus Your Honor on what they're really
10 getting at here, which is that, are all these contracts
11 actually swaps? That's really the nub of the issue. They're
12 trying to say, we want to -- and a lot of their requests are,
13 please explain to me what all of the financial, economic, and
14 commercial consequences are of all of these event contracts,
15 set aside the fact that there are thousands of them. But the
16 important point, the key point, it's not financial, economic,
17 and commercial consequences; it's potential financial,
18 economic, and commercial consequences.

19 And that word "potential" does a huge amount of work
20 here. It is a word that was used by the Congress, not by the
21 CFTC. That is how they define swaps. And I would defy them to
22 identify for me, even in the abstract, something that is
23 actually a swap but it's not going to have even a potential
24 financial or economic consequence. It really makes no sense.
25 I mean, reading -- reading the definition of swap itself is

1 extremely instructive. It's a payment -- it's an agreement,
2 contract, or transaction that provides for payment that is
3 dependent on the occurrence, non-occurrence, or the extent of
4 the occurrence of any event or contingency associated with a
5 potential financial, economic, or commercial consequence.
6 There is no serious argument here that all of these event
7 contracts are not swaps or that any of them are not swaps.

8 And at a minimum --

9 THE COURT: So just for my own edification, how is
10 the contract regarding Timothée Chalamet and Kylie Jenner a
11 swap?

12 MR. MAINLAND: Because there is a potential
13 financial or economic consequence associated with that. Kylie
14 Jenner is one of the biggest stars in the world these days.
15 The Kardashian empire is, like, a multi-billion-dollar
16 enterprise.

17 THE COURT: So, but what kind of independent -- what
18 kind of consequence would it have whether they get engaged or
19 not?

20 MR. MAINLAND: Headlines everywhere, in *People*
21 *Magazine*. You've got agents who all of a sudden are -- their
22 phones are ringing off the hook. You have a whole -- there
23 will probably be a reality show about their marriage. And I
24 laugh because, you know, this isn't, you know, corn futures or
25 whatever they seem to suggest is sort of a more legitimate kind

1 of derivative, but the reality is that what Dodd-Frank was
2 doing was bringing derivatives onto exchanges.

3 They felt that -- the Congress felt that the
4 financial crisis in 2008 was magnified by the fact that you had
5 all these sort of in-the-dark type derivative transactions that
6 no one really appreciated the scale of and so the legislative
7 solution by the U.S. Congress was to bring it into the light,
8 put it on the exchanges, and put a single regulator in charge
9 of it. And the way they did that was defining the word "swaps"
10 extremely broadly, potential consequences.

11 They would need to show -- and what they want to do
12 is look at a bunch of different contracts and argue to Chief
13 Judge Gordon, maybe even have a trial about it, well, there
14 isn't really a consequence here, let's cross-examine someone
15 about what the consequence is. Potential consequence is all
16 that needs to be shown, and part of that is, when a registered
17 entity with the CFTC self-certifies one of these contracts,
18 they don't need to tell the CFTC anything about what these
19 consequences are.

20 THE COURT: We'll go into that in a second. I guess
21 going back to the example that was -- my question, then, is,
22 then what is not a swap? If it's a potential consequence, what
23 is not a swap?

24 MR. MAINLAND: Well, first of all, these are -- what
25 they have exclusive jurisdiction over are swaps that are listed

1 on exchanges.

2 THE COURT: Uh-huh.

3 MR. MAINLAND: So these are -- you have to be
4 trading them on a DCM for it to fall within the jurisdiction of
5 a CFTC. So that's a very important limiting principle right
6 there. They make it seem like, you know, our argument would
7 mean the CFTC takes over the universe. No. They have to be
8 traded on exchanges that are DCM's, and that's what's happening
9 here. So that's number one.

10 What would not be a swap? I mean, there are -- it's
11 not just potential consequence; it's an agreement that provides
12 for payment dependent on the occurrence of an event. So it is
13 extremely broad, and I'm not going to fight with you on that,
14 Your Honor, but it's broad by design. Congress deliberately
15 made this an extremely broad definition.

16 And, look, if they think there's some argument they
17 have based on the fact that it's super-broad, that's a legal
18 debate we should be having about the import of this decision,
19 but I am completely flummoxed as to what facts would exist in
20 Kalshi's files that would inform whether, you know, these are
21 actually swaps or not swaps.

22 THE COURT: All right.

23 MR. MAINLAND: Now, I do have other -- I do have
24 other points on this that I think are really important to keep
25 in mind. One is that the cease and desist letter does not

1 purport to separate out, you know, real swaps from fake swaps
2 or --

3 THE COURT: All of them.

4 MR. MAINLAND: -- preempted contracts. It basically
5 says anything -- under Nevada law, it says, "an other event."
6 It's all gambling, and we're in charge of it, not the CFTC.
7 And it says all -- you know, it's all gambling and you're
8 criminally liable if you don't play by our rules immediately.
9 It makes no sense that they need to do an individualized review
10 in discovery if their position is that all event contracts are
11 illegal under Nevada law unless you play by our rules.

12 THE COURT: I guess I'm not following. Why would it
13 not be important? So if their position is that all of them
14 are -- do not qualify as swaps, right?

15 MR. MAINLAND: Yes.

16 THE COURT: Then why is it not important? I mean,
17 don't they need to show that they're not swaps and, because of
18 that, they're not subject to the exclusive jurisdiction of the
19 CEA?

20 MR. MAINLAND: I think their position is that -- as
21 far as I understand it, and they can correct me if I'm wrong,
22 is that all event contracts are illegal under Nevada law and
23 the CFTC does not preempt that -- or the CEA does not preempt
24 that full stop. So why they need discovery -- they don't claim
25 to say, we think maybe 50 percent of the contracts that are

1 traded on Kalshi are not preempted but then there are some that
2 we -- you know, we can see that they are. They're saying none
3 of it is because it's all subject to Nevada law and there was
4 never a Congressional intent to go this far. So -- but that's
5 not the only point.

6 The other important point here is, imagine
7 defendants were given discovery that they seek and then they
8 could engage in this debate that they want to have about
9 whether contract X really is a swap, whether it really has a
10 potential consequence or not. I have a hard time understanding
11 what that argument would look like, no -- even a potential, not
12 even the possibility of a consequence. They would have to show
13 that. But imagine they do. The event contracts are still --
14 they're still indisputably traded on the exchange --

15 THE COURT: Let me just -- I hate to take you back
16 to this, but -- and I'm not sure who argued this before Judge
17 Gordon during the preliminary injunction, but the position that
18 the plaintiff took there was that a coin flip would not be a
19 swap, but what you're saying to me today is that perhaps it is,
20 potentially. I mean, the person now has \$10 less to go to the
21 grocery store. It impacts , you know...

22 MR. MAINLAND: I don't think my -- so I will speak
23 for my colleague. I don't believe he was saying -- and I've
24 reviewed the transcript -- that that's not a swap. I think
25 what he was saying at the time is there are different kinds of

1 contracts that were at that time available. And he was saying,
2 yeah, we have event contracts that might relate to the outcome
3 of the Superbowl but not the coin toss that happens at the
4 beginning. And the judge was asking detailed questions about
5 that, and that was a factual answer. But I do not believe, and
6 I don't recall in the transcript, him saying, that's not a swap
7 but this would be.

8 All of these -- again, I mean, our position all
9 along has been that the swaps definition is exceedingly broad
10 and it captures everything that Kalshi offers.

11 The other issue here, and it really is a practical
12 issue, if they want to have this debate about whether
13 there's -- it's really a swap or not, these contracts are, as
14 we stand here today, they're being traded on an exchange. The
15 CFTC unquestionably has exclusive jurisdiction over that
16 exchange, and so you -- but you would have a State regulator
17 saying, they're illegal, take them down. This is the exact
18 opposite of what Congress intended and it's -- and it's not
19 happening on a blank slate at all.

20 I understand they're trying to say that -- and I
21 think I heard, you know, my friend at the defense table saying,
22 you know, that we're gradually losing this case. There's one
23 decision in Maryland where a judge formed a different view.
24 We've won other cases. We won a PI in this case. We've won in
25 New Jersey. We're taking that up for an affirmance in the 3rd

1 Circuit. We've won in the District of Columbia on
2 political-related event contracts. There is no gradual losing
3 that's happening here. In fact, what I am sensing from the
4 other side is, maybe we can run out the clock with a bunch of
5 discovery on issues that have no bearing on the legal issue of
6 preemption, that have no bearing on it at all, and hope that
7 we'll notch a few wins in our favor in other Courts around the
8 jurisdiction and then put it to work. But one thing's for
9 sure. They will, no doubt, bring the Maryland decision to the
10 attention of Chief Judge Gordon in their opposition to our
11 summary judgment motion. They can make whatever arguments they
12 want as to the import of that, but it has nothing to do with
13 whether there should be fact discovery here.

14 Your Honor, cognizant of time, I want to move on to
15 the conflict preemption point, unless you have --

16 THE COURT: Before you do that, I did have one
17 question. Give me one second.

18 At the very beginning, we -- either me or you
19 started talking about whether this was an inquiry as opposed to
20 regulation. Do you want to address that as it regards the
21 swaps themselves, so the idea here being -- I think that you
22 said this is essentially tantamount to them doing what the
23 Commission is charged to do and not the defendants themselves.

24 MR. MAINLAND: I mean, I do believe that they are
25 purporting to play that role. I guess I want to make sure,

1 though, I understand Your Honor's question. Is it what is the
2 difference between doing it in the context of litigation and
3 what would be a true --

4 THE COURT: So your position appears to be that this
5 is tantamount -- inquiring about the nature of these contracts
6 is tantamount to regulating. I sort of take issue with that
7 position, so I'd like you to develop that a little bit more.

8 MR. MAINLAND: Sure. I mean, I think what we're
9 talking about here, let's take a step back, Congress determined
10 that there would be a single regulator over contracts traded on
11 exchanges. I think we -- I mean, the statute literally says
12 that, exclusive jurisdiction. And what's happening here is
13 that they want to intervene, they want to get involved, and
14 they want to get into debates about whether these are properly
15 on the exchange. That is -- if that's not core to the
16 exclusive jurisdiction of the CFTC, I don't know what is. And
17 if they're going to be --

18 THE COURT: I guess -- and I'm sort of splitting
19 hairs here, but are they asking whether they're properly on the
20 exchange, or are they asking whether they qualify as swaps?

21 MR. MAINLAND: Well, I don't think they get to
22 decide -- well, look, at the end of the day --

23 THE COURT: I mean, I don't know that they get to
24 decide or not, but don't they get to inquire and see whether
25 they are subject to the exclusive jurisdiction of the CEA?

1 MR. MAINLAND: I don't think there's any serious
2 factual question as to whether they qualify. I think that's --

3 THE COURT: But that's your position, right?

4 MR. MAINLAND: Well, look, I have yet to hear an
5 articulation of what they could show that would not have a --
6 an event contract -- and, again, they're all available on this
7 website, so it's fully available to them to come in and say,
8 I've got proof positive, I'm going to make a great argument in
9 court at trial to Chief Judge Gordon post-summary judgment when
10 he's denied it -- this is their vision -- of why this doesn't
11 even have the potential for any sort of economic consequence.
12 That's -- that's the vision that they have here, and that's
13 just not a serious argument.

14 At summary judgment, Chief Judge Gordon will be
15 well-equipped to decide what meaning should be imbued to that
16 very broad definition, and if he thinks there should be some
17 discovery on this or that, he can grant their 56(d)
18 application. If he thinks there should be a trial on that
19 issue -- I'm very dubious he would reach that conclusion, but
20 that's within his power -- there is no prejudice to them in
21 holding until we see how he's engaged with what I think is
22 fundamentally a legal question as to what the definition means.

23 THE COURT: Well, they take the position that there
24 is indeed prejudice because there's currently an injunction in
25 place which allows you to continue offering these contracts,

1 right?

2 MR. MAINLAND: Uh-huh.

3 THE COURT: So the longer that this goes and if I
4 only allow discovery as to certain issues, for example,
5 whatever issues they're bringing up in the 56(d) motion and the
6 motion for summary judgment is indeed denied, then they need to
7 start with the rest of the discovery and it's more time in
8 which you're continuing to offer these contracts.

9 MR. MAINLAND: I hear that argument. We're talking
10 about briefing being done on October 3rd. We're a little over
11 a month away before this is fully teed up for the judge, for
12 the District Judge, and, look, he's already engaged with these
13 issues. I know he was very thoughtful and immersed in the
14 issues at the preliminary injunction hearing in April. I
15 expect, you know, that he obviously has a lot on his plate, so
16 I can't make any predictions as to how quickly he would rule,
17 but I know that he's well-equipped to do so in a prompt way,
18 and so I really don't think that's a serious prejudice that
19 they identify.

20 And I would say that on this issue of, well, you've
21 got your preliminary injunction, you're fine, we're not
22 enforcing this thing against you and so what's the harm in us
23 rummaging around in your documents, the core issue here is they
24 lack jurisdiction over us. This is -- this is -- setting
25 aside, you know, the burden aspect of it, they attack us with

1 an unlawful cease and desist order, they refuse to even extend
2 it a little bit so we can try to work in some breathing room,
3 and then they complain about not having enough time to put in a
4 really good PI opposition. We seek and obtain this injunction
5 on the basis that they lack authority, then they effectively
6 try to exercise the same enterprise, the same regulatory over
7 us, say, through the civil discovery process. We object to
8 that strenuously in principle, and the precedent it would
9 set -- the precedent if we were to acquiesce to that is
10 completely untenable. It essentially amounts to the very
11 regulatory patchwork that Congress explicitly said --

12 And remember, in the legislative history, which is
13 fascinating here, you had the House including a concept that
14 there would be some amount of parallel authority between the
15 States and the Feds, and the Senate took it out and the bill
16 that got passed in the '70s kept it out. So this is a very
17 deliberate Congressional decision, and to have, not just
18 Nevada, but I guarantee you, Your Honor, the minute they learn
19 that all you have to do, whether you have the authority or not,
20 is send a cease and desist, Kalshi will run in and sue and then
21 you get discovery and you get to look at all this stuff. And
22 they want to look at every communication we've had with the
23 CFTC, every communication we've had with the Federal
24 Government. They're toying with the theme that there's
25 corruption here, that the reason where we are --

1 THE COURT: Well, I'll get to that later. That's a
2 question that I have for them, yes.

3 MR. MAINLAND: Okay. So, I mean, I can't state
4 strongly enough how -- set aside money -- how deeply
5 objectionable that is. And that is a serious prejudice. Just
6 sitting around saying, well, why not let the State of Nevada
7 depose your people and look at your documents when they have no
8 authority at all, that's extremely objectionable, so -- and the
9 money is real. I mean, they mention a \$2 billion valuation.
10 This is a start-up company, a VC-backed start-up company.
11 \$2 billion, \$5 billion, a hundred billion dollars, whatever
12 valuation you put on it, it's impressive. And it's a very
13 serious company that's growing rapidly, but they're not sitting
14 on that kind of cash. Whatever cash they're generating they're
15 plowing back into the growth of the business. So to make light
16 of it and say, oh, it's a \$2 billion company, money's no
17 object, what's the harm, there is a real harm there.

18 THE COURT: Conflict preemption.

19 MR. MAINLAND: Conflict preemption. So conflict
20 preemption, the first point I want to be very clear on is that
21 we don't need it. So the judge --

22 THE COURT: Yeah. And you're saying field
23 preemption --

24 MR. MAINLAND: I want to be very clear, field
25 preemption does the work we need it to do and field preemption

1 has always been --

2 THE COURT: You briefed it on your motion for
3 summary judgment, so let's talk about it.

4 MR. MAINLAND: Sorry. We do -- exactly. So I want
5 to be clear that we're not dropping it, but it is a -- it's
6 secondary to field preemption.

7 THE COURT: Understood.

8 MR. MAINLAND: And Chief Judge Gordon agreed with
9 that. You know, this idea that we would need to show exactly
10 how it's impossible to comply with Nevada law, you know, much
11 like they want to do sort of event contract by event contract
12 analysis, they seem to want to engage in a, let's walk through
13 every provision of Nevada statutes and see why -- why isn't
14 that one complementary with the Federal scheme? Why can't you
15 abide by that one and also abide by the CFTC regulations? That
16 is very hard to square with the Federal exclusive jurisdiction
17 preemptive scheme that Congress established.

18 And, you know, look, it's hard to escape the
19 conclusion when you think about conflict that they're being a
20 little deliberately obtuse on this. You've got a Federal
21 regulator saying these contracts are fine and you've got a
22 State regulator saying, take them down or we're going to come
23 after you criminally. If that's not a stark contrast, I
24 don't -- or conflict, I don't know what is.

25 THE COURT: So my question is not so much whether it

1 is a conflict or not. My question is, do we need discovery to
2 make that determination? So my question to you is, if there is
3 no discovery needed to make that determination, why is Xavier
4 needed here?

5 MR. MAINLAND: Sorry, I didn't hear the last part.
6 Why is --

7 THE COURT: Why is Xavier Sottile needed in this
8 case?

9 MR. MAINLAND: Oh. I don't think he is needed. I
10 mean, look, if we were ever to have a trial, we would obviously
11 want someone knowledgeable to be testifying on behalf of the
12 company, but I've never had, you know, sort of initial
13 disclosures held against me before in this way. We had an
14 obligation to serve our initial disclosures and to identify
15 persons with knowledge, and if it ever came -- among -- among
16 the various harm arguments we have made, but I would say it's
17 probably a third-level argument, is this issue about what it
18 would cost to engage, for example, in geofencing and the ways
19 in which this would be disruptive, but that's -- we don't need
20 that argument either, but I think it would be misleading and
21 basically improper if we had any -- you know, ever even
22 contemplated making that argument to not identify him.

23 THE COURT: Understood. Okay.

24 MR. MAINLAND: So, I mean, that's -- we definitely
25 do not need him, and that's our point, we don't need anything

1 more than the undisputed facts that we've attached to our
2 summary judgment papers.

3 Now, it does seem that NRA in particular seems to be
4 saying there's no conflict because, of course, it's possible to
5 comply with both. You could just -- you could just pull the
6 contracts altogether and, you know, there wouldn't be any
7 conflict with Federal law because Federal law, after all, it
8 doesn't require that you offer these contracts. It just says,
9 if you do, here are all the things you need to do. But, you
10 know, when you really think about that argument, that's absurd.
11 That basically is the opposite of preemption.

12 THE COURT: But that's more merits-based, and my
13 question here is, do we need discovery to make these
14 determinations?

15 MR. MAINLAND: I don't think so at all.

16 THE COURT: Okay. I'm just checking.

17 MR. MAINLAND: I think these are purely legal
18 issues. The only impossibility argument that we really lean
19 on -- and it is a real argument, but it's a purely legal
20 argument -- is the impartial access claim. So we've mentioned
21 this in our papers. The CFTC's core principles require that we
22 provide impartial access to our exchange, but to comply with
23 the cease and desist order, to comply with Nevada law, would
24 basically amount to treating Nevadans differently from everyone
25 else who's trading around the country. That, at least

1 arguably, and I think it's a very serious argument, would be
2 intentioned with the impartial access provision and the core
3 principle, and I -- again, it's very hard for me to understand
4 what kind of facts would exist in Kalshi's files that would
5 shed light on that. It's just a legal argument. So I don't
6 see anything there.

7 The other thing is that our core conflict preemption
8 argument is really not this impossibility piece. They like to
9 focus on that because they want to sort of compare Nevada law
10 to Federal law and see whether they could be complementary.
11 The issue here is that impossibility is one way of showing
12 conflict preemption, but another way is if it just
13 fundamentally undermines the Federal scheme. That's exactly --
14 you know, this is the opposite of what Congress intended.
15 Congress wanted a national uniform set of recognitions, and the
16 idea that Kalshi or other DCM's would need to weigh the varying
17 dictates of Nevada law or New Jersey law or Maryland law or
18 whatever it may be and figure out, is this one complementary,
19 can we do this consistent with Federal law or not, is
20 completely inconsistent and undermines the uniform Federal
21 scheme.

22 I just made the argument. You don't --

23 THE COURT: Understood.

24 MR. MAINLAND: It's purely legal.

25 THE COURT: Understood.

1 MR. MAINLAND: So I think at the end of the day, all
2 of the conflict preemption points are purely legal.

3 THE COURT: Do you want to turn to affirmative
4 defenses?

5 MR. MAINLAND: Sure. Just very briefly on that, the
6 only ones they really mention, Your Honor, in their brief --

7 THE COURT: The only ones that you take issue with
8 are equitable and judicial -- excuse me -- judicial estoppel
9 and -- what's the second one?

10 MR. MAINLAND: I think there is unclean hands as
11 well.

12 THE COURT: Okay.

13 MR. MAINLAND: Those are the ones that I noticed.

14 THE COURT: All right. So your argument here is
15 that I really should not be -- not me, but we should not be
16 paying any attention to these affirmative defenses because
17 they're based on misrepresentations of Kalshi, in other words,
18 if Kalshi did not take the position that sports events
19 contracts were not swaps in a particular litigation -- that's
20 in your footnote.

21 MR. MAINLAND: Oh, okay. I'm following you now,
22 Your Honor. I apologize.

23 I think we have a more fundamental point here, which
24 is going to whether there should be -- there needs to be any
25 factual discovery into this. I have no idea what that fact

1 discovery would be. The issue of judicial estoppel, whether
2 we've taken some position and gotten some improper benefit in a
3 different court proceeding that should somehow estop us here --
4 now, we very much contest that there would be any basis for
5 that, but there's no factual underpinning to that. The only
6 way you analyze judicial estoppel is look at what was said over
7 in this case over here and whether it affects this case over
8 here.

9 THE COURT: Unclean hands.

10 MR. MAINLAND: Unclean hands, I think, look, on that
11 one, there is -- let's put it this way: You don't get to
12 enforce a preempted State law because you think the target of
13 the law acted inequitably. If that were true, then any
14 attempts at enforcing preempted laws -- you know, they're
15 always going to involve allegations that a target acted
16 inequitably. Imagine a State criminal law that's preempted and
17 they say, well, it may be preempted, but, you know, we have an
18 unclean hands defense, we can use it because we got a bad actor
19 over here. That just doesn't work when we're dealing with
20 preemption.

21 So -- and there, too, I'm not sure what they're even
22 referring to. I don't even feel like we're adequately on
23 notice of what our supposed unclean hands are. This may get
24 into the sort of innuendo you see a little bit in their briefs
25 as to dealings with the Government. It's completely made up

1 and so I don't -- I honestly don't even know what they're
2 getting at with that.

3 THE COURT: All right. Injunctive relief and harm.

4 MR. MAINLAND: Sure. And apologies for my voice.
5 I'm recovering from a cold, so...

6 Just briefly on irreparable harm --

7 THE COURT: And, I'm sorry, public interest as well.

8 MR. MAINLAND: And public interest. I'll address
9 both. Before I directly address those, I want to make one
10 fundamental point on these other factors. It's a little bit of
11 a conceptually interesting thing when you switch from a
12 preliminary injunction to a permanent injunction because what
13 we're looking at here is a world where the judge decides as a
14 final matter, not a preliminary matter, that these laws are
15 preempted and that the cease and desist letter cannot be
16 enforced. Imagine the judge reaches that conclusion, whether
17 on a trial or in summary judgment, and then the question is, do
18 I enjoin this law? We haven't found a single case, they
19 haven't cited a single case -- and we've looked hard -- a
20 single case where a judge found, this law is preempted, but I'm
21 going to decline to enjoin it, I'm going to allow it to be
22 enforced. And that makes perfect sense. It totally stands to
23 reason. Because if a State law is preempted, there is no
24 equity in allowing it to be enforced. The law is just
25 unconstitutional at that point.

1 And in any event, there is simply no need for
2 discovery into irreparable harm. Our principal argument on
3 this is one we made at the PI stage. We continue to lead with
4 it here. It's the basic Hobson's choice issue where, faced
5 with a situation where if this law is allowed to be enforced,
6 then we have to choose between either defying it --

7 THE COURT: I read the briefs.

8 MR. MAINLAND: You're familiar with Hobbs --

9 THE COURT: Yes. I read it in the original
10 argument. I read it in your briefs right now. I'm familiar
11 with it.

12 MR. MAINLAND: Thank you, Your Honor. Well, so no
13 need to belabor it. That's -- I mean, and that's a pure -- we
14 can just make the argument, and the judge will either accept
15 it, he already did accept it, albeit at a PI stage, but we
16 continued to lean on that.

17 I also just think it's very -- the sovereign
18 immunity thing is a very serious issue here. Irreparable harm,
19 at the end of the day, is an inquiry into whether this could be
20 remedied in damages. We know it cannot be as a matter of
21 sovereign immunity. They've sort of been a little coy about
22 whether they might waive a little bit of that, but there's a
23 statutory cap at di minimis amounts. I think we've all agreed
24 on this. So that's a real issue. There's really no question
25 and certainly no need for discovery into how we've been harmed

1 when we have these -- I mean, the judge can find as a matter of
2 law that there's no legal remedy available here.

3 And then on public interest, the same essential
4 point. Courts, you know, they don't find laws to be preempted
5 and nonetheless conclude that, you know what? I think it might
6 be in the public interest to just allow it, allow it to go.
7 That doesn't make sense. As a matter of law, it cannot be in
8 the public interest to enforce an unconstitutional law, and I
9 just don't see that that's where -- I mean, if you're thinking,
10 Your Honor, is there some discovery that makes sense before
11 Chief Judge Gordon is evaluating whether to grant summary
12 judgment or not, the notion that the judge is going to want to
13 hold a trial after having ruled that the law is preempted but
14 wants to figure out whether there might be some public interest
15 reason why he should let it go anyway, I mean, that's -- to me,
16 that just screams sort of an appellate issue. I don't really
17 understand how that would work.

18 And at the end of the day, look, the CFTC was
19 endowed by the United States Congress with public interest to
20 review power. That is the special rule. We've cited that in
21 our papers. The Congress said that it is the CFTC's job to
22 look at event contracts in certain categories and make its own
23 discretionary determination, may determine whether to prevent
24 those from being listed as a matter of public interest.
25 They're coming in and trying to use a permanent injunction

1 argument to try to say you can ignore preemption doctrine
2 altogether because it's in the public interest. And they want
3 to be able to compare the Federal scheme to the State scheme
4 and say their scheme is better. That is not how preemption
5 works, and if it did work that way, it would be a recipe for
6 complete chaos. You'd had 50 states stepping up to say, we've
7 got a better regulation -- regulatory system than the Federal
8 Government does. It just doesn't work.

9 So that's -- I believe that covered everything you
10 had asked about.

11 THE COURT: It did.

12 MR. MAINLAND: Anything else, Your Honor?

13 THE COURT: Not from me.

14 MR. MAINLAND: I believe in the course of answering
15 your questions I've sort of touched on everything that I had
16 hoped to.

17 THE COURT: I think you did. So I'm going to turn
18 to the defendants, and then, of course, you'll have the last
19 word.

20 MR. MAINLAND: Thank you, Your Honor.

21 THE COURT: All right. So the questions that I have
22 for both of you -- and you'll figure out which ones are for
23 which one. So let's see.

24 So one of the questions that I have for you is --
25 and I think that I sort of previewed this for you earlier --

1 what kind of discovery do you need on the status of Kalshi as a
2 DCM? What kind of discovery do you need regarding the
3 self-certification of event contracts? So I think that it's
4 the State defendants that say that you need communications with
5 the Commission regarding Kalshi's designation as a DCM and
6 self-certification of contracts.

7 So I guess my question is, are you really
8 challenging whether it is indeed a DCM and are you really
9 challenging whether these are indeed self-certified? Then I
10 have this other question. One of the things that you mentioned
11 is that you need discovery as to why the Commission did not
12 initiate review of the different contracts in question, and I
13 think that's what was being suggested right now, whether the
14 lack of review was politically motivated or not. I guess my
15 question is why that would be relevant at all. So isn't really
16 here the question whether the lack of review or inaction by the
17 Commission preempts State law, which appears to be your
18 position, isn't that a purely legal question? So why is it
19 important the reason? Why is the reason for the inaction
20 important?

21 And then I guess the last question that I have for
22 you is on the issue of swaps, if you could address sort of this
23 notion that only potential economic consequences are at play
24 and that that could be easily satisfied.

25 And, lastly, the argument regarding injunctive

1 relief and why it is that discovery would be needed as to that.
2 So you can address the Hobson's choice, you can address all of
3 the arguments that were made here by counsel for plaintiff.

4 MS. WHELAN: Your Honor, Mr. Hosmer-Henner
5 practically arm wrestled me to get to go first, so if it's okay
6 with you, I'll let him start.

7 THE COURT: Okay. That's fine. And, I mean, if --
8 I don't know if you wanted two minutes to just sort of talk
9 about who wants to argue what. I don't need you to repeat
10 yourselves.

11 MS. WHELAN: I'll just pick up whatever he
12 doesn't --

13 MR. HOSMER-HENNER: That is not necessary, Your
14 Honor.

15 Your Honor, this has been an interesting hearing
16 because it's been a lot about the merits of the case, and what
17 we've really missed is why we don't get into discovery in terms
18 of resolving any of the merits of this case.

19 I want to just start with one of Your Honor's
20 frequently cited cases, which is *Alaska Cargo Transportation*
21 from the 9th Circuit, which holds that the District Court may
22 not stay discovery when discovery is needed to litigate the
23 dispositive motion. This goes back into the old preliminary
24 peek analysis and what we're doing here today.

25 It was Kalshi, not our side, that filed a motion for

1 summary judgment, and it's Kalshi that introduces arguments in
2 terms of the dispositive motion that they're claiming resolves
3 this case. On Page 17 of the motion for summary judgment with
4 respect to conflict preemption, something that Kalshi is not
5 dropping today, Kalshi claims that their event contracts are
6 swaps because they have potential financial, economic, or
7 commercial consequences. They further reject our arguments
8 that were made at the preliminary injunction stage and
9 elsewhere because, quote, Major sports events like those for
10 which Kalshi offers contracts similarly have significant
11 financial consequences for a host of stakeholders, including
12 team sponsors and advertisers.

13 How can we respond to these arguments about the
14 potential economic financial consequences of these swaps unless
15 Kalshi discloses them in the case, as they're the party seeking
16 to preempt Nevada gaming law, not in general, not with respect
17 to everything ever offered on the DCM --

18 THE COURT: Just let me ask, how -- what would
19 discovery look like? So they're saying, just take a look at
20 the website and see what the different contracts are.

21 MR. HOSMER-HENNER: Well, with respect to the
22 website, again, that shows why they should disclose the
23 contracts they're offering, but that website doesn't have all
24 the contracts they've ever offered. It doesn't have contracts
25 that are updated all the time. It doesn't show what they're

1 planning on doing in the future. That means that nothing is
2 going to be disclosed -- nothing could possibly -- the Nevada
3 gaming authorities could never regulate anything there.

4 And if you look -- and this is why I don't -- I
5 don't need to make this argument today because opposing
6 counsel's colleague made it during the hearing on the
7 preliminary injunction. Judge Gordon asked, "So the coin flip
8 would not be a swap?" Mr. Havemann, "That's correct." Judge
9 Gordon, "Even though many, many people in Nevada bet on the
10 results of the coin flip at the Superbowl? That is economic
11 consequences." Mr. Havemann, "That's right. And I think that
12 helps distinguish, you know, sportsbooks and the sort of
13 entities that the Board claims Kalshi is from Kalshi."

14 If Kalshi is offering an event contract on a coin
15 flip or a coin flip between Kylie Jenner and Timothée Chalamet
16 or a coin flip at the Superbowl, their counsel told Judge
17 Gordon that is not a swap. The CFTC has exclusive jurisdiction
18 over swaps. We, at minimum, should be permitted to inquire,
19 what are you offering and what you are claiming are the
20 potential economic consequences of these swaps so that we can
21 argue that they are not swaps.

22 They've said to the Court, a coin flip is not a
23 swap, and yet there are going to be prop bets at a Superbowl
24 event or elsewhere over a coin flip. There are contracts over
25 whether President Zelenskyy was going to wear a suit to meet

1 with Trump. There are prop bets over -- and, again, this is
2 not the right move to challenge someone in Nevada to identify
3 potential prop bets or bets that have no economic consequences,
4 but we have bets over the color of Gatorade, over virtual horse
5 racing, virtual dog racing, over the winners of a chess match,
6 over the --

7 THE COURT: I gotcha.

8 MR. HOSMER-HENNER: -- type of defense used in a
9 chess match.

10 THE COURT: Yes.

11 MR. HOSMER-HENNER: So it's not our burden as the
12 party seeking to say that these contracts are preempted. It's
13 their burden to say that these are swaps that have economic
14 consequences that we require that discovery in and discovery
15 about.

16 And it can't be the case where we are required to
17 search their website to then tell the Court what they are
18 offering and to show that as our evidence in terms of what
19 their bets are and to then say that those do not have potential
20 economic consequences. They're the party seeking summary
21 judgment in this case.

22 The second argument -- and I'm more than happy to go
23 into those -- that economic consequence, but that's their
24 argument with respect to conflict preemption. And discovery
25 can't be limited to what opposing counsel believes about these

1 contracts or what their position is and their imagination as to
2 what these contracts are actually going to be or what they
3 could be. Discovery has to be about what Kalshi is actually
4 doing and what Kalshi wants the Nevada gaming regulators to
5 stop doing.

6 The second argument that they make in their motion
7 for summary judgment is that compliance with both the CFTC's
8 and Nevada's requirements would be impossible, Page 16. It's
9 not the argument that they tried to distance from during the
10 oral argument today, saying there are different ways to show
11 conflict preemption. It's the argument they made in their
12 brief and that they're trying to say now we have no ability to
13 seek any discovery, including from Mr. Sottile, who it's not a
14 question of using their initial disclosures against them; it's
15 a question of they presented that to us and said he has
16 discoverable information about the difficulties Kalshi would
17 have of complying with State and Federal laws at the same time.

18 I just want to clarify one thing. The argument
19 wasn't just, you can withdraw your contracts from Nevada and,
20 therefore, harmonize the Federal and State regulations; the
21 argument is you could obtain a license from Nevada. You could
22 comply with Nevada regulations at the same time that you comply
23 with the CFTC rules. They don't want to do that, not because
24 it's impossible, but because they don't want to obtain a
25 license and they don't want to comply with Nevada regulations

1 for any number of reasons.

2 THE COURT: I thought there was an argument about
3 this and how that was essentially a non-starter during the
4 preliminary injunction. Would they ever get the license?

5 MR. HOSMER-HENNER: That's certainly not up for me
6 to decide, and I'll defer that difficult question to my
7 colleague, but I think the issue is that you could have this
8 and, at a minimum, again, why not show discovery on that,
9 right? I mean, open up Mr. Sottile to a deposition. He can
10 say his one sentence and then we move on. But taking them at
11 their word for every single sentence in this case, every single
12 assumption and allegation, simply isn't what normal litigation
13 processes should be like, specifically when they're the ones
14 seeking summary judgment.

15 But these are factual determinations and they make
16 these arguments in their brief and then say, we don't even get
17 summary -- we don't even get discovery to oppose to these
18 specific arguments. On Page 16, they argue that pulling these
19 contracts would also risk market disruption and facilitate
20 manipulation. How, why, where, when? I mean, how are we
21 supposed to respond to that argument that that creates
22 disruption and impossibility of compliance with Federal and
23 State regulations?

24 They argue that the DCM's must ensure contracts are
25 not readily susceptible to manipulation. Again, these aren't

1 arguments we're putting at issue; these are arguments that
2 Kalshi is saying as a reason that Judge Gordon should grant
3 their motion for summary judgment but then, again, denying us
4 the ability to respond through even basic discovery.

5 And they talk about how impartial -- unless they are
6 able to have total preemption, that would violate the Court
7 principles. We haven't really tracked their argument because
8 they haven't identified the core principle that actually the
9 CFTC would find to be violated depending on if they complied
10 with Nevada regulations or they withdrew from the Nevada
11 market. And, in fact, they even say the CFTC has never found
12 that before. But, again, these are things that the
13 communications to and from the CFTC may be relevant about.

14 I think there was one other question I wanted to
15 address before I got to -- turned it over to my colleague, but
16 when we're looking at the self-certification of event contracts
17 and the question of whether the CFTC -- the communications with
18 the CFTC and how they're relevant, one of the things that
19 opposing counsel said today is that the CFTC has approved these
20 event contracts. We don't believe that to be true. The CFTC
21 does not approve these specific --

22 THE COURT: But my understanding is that there's two
23 ways in which these can go about. One is self-certification,
24 and then the Commission can come in and take a look at it more
25 carefully and say yes or no, right? So I didn't take their

1 statement to be -- and you can go ahead and correct on the
2 record right now as we go whether you meant that the Commission
3 had actually blessed these but, rather, that you had
4 self-certified.

5 MR. MAINLAND: That's correct, Your Honor. The CEA
6 itself provides for self-certification, and that's what
7 happened here, and to our mind, that's a totally objective
8 fact.

9 THE COURT: Understood. Yeah, go ahead.

10 MR. HOSMER-HENNER: And one of their other
11 arguments -- and I understand that implied approval, but one of
12 their other arguments is, you don't need to tell the CFTC
13 anything about your specific swap. And that was one of the
14 arguments during this, you don't need to disclose even that to
15 the CFTC, these individual point spread contracts, these bets
16 on whether the Gatorade will be green or yellow. If they're
17 not disclosing that to the CFTC, then that weakens their
18 overall preemption argument across the Board. And this is
19 something that actually goes to the core heart of the
20 preemption is, what is the CFTC actually trying to preempt,
21 what's their mission, and what do they have jurisdiction over?
22 And if these particular swaps are not disclosed or approved but
23 are self-certified by Kalshi, these are all things that we hope
24 Kalshi would drop and would change -- you know, stipulate to
25 waive their certain arguments, but they're arguments they've

1 made in summary judgment briefing that's pending before this
2 Court.

3 For that reason, we see no basis for discovery to be
4 stayed certainly at this time, and we don't think at any point
5 during this case the discovery will be less relevant.

6 THE COURT: So on self-certification, what kind of
7 discovery would you be seeking?

8 MR. HOSMER-HENNER: The specific --

9 THE COURT: I mean, there's a legal question here as
10 to whether that's good enough, right, and I think that you
11 talked about the NBA and how the NBA said, listen, the
12 Commission's really not regulating the way they're supposed to
13 be regulating and that may play into your argument regarding
14 conflict preemption, et cetera. But what kind of discovery
15 would you be seeking regarding the certification itself? I
16 mean, I've not looked in detail to the exhibits that have been
17 attached to the summary judgment motion, but are they not
18 certifying that -- you know, that indeed they'd self-certified
19 these contracts?

20 MR. HOSMER-HENNER: So, Your Honor, these are the
21 communications that they chose and attached to their motion for
22 the summary judgment. So, you know, Exhibit A8, A9 is a
23 KalshiEX, L.L.C., notification regarding the initial listing of
24 the "Will last week's top songs still top of the Billboard Hot
25 100" contract? These are things they're producing that they're

1 submitting to the CFTC. We'd like to know if there's any
2 response back, any -- you know, the CFTC has initiated reviews
3 of contracts for the exact reasons that are -- that they're now
4 trying to offer, and so the status of those reviews, whether
5 they have initiated any of these reviews -- one of the things I
6 think is critical here is this is a dynamic process with a very
7 new product that they keep hyping up as a start-up company. If
8 the CFTC were to initiate a review and that's not brought to
9 the attention of Judge Gordon before he makes his decision,
10 then all of a sudden you have Judge Gordon finding that Nevada
11 gaming laws are preempted over a contract --

12 THE COURT: I see. So what you really want to see
13 is, okay, they've self-certified, fine; has there been any sort
14 of initiation by the Commission to review that certification?

15 MR. HOSMER-HENNER: That's -- yeah, that's
16 absolutely one area.

17 THE COURT: Understood.

18 MR. HOSMER-HENNER: Was there anything else before I
19 turn to...

20 THE COURT: Are you going to be addressing
21 injunctive relief?

22 MR. HOSMER-HENNER: My colleague will.

23 THE COURT: Okay. Thank you.

24 MS. WHELAN: So Kalshi's argument boils down to,
25 this is a purely legal issue and no discovery is needed, right?

1 But there are many examples of purely legal issues, and they
2 don't exist in a vacuum. We need to be able to see the facts
3 that inform and -- inform the legal issue, given a particular
4 case or controversy. And I think a key thing here is that
5 Kalshi is making an as-applied challenge to Nevada's authority
6 over event contracts.

7 THE COURT: Yeah, but ultimately what they're saying
8 is, listen, if Judge Gordon agrees with us and they find that
9 there is preemption, whether it's field or conflict, either
10 one, in what world would he not also allow for injunctive
11 relief? How would he find that what the defendants are trying
12 to do is not constitutional on the one hand and also not grant
13 injunctive relief? How would that work?

14 MS. WHELAN: Well, I think the larger point is
15 they're not asking to say that -- at least as I understand it,
16 they're not asking Chief Judge Gordon to say that it's
17 preempted in all circumstances on every event contract. At
18 least that's not how they've argued it.

19 They've argued that -- that the law -- that Nevada
20 gaming statutes are preempted as applied to Kalshi's event
21 contracts. And how can we know that without knowing more
22 information about what the event contracts are, if and when
23 they were self-certified, as Mr. Hosmer-Henner said, you know,
24 any discovery that's surrounding it? If I have a breach of
25 contract claim, I can't just present the Court with the

1 contract and an email from the other side saying, I'm not going
2 to comply.

3 THE COURT: Mr. Hosmer-Henner has already addressed
4 that. Go on to harm.

5 MS. WHELAN: Okay. To the harm, I'm sorry, what
6 specifically?

7 THE COURT: Injunctive relief. So what kind of
8 discovery would you need?

9 MS. WHELAN: So with respect to injunctive relief, I
10 think that this is where the affirmative defenses come into
11 play because it's axiomatic that one who requests equity must
12 do equity. And so looking into the circumstances surrounding
13 the timing of Kalshi's initial self-certification of event
14 contracts and their entry into the Nevada market is going to be
15 key. They started offering event contracts in Nevada on
16 January 25, 2025 --

17 THE COURT: What affirmative defense does that go
18 to?

19 MS. WHELAN: Unclean hands.

20 THE COURT: And how so?

21 MS. WHELAN: To the extent that Kalshi was entering
22 the event contract space in Nevada at a time when there was
23 transition in -- a transition in presidential administrations,
24 right, that's key because the way that I understand the
25 self-certification process to work and how Mr. Havemann at the

1 preliminary injunction hearing represented it was that Kalshi
2 self-certifies, the CFTC has a ten-day window within which to
3 start a review, and if the ten-day window passes, then it's
4 sort of deemed approved.

5 And so when you have this transition of outgoing
6 administration members, incoming, it really calls into question
7 the timing of it, whether there was any political motivation
8 there. There's also political links that we would like to
9 inquire into.

10 THE COURT: I guess the political motivations --
11 okay. Go ahead. Sorry.

12 MS. WHELAN: And that would be that a former -- I
13 believe it was a former Kalshi official or a member of Kalshi's
14 Board has been nominated as the CFTC Chair. Donald Trump, Jr.,
15 is a well-known advisor to Kalshi. And so I think that that's
16 not irrelevant here. And even if we may not be successful on
17 these affirmative defenses, discovery is broad. We're still
18 entitled to look into it. It's not a pure fishing expedition.
19 There are things here that really call into question the
20 propriety of what's being done.

21 I think there's also, with respect to the estoppel
22 arguments, at the preliminary injunction hearing, counsel for
23 Kalshi said that Kalshi -- I can't remember the exact wording
24 but that Kalshi basically takes great pains to ensure that the
25 event contracts it listed -- that it lists have real-world

1 economic consequences. There's been news articles in recent
2 days that say Kalshi's going to start getting into prop bets,
3 those same prop bets that Kalshi represented at the hearing,
4 you know, did not have real-world economic consequences.

5 And I want to talk a little bit about economic
6 consequences because what counsel for Kalshi said is basically,
7 you know, I'd challenge them to point out anything that doesn't
8 have a potential economic consequence. So taking him at his
9 word, doesn't that mean that that language in the statute is
10 superfluous, and isn't that contrary to, you know, principles
11 of statutory interpretation? What does that mean? And we
12 think we're entitled to, you know, engage in discovery to say,
13 what have you told the CFTC about these economic consequences?
14 How do you Kalshi determine that? How do you determine that
15 this has real-world economic consequences such that it does
16 qualify as a swap?

17 One example of a current event contract asks what
18 words the *South Park* character Eric Cartman will say in an
19 upcoming episode of the show. What's the potential or real
20 economic consequence there, and how does Kalshi determine that?
21 I don't think that that's getting too far afield and I think
22 that it can be tailored to, you know, address these specific
23 issues that are really problematic and that will inform the
24 legal analysis on summary judgment.

25 You know, Kalshi is making an extraordinary request

1 here. What it's seeking to do is upend more than a century of
2 State regulation of gaming, to upstate the Federal/State
3 balance of power, to erode the State's police power. This is
4 an area of traditional State regulation.

5 And one thing that hasn't been brought up thus far
6 that I would like to bring up is the possibility of expert
7 discovery. You know, this is a huge issue for Chief Judge
8 Gordon to decide. It's going to have massive ripple effects.
9 It's going to go up to the 9th Circuit, it could potentially go
10 up to the U.S. Supreme Court, and I don't think that a rush to
11 judgment would be beneficial. I think that this Court should
12 pump the brakes, and even if -- and I think that that means
13 probably bringing in experts in the area of State regulation of
14 gaming, in the area of CFTC regulation and CFTC jurisdiction,
15 and I think that that would be extremely helpful for the Court
16 on these complicated factual legal issues that the Court's
17 going to be presented with. So that's just a point that I
18 didn't want to miss when we're talking about discovery. It's
19 been all fact discovery thus far.

20 Let's see. You know, I think the fact, too -- I
21 think that Kalshi has in some way impliedly admitted or
22 conceded that there are -- that there is some universe of facts
23 that is relevant to its motion for summary judgment. That's
24 why there's ten exhibits to the motion for summary judgment.
25 That's why there's the initial disclosures that list

1 Mr. Sottile as a person with discoverable information. That's
2 why there's categories of documents that have not yet been
3 provided that we're entitled to see and we're entitled to
4 question about.

5 THE COURT: So all of these arguments have been
6 covered by your colleague over here. I don't mean to cut you
7 short, but I've heard him. I understood him. Is there
8 anything new that has not been presented to me that you would
9 like me to pay attention to? And I'm saying this because it's
10 5:03. We've been at it for an hour and a half.

11 MS. WHELAN: Yes. No, I understand. Thank you.

12 The last thing I'll say, I guess, is that their
13 argument that, well, the Nevada regulators lack jurisdiction
14 over us and so they can't kind of come in and do discovery,
15 well, even if that's their argument that Nevada lacks
16 jurisdiction, our argument is that we do have jurisdiction,
17 right? And certainly the Court has jurisdiction over Kalshi
18 because it brought this lawsuit, and so it shouldn't be
19 permitted to sort of get around the normal course of how
20 these -- of how civil litigation proceeds.

21 I have a few more points, but I think that it's
22 adequately been covered by Mr. Hosmer-Henner, so if there are
23 no further questions --

24 THE COURT: No further questions. Thank you so
25 much.

1 MS. WHELAN: Thank you.

2 THE COURT: All right. Mr. Mainland, last word?

3 MR. MAINLAND: I'm cognizant of the time, as well as
4 my voice, so I'll keep it short.

5 You know, one thing I'm not hearing from either
6 counsel is, really, what do you want? And when we get into
7 this stuff about, well, we can't just take them on their say-so
8 about potential financial or economic consequences. I'm sort
9 of at a loss as to what kind of documents would even bear on
10 that. There seems to be some built-in --

11 THE COURT: Well, I mean, Mr. Hosmer-Henner actually
12 did say specifically, for example, communications regarding
13 whether there was any intent by the Commission to come in after
14 the self-certification process. That's one category that
15 occurs to me right away.

16 MR. MAINLAND: Well, but so that's -- yeah. I mean,
17 that's an interesting one in the sense that I fail to
18 understand how that would have any relevance to the preemption
19 issue. The fact that we're having dealings with our sole
20 regulator is to be expected. And it's almost as if they're
21 trying to say, if you self-certified and the CFTC didn't
22 question you about it, then there's a question as to whether
23 it's properly listed or something like that. That's not how
24 this works at all.

25 The CEA itself, the Commodity Exchange Act, says you

1 can list, you can self-certify, and it's up to the CFTC. They
2 have all sorts of tools at their disposal if they have a
3 question about a particular product. So I just don't -- I
4 literally don't understand what the import of that factual --
5 you know, if we're going to start digging around for documents
6 as to whether the CFTC ever asked a question about a particular
7 contract -- again, we're talking about many thousands of
8 contracts, and they're changing every day. So that's not
9 really a tenable exercise. But more importantly, it really
10 doesn't bear on the issue of preemption. In fact, it only
11 underscores, if we're dealing with our regulator on these, the
12 regulator at least, who is endowed with all these powers by the
13 U.S. Congress, is overseeing it.

14 I also just want to make the point -- and I mean
15 this respectfully, but it really isn't Nevada's place to come
16 in and say, we think the CFTC isn't doing a good job, or we
17 think the CFTC has been tricked. They're sort of -- I mean,
18 they're really coming out and saying it, they think the day
19 Donald Trump became President in January that we snuck one by
20 them. That's not how this works. You can self-certify
21 pursuant to the law, and we're doing that more or less every
22 day. And the next day it can trade. The ten-day rule,
23 actually, is just a rule of thumb. There's no strict
24 requirement of ten days. That is the case for rules but not
25 for event contracts themselves. They can go live the very next

1 day.

2 So the idea that we needed to, in the dark of night,
3 slip this by an administration which, at the same time, they're
4 saying we're totally in bed with and they -- you know, they're
5 doing our bidding and all that kind of stuff, it just doesn't
6 add up and it really does feel like a fishing expedition,
7 particularly when you say we want every communication you've
8 ever had with the CFTC or the United States Government. It
9 won't have any bearing on the issues and it's totally -- it's
10 totally overbroad and, frankly, a little outrageous. And it's
11 all based on innuendo, this idea that there must be some
12 sweetheart deal. It doesn't make any sense at all and it
13 certainly has no bearing on the preemption issues.

14 I really do want to turn back to the contracts.
15 Every single contract is on the CFTC's website, every single
16 one. They can go onto the CFTC's website and go through an
17 endless list of Kalshi event contracts, and it will say what it
18 is, what's the event that people are able --

19 THE COURT: Answer what the potential economic
20 consequence might be as to each one, right?

21 MR. MAINLAND: Right. But we have no obligation --
22 my understanding is no one's doing that. That is not --

23 THE COURT: You have no obligation to what? Don't
24 you have an obligation to show that it qualifies as a swap?

25 MR. MAINLAND: No. I mean -- well, look, they are

1 swaps, and I don't want to -- I don't want to -- I'm not a
2 commodities lawyer, my partner Josh Sterling is, and I do know
3 that there is analysis that is provided in connection with
4 every self-certification that we provide for any event
5 contract. The statute and the regs call for that. The regs in
6 particular are pretty detailed about exactly what the CFTC
7 expects you to inform them of, and there isn't a line that
8 says, please explain to us what is -- you know, what the
9 potential economic or financial consequences are. They seem to
10 envision that there is. There's no regulatory requirement that
11 would do that, partly because it's so blindingly obvious --

12 THE COURT: So my question is, do you not need to
13 show that they are indeed swaps so as to be able to invoke the
14 exclusive jurisdiction of the CEA?

15 MR. MAINLAND: Again, I don't want to go beyond my
16 expertise, but what I will say is we do need to represent to
17 the CFTC that they are CEA-compliant. Whether that extends to
18 the issue of we are hereby representing to you that this is a
19 swap, I think we do as a practical matter explain to them, this
20 is an event contract. An event contract is something that's an
21 excluded commodity under the CEA. That is a regulated product.
22 That's a commodity that's relevant here, and these are swaps on
23 regulated -- on an excluded commodity, an event.

24 So what we informed the CFTC, well-advised by
25 counsel, is this is -- this is how -- we are answering the

1 questions that the CFTC asks us to inform them of. And I know
2 at that level I'm comfortable saying that's what we do, but I
3 do think there's a misconception that there's some sort of,
4 like, ten-page memo that goes with it that says, here's what
5 the potential financial and economic consequences are. My
6 understanding is that does not exist.

7 And, again, this is partly because we're sort of
8 living in parallel universes here. This is not how the real
9 world of the CFTC and the commodities exchange works. This
10 is -- people aren't debating whether things are swaps or not
11 when they're very clear -- event contracts are agreements that
12 are based on a payment that will flow out of the occurrence or
13 non-occurrence of an event. It's a very simple definition, and
14 it can be construed as a matter of law.

15 Just a couple of other issues. You know, this point
16 about, you know, we would need to pump the brakes, this is an
17 area of traditional State regulation, look, 50 years now that
18 Congress has given the CFTC exclusive jurisdiction over
19 event -- not event contracts but any sort of exchange-traded
20 commodities or derivatives, 50 years. So this isn't like -- I
21 get that there's evolution in the marketplace, but this
22 exclusive jurisdiction, there is a whole lot of law supporting
23 it, and Chief Judge Gordon already appreciated that, so the
24 idea that there is some novel congressional encouragement into
25 State sovereignty here that needs to be brushed back a little

1 bit, if anything, I would say the opposite is happening, which
2 is, we have States who are jumping all over an area of Federal
3 regulation --

4 THE COURT: We're getting again really into merits
5 phase.

6 MR. MAINLAND: Okay. I apologize. I just wanted to
7 make that one point.

8 I think one final thing, they mentioned expert
9 discovery. They mention, again, pumping the brakes; let's be
10 careful, let's explore this very fully, what's the harm? One
11 thing you're not hearing, you haven't heard once out of their
12 mouth, is 56(d). That is the way to deal with this. If you
13 really think that we have -- there are facts that are essential
14 to our opposition to summary judgment, then you can make that
15 application to the same judge who will be deciding the summary
16 judgment motion. He will know at that time, you know what?
17 I'm losing a little sleep over this factual issue. I think
18 there at least could be a genuine issue of material fact over
19 here. Why don't we authorize some brief discovery on that?
20 I'll see you in a month.

21 THE COURT: So I guess -- and I did raise this issue
22 earlier, and that is, they make that argument through Judge
23 Gordon, Judge Gordon says, for purposes of this argument, sure,
24 go ahead and pursue discovery as to A, B, C, D, and E, then he
25 decides the motion for summary judgment and denies it. Now

1 they need to go after all of this other discovery that they've
2 not gone after. In the meantime, there's still an injunction
3 in place which they're saying is harmful to their position.

4 MR. MAINLAND: Look, these are -- I hate to say it,
5 but I think these are di minimus delays relative to what we are
6 dealing with here. I am confident that if Chief Judge Gordon
7 thinks there are factual issues here, and I'll be surprised if
8 he does -- I really just think this is a purely legal issue,
9 but if he does, I don't think it's going to be anything close
10 to, we want to figure out if there was corruption between
11 Kalshi and President Donald Trump --

12 THE COURT: I agree with you on that specific point,
13 yes.

14 MR. MAINLAND: Well, but it's extremely broad, and
15 so what would be happening here is we would set things back by
16 a month. But the flip side, if we just --

17 THE COURT: I don't know if it would be a month. I
18 mean, you're just sort of assuming that Judge Gordon's going to
19 be ruling on the motion for summary judgment a week after the
20 reply is in, and I'm not sure that that's the case.

21 MR. MAINLAND: No, you're right, Your Honor, and I
22 don't want to be presumptuous on that front. I am fully aware
23 that Chief Judge Gordon has a lot on his docket and on his
24 plate, so I don't want to seem remotely presumptuous, but I do
25 think this whole idea of, well, what's the harm? We've got

1 these extremely broad requests. Again, what I'm hearing is,
2 let's have a debate about every possible contract. I don't
3 even know where that ends.

4 And, by the way, if you offer a new one tomorrow, we
5 want to start talking about that. What if the judge enters
6 summary judgment and then there is some new product that they
7 say, well, this one really isn't preempted, so -- and you
8 didn't address it because it didn't exist yet, so we're going
9 to send a new cease and desist? At some point they need -- the
10 Court needs to tell the State regulator to butt out when
11 there's been field preemption. The judge has already found, I
12 agree, on a PI record, but still, pretty forcefully that this
13 law is field preempted. And that's a -- that's not a normal
14 situation to be in here. They make it seem like we're just
15 rushing to judgment. The judge has already put a lot of
16 thought into this, and I think we can see where it's going.

17 Obviously, nothing is preordained here, but under
18 those circumstances, which are pretty unusual, we're pretty far
19 along here. I think putting the pause on the discovery piece
20 is what we should be doing, see where these issues shake out,
21 and if there are some targeted fact issues that flow out of
22 that by the judge who's going to be deciding the ultimate
23 summary judgment motion, that's the time to deal with it and we
24 will jump on that. We will do that in an expedited way if we
25 need to at that point, but right now it makes no sense and it's

1 extremely burdensome and, frankly, an inappropriate incursion
2 on -- you know, we have one regulator that we're dealing with,
3 and all of a sudden it's not just Nevada, it's potentially 50
4 other regulators around the country that we're dealing with if
5 this is sort of green lit.

6 So there's a lot riding -- this is just a motion to
7 stay discovery, in a sense. There's a lot riding on it, and
8 so, you know, I would ask that Your Honor grant the motion.
9 Thank you very much.

10 THE COURT: Thank you.

11 Thank you, everyone. All right. I'm going to take
12 this under submission, and what I'll do is I'll probably just
13 prepare an order, I'll just read it from the bench. My oral
14 ruling will -- or the transcript of my oral ruling will serve
15 as the written order, and we can go from there, but I can't
16 promise you how fast that's going to happen. All right? I'll
17 try -- I mean, it's top of my list. I just don't know when I'm
18 going to have a decision, hopefully next week sometime. All
19 right? Thank you.

20 (Proceedings concluded at 5:15 p.m.)

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I, Judy K. Moore, a court-appointed transcriber, certify that the foregoing is a correct transcript transcribed from the official electronic sound recording of the proceedings in the above-entitled matter.

Date: August 28, 2025

/s/ Judy K. Moore

Judy K. Moore, CRR, RMR
Official Court Reporter
United States District Court
District of Nevada