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ARTICLE

RESCUING EXPEDITED DISCOVERY FROM THE COMMODITY FUTURES TRADING COMMISSION & RETURNING IT TO FED. R. CIV. P. 26(d)(1): USING A DOCTRINE'S FORGOTTEN HISTORY TO ACHIEVE LEGITIMACY

JESSE N. PANOFF, ESQ.*

INTRODUCTION

A \$40 trillion market¹ is regulated by the Commodity Futures Trading Commission (CFTC),² a federal agency that has, during the past eleven years, been denied expedited discovery only twice.³ The CFTC's unparalleled record is one of the primary results of expedited discovery's illegitimacy.⁴ Illegitimacy exists because federal courts throughout the

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¹ COMMODITY FUTURES TRADING COMM'N, STRATEGIC PLAN FY 2011-2015 at 3 (2011), available at <http://cftc.gov/ucm/groups/public/@aboutcftc/documents/file/2015strategicplan.pdf>.

² Throughout this Article, "CFTC" and "Commission" refer to the Commodity Futures Trading Commission. Likewise, the following terms are synonymous with "expedited discovery": "early discovery," "pre-26(f) discovery," "accelerated relief," "accelerated discovery," and "the doctrine."

³ *Commodity Futures Trading Comm'n v. UForex Consulting, LLC*, 551 F. Supp. 2d 513, 516 (W.D. La. 2008); *Commodity Futures Trading Comm'n v. Chilcott*, No. 2:02-CV-94-FTM-29DNF, 2002 WL 1455345 (M.D. Fla. filed Mar. 7, 2002), available at <http://cftc.gov/files/enf/02orders/enfchilcott-sro.pdf> (omitting CFTC's proposed expedited-discovery provisions from ex parte restraining order; PDF copy of order shows proposed provisions crossed out by court).

⁴ See Jesse N. Panoff, *Rescuing Expedited Discovery from Courts & Returning It to FRCP 26(d)(1): Using a Doctrine's Forgotten History to Achieve Legitimacy*, 64 ARK. L. REV. 651, 672

country have developed⁵ expedited discovery—a legal doctrine—in ways that are inconsistent with Federal Rule of Civil Procedure 26(d)(1), the doctrine’s provenance.⁶

According to 26(d)(1), “[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except . . . when authorized by . . . court order.”⁷ So, discovery is generally prohibited before the parties conduct a Rule 26(f) discovery planning conference.⁸ An exception to this general prohibition is when discovery is “authorized by . . . court order.”⁹ Importantly, the rule does not specify the circumstances when a court should “authorize[.]”¹⁰ discovery.¹¹ That determination rests with a court’s discretion,¹² which

(2011) [hereinafter Panoff, *Rescuing Expedited Discovery I*] (“At least since 2000, the Commodity Futures Trading Commission has obtained sweeping expedited-discovery orders under the rubric of good cause. These decisions rely on the same generalized justifications, rarely paying any attention to the details of 26(d)(1), but allowing for nearly boundless discovery.” (footnotes omitted) (citing U.S. Commodity Futures Trading Comm’n v. Kim, No. 11 CIV 1013, 2011 WL 554105, at *1, *4 (S.D.N.Y. Feb. 15, 2011)).

⁵ As used in this Article and in Panoff, *Rescuing Expedited Discovery I*, the word “developed” describes the judicial process’s articulation and readjustment of a standard or a test. See *Jaybird Mining Co. v. Weir*, 271 U.S. 609, 619 (1926) (Brandeis, J., dissenting) (“It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in *developing* a rule, is not allowed to end with its enunciation, and that an expression in an opinion yields later to the impact of facts unforeseen.”) (emphasis added); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 236 (1924) (Brandeis, J., dissenting) (“The process of inclusion and exclusion, so often applied in *developing* a rule, cannot end with its first enunciation. The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law.”) (emphasis added); BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 138 (Yale University Press 1963) (referencing Justice Brandeis’s process of inclusion and exclusion).

⁶ See *infra* Appendix I (decisions authorizing early discovery without using any interpretive test); see also *infra* Appendix IV (decisions permitting expedited discovery despite omitting any citation to FED. R. CIV. P. 26(d)(1)).

⁷ FED. R. CIV. P. 26(d)(1).

⁸ *Id.* (“A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)”); see also *Lamar v. Hammel*, No. 08-02-MJR-CJP, 2008 WL 370697, at *2 (S.D. Ill. Feb. 11, 2008).

⁹ FED. R. CIV. P. 26(d)(1) (“[e]xcept . . . when authorized by . . . court order.”); see also *Quia Corp. v. Mattel, Inc.*, No. C10-01902 JF (HRL), 2010 WL 2179149, at *1 (N.D. Cal. May 27, 2010); *Bug Juice Brands, Inc. v. Great Lakes Bottling Co.*, No. 1:10-cv-229, 2010 WL 1418032, at *1 (W.D. Mich. Apr. 6, 2010); *Diplomat Pharmacy, Inc. v. Humana Health Plan, Inc.*, No. 1:08-CV-620, 2008 WL 2923426, at *1 (W.D. Mich. July 24, 2008).

¹⁰ FED. R. CIV. P. 26(d)(1).

¹¹ See, e.g., *Lamar*, 2008 WL 370697, at *3 (“There is no set test or criteria for deciding whether early discovery is warranted, but certainly fairness to all concerned must be a paramount concern.”); *Better Packages, Inc. v. Zheng*, No. Civ.A. 05-4477(SRC), 2006 WL 1373055, at *2 (D.N.J. May 17, 2006) (“Unlike most other discovery provisions within the Federal Rules, these provisions contain little guidance regarding the granting of expedited discovery.”).

¹² See, e.g., *MRP, Inc. v. Moreman*, No. 3:10-CV-707, 2011 WL 61177, at *2 (W.D. Ky. Jan. 7, 2011); *Avaya, Inc. v. Acumen Telecom Corp.*, No. 10-cv-03075-CMA-BNB, 2011 WL 9293, at *2 (D. Colo. Jan. 3, 2011); *Russell v. Lumpkin*, No. 2:10-cv-00314, 2010 WL 1882139, at *1 (S.D.

can be robust in the discovery setting.¹³ While discretion is extensive, it is not unlimited.¹⁴ The rule's structure and text have boundaries that can and should harness discretion.¹⁵ The problem is that courts ignore 26(d)(1)'s structure and text when faced with a CFTC request for expedited discovery.¹⁶

For over a decade, judicial decisions have “authorized”¹⁷ the CFTC to conduct expedited discovery irrespective of 26(d)(1)'s structure and text.¹⁸ Instead, courts typically allow discovery because either: (i) “good cause” exists, or (ii) for no articulated reason at all. Consider that the so-called Good-Cause Test merely proclaims, “[g]ood cause exists for the plaintiff [CFTC] to conduct expedited discovery”¹⁹ Hence, judicial decisions have developed the doctrine in ways that are attenuated from 26(d)(1). The overall result is if the Commission asks for accelerated discovery, then courts will grant such relief.²⁰ This is somewhat unsurprising because the very decisions—the court orders—that “authorize”²¹ early discovery are written by the CFTC and signed by federal judges with little if any modification.²² In fact, out of 101

Ohio May 11, 2010); *Better Packages, Inc.*, 2006 WL 1373055, at *2; *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 326 (S.D.N.Y. 2005); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor*, 194 F.R.D. 618, 623 (N.D. Ill. 2000); *see also BlackRock, Inc. v. Schroders PLC*, No. 07 Civ. 3183(PKL), 2007 WL 1573933, at *8 (S.D.N.Y. May 30, 2007) (stating that expedited discovery is discretionary).

¹³ *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003); *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003); *Rhodes v. McDannel*, 945 F.2d 117, 119 (6th Cir. 1991).

¹⁴ Panoff, *Rescuing Expedited Discovery I*, at 658-59.

¹⁵ *Id.*

¹⁶ *See, e.g.*, *U.S. Commodity Futures Trading Comm'n v. People's Alt., Inc.*, No. 2:10-cv-07013-GAF-E, at 3 (C.D. Cal. filed Sept. 22, 2010), *available at* <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfpeoplesorder092210.pdf>; *U.S. Commodity Futures Trading Comm'n v. Driver*, 2009 WL 3396172, at *5 (C.D. Cal. 2009); *Commodity Futures Trading Comm'n v. Nations Inv., LLC*, No. 07-CV-61058-RWS, at 5 (N.D. Ga. filed Jan. 31, 2007); *U.S. Commodity Futures Trading Comm'n v. Cornerstone Capital Mgmt., LLC*, No. 07-CV-0274-RWS, at 17-18 (N.D. Ga. filed Jan. 31, 2007).

¹⁷ FED. R. CIV. P. 26(d)(1).

¹⁸ Structure involves the general prohibition and discretionary exception. Text encompasses specific actors, conduct, and time period.

¹⁹ *See U.S. Commodity Futures Trading Comm'n v. ACJ Capital, Inc.*, No. 3:11-CV-01419-JAF, at 3 (D.P.R. filed May 4, 2011), *available at* <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfacjcapitalorde050411.pdf> (filed under seal).

²⁰ *See infra* Appendix I (decisions authorizing expedited discovery without using an interpretive test, implying the movant's identity—the CFTC—is the determining factor).

²¹ FED. R. CIV. P. 26(d)(1).

²² *See, e.g.*, *U.S. Commodity Futures Trading Comm'n v. Fin. Robotics*, No. 11-CV-2446-LR, at 2, 15 (S.D. Tex. filed June 30, 2011), *available at* <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enffinroborder063011.pdf>; *U.S. Commodity Futures Trading Comm'n v. Cornerstone Capital Mgmt., LLC*, No. 07-

decisions, spanning from 2000 to 2011, not one quoted 26(d)(1), with some omitting it entirely.²³ Courts have, therefore, within the CFTC-expedited discovery context, trivialized and minimized the doctrine's source.

Other legal contexts have dealt with expedited discovery similarly. Examples include cases concerning anonymous online copyright infringers,²⁴ the Fair Labor Standards Act,²⁵ the Private Securities Litigation Reform Act,²⁶ and Fed. R. Civ. P. 44.1.²⁷ As with the CFTC-expedited discovery context, these areas of law have "authorized"²⁸ pre-26(f) discovery with scant attention to or respect for 26(d)(1)'s structure or text.²⁹ Such areas of law involve issues—including investments and employment—that are at the heart of this country's recent economic decline. The CFTC context, however, deals with some of the forces that enervated our country's economy.³⁰

The forces behind the economic decline are the commodity futures and option markets, volatile economic sectors rife with speculators, some of whom have perpetrated widespread abuses ranging from market or price manipulations to variegated forms of fraud, costing investors and markets hundreds of millions of dollars.³¹ And now, the stakes—already

CV-0274-RWS, at 17-18 (N.D. Ga. filed Jan. 31, 2007), available at <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfcornerstoneorder.pdf>.

²³ See *infra* Appendix IV.

²⁴ See, e.g., *Arista Records, LLC v. Does 1-4*, No. 1:07-cv-1115, 2007 WL 4178641, at *1-2 (W.D. Mich. Nov. 20, 2007); *Interscope Records v. Does 1-8*, No. CIVA06CV00352WDMPCAC, 2006 WL 1351876, at *1 (D. Colo. Mar. 13, 2006); *Arista Records LLC v. Does 1-20*, No. 05-CV-2144-WDM-PAC, 2005 WL 3776346, at *1 (D. Colo. Nov. 7, 2005).

²⁵ See, e.g., *Mehmedi v. La Dolce Vita Bistro, LLC*, No. 1:10 CV 01591, 2010 WL 4789579, at *1 (N.D. Ohio Nov. 17, 2010); *Reid v. Timeless Rests., Inc.*, No. 3:09-CV-2481-L, 2010 WL 4627873, at *2 (N.D. Tex. Nov. 5, 2010).

²⁶ See, e.g., *Dixon v. Ladish Co.*, No. 10-CV-1076, 2011 WL 719018, at *1 (E.D. Wis. Feb. 22, 2011); *Leone v. King Pharms., Inc.*, No. 2:10-CV-230, 2010 WL 4736271, at *2-4 (E.D. Tenn. Nov. 16, 2010).

²⁷ See, e.g., *Wultz v. Islamic Republic of Iran*, No. 08-cv-1460 (RCL), 2010 WL 4166773, at *2 (D.D.C. Oct. 20, 2010); *Base Metal Trading S.A. v. Russian Aluminum*, No. 00 CIV. 9627 JGK FM, 2002 WL 987257, at *4 (S.D.N.Y. May 14, 2002).

²⁸ FED. R. CIV. P. 26(d)(1).

²⁹ See Panoff, *Rescuing Expedited Discovery I*, at 671-72, 689-90.

³⁰ Gary Gensler, Chairman, U.S. Commodity Futures Trading Comm'n, *Bringing Transparency to the Swaps Markets* ¶ 9, Remarks at the National Association of Corporate Treasurers Conference (June 2, 2011) (transcript available at <http://cftc.gov/PressRoom/SpeechesTestimony/opagensler-83.html>) (recounting how swaps contributed to 2008 financial crisis).

³¹ COMMODITY FUTURES TRADING COMM'N, SUMMARY OF PERFORMANCE & FINANCIAL INFORMATION: FISCAL YEAR 2010, at 17, 26 (2010), available at <http://cftc.gov/ucm/groups/public/@aboutcftc/documents/file/2010summary.pdf>; see also *Dunn v.*

valued at \$40 trillion for the commodity futures and option markets—are about to grow. The CFTC will regulate the swaps market, over-the-counter derivatives valued at \$300 trillion, another market accused of causing the current economic crisis.³² Thus, by virtue of the amount of money associated with swaps and commodity futures and option markets, the CFTC will become a prominent player in the government’s efforts to rebound from financial collapses, the effects of which are still being felt today.³³

How the CFTC regulates these markets impacts varying segments of society, yielding nationwide consequences.³⁴ Regulation is explicated by the statute the CFTC enforces: The Commodity Exchange Act (CEA). The CEA gives tremendous investigatory and enforcement authority to the CFTC.³⁵ Statutory authority recognizes that those who have broken the law, who have betrayed investors’ trust, or who have misled market participants, should be held accountable for their actions.³⁶ Sometimes accountability must be rapid in order to stave off asset depletion or document destruction. These outcomes can be avoided through the CFTC’s investigatory and enforcement tools.³⁷ The Commission’s

U.S. Commodity Futures Trading Comm’n, 519 U.S. 465, 468-69 (1997) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 356 (1982)).

³² COMMODITY FUTURES TRADING COMM’N, PRESIDENT’S BUDGET & PERFORMANCE PLAN: FISCAL YEAR 2012, 2-3 (2011), available at <http://cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcbudget2012.pdf>; see also Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 721(a)(21), 124 Stat. 1376, 1666-69 (H.R. 4173, amending 7 U.S.C. § 1a to include definition of “swap” at 7 U.S.C. § 1a(47)).

³³ Gretchen Morgenson, *It’s Not Over Until It’s in The Rules*, N.Y. TIMES, Aug. 28, 2010, at BU1, available at www.nytimes.com/2010/08/29/business/29gret.html?ref=todayspaper (discussing CFTC’s involvement with implementing the Dodd-Frank Act and overseeing the derivatives market).

³⁴ *Id.* As this Article observes, commodity futures and option markets—as well as swaps—were some of the forces that caused this country’s recent economic decline. And these markets’ collective approximate value is nearly \$400 trillion. The agency in charge of regulating these markets will take action—whether it be by authoring and implementing administrative rules or by bringing CEA enforcement actions—that will generate nationwide consequences. After all, the economic forces at work within the CFTC-expedited discovery context are part and parcel of, if not intertwined with, the socio-economic factors that undermined our Nation’s financial stability. This part of the Introduction connects the CFTC, and this Article, to our day’s most pressing concern: the economy.

³⁵ 7 U.S.C.A. §§ 1-27f (Westlaw 2012).

³⁶ In 2009, the CFTC “[o]btained \$183 million in restitution and disgorgement and \$97 million in civil monetary penalties in previously filed or existing cases.” COMMODITY FUTURES TRADING COMM’N, PERFORMANCE & ACCOUNTABILITY REPORT: FISCAL YEAR 2009, at 20 (2009), available at <http://cftc.gov/ucm/groups/public/@aboutcftc/documents/file/2009par.pdf>.

³⁷ See, e.g., 7 U.S.C.A. § 13a-1 (Westlaw 2012) (statutory restraining orders); see also COMMODITY FUTURES TRADING COMM’N, CFTC ANNUAL FUTURES REPORT 1997, available at www.cftc.gov/anr/anrenf97.htm (describing “quick strike” cases).

statutory power is subject to review and scrutiny by federal courts.³⁸ As a result, it falls upon courts to ensure the CFTC, a powerful independent agency,³⁹ enforces the CEA in a manner that is mindful of procedural regularity,⁴⁰ which demands a resolute fidelity to 26(d)(1)'s strictures.⁴¹

Regrettably, federal courts have forsaken 26(d)(1). For example, courts treat the CFTC differently from private litigants; judges do so by signing off on sweeping expedited discovery requests that would be viewed skeptically in any other legal arena.⁴² Courts would perceive such requests from other litigants as indicative of abusive discovery.⁴³

³⁸ See, e.g., 7 U.S.C.A. § 2(a)(1)(C)(v)(VI) (Westlaw 2012) (judicial review of Commission's alteration or supplementation of a contract market rule); *id.* § 7(b) (referencing judicial review of suspension or revocation of a registered entity, as provided for in 7 U.S.C. § 8(b)); *id.* § 8(b) (judicial review of suspension or revocation of a registered entity); *id.* § 12c(c) (judicial review of CFTC's or exchange's discipline of an exchange's member); *id.* § 27d(c)(6) (judicial review of CFTC's determination or rulemaking that implicates the "predominance test").

³⁹ See 7 U.S.C.A. § 2(a)(2)(A) (Westlaw 2012) ("There is hereby established, as an independent agency of the United States Government, a Commodity Futures Trading Commission.").

⁴⁰ Procedural regularity is a broad concept, achieved and maintained through rule fidelity. See generally *Burdeau v. McDowell*, 256 U.S. 465, 476-77 (1921) (Brandeis, J., dissenting) ("[I]n the development of our liberty insistence upon procedural regularity has been [a] large factor.").

⁴¹ See generally *id.*

⁴² See *MRP, Inc. v. Moreman*, No. 3:10-CV-707, 2011 WL 61177, at *2 (W.D. Ky. Jan. 7, 2011) ("The information MRP seeks through expedited discovery in this case is exceedingly broad."); *Avaya, Inc. v. Acumen Telecom Corp.*, No. 10-cv-03075-CMA-BNB, 2011 WL 9293, at *2 (D. Colo. Jan. 3, 2011) ("In this case, the requested discovery is not limited or narrowly tailored, but is sweeping in its scope."); *Fifth Element Creative, LLC v. Kirsch*, No. 5:10-cv-255-KKC, 2010 WL 4102907, at *2 (E.D. Ky. Oct. 18, 2010) (finding discovery requests overly broad and not narrowly tailored to obtain information relevant to preliminary injunction motion's determination); *Wheeler v. HXI, LLC*, No. 10-cv-145-JD, 2010 WL 3023518, at *2 (D.N.H. July 28, 2010) ("[t]he request is not narrowly tailored or sufficiently specific, and risks converting the expedited discovery process into a fishing expedition."); *Landwehr v. F.D.I.C.*, No. 09-0716 (RMU), 2010 WL 2572077, at *2 (D.D.C. June 28, 2010) ("Moreover, there is no indication that this expedited discovery would be narrowly tailored, as it was in the cases relied on by the plaintiffs."); *L'Occitane, Inc. v. Trans Source Logistics, Inc.*, No. WMN-09-CV-2499, 2009 WL 3746690, at *2 (D. Md. Nov. 2, 2009) ("Moreover, the Court does not find Plaintiff's request to depose Defendant Cates to be narrowly tailored as it does not set forth the subjects upon which it would depose Mr. Cates."); *Sunflower Elec. Power Corp. v. Sebelius*, No. 08-2575-EFM-DWB, 2009 WL 774340, at *4 (D. Kan. Mar. 20, 2009) ("The title of the present renewed motion refers to 'limited, expedited discovery', but there is no claim that the proposed deposition of the Governor will be limited in scope or duration in any manner. The court can only conclude that Sunflower is, in reality, attempting to pursue very broad discovery from the Governor concerning all aspects of the present case.").

⁴³ Court decisions frequently authorize a generalized form of "discovery," oftentimes in conjunction with depositions, without mentioning whether the Commission described its proposed discovery requests. See *U.S. Commodity Futures Trading Comm'n v. Groover*, No. 4:11-CV-64, 2011 WL 1490901, at *2, *5 (E.D. Tex. Feb. 11, 2011); *U.S. Commodity Futures Trading Comm'n v. Bame*, No. CV08-05593, 2008 WL 4377126, at *1, *2 (C.D. Cal. Aug. 26, 2008); *U.S. Commodity Futures Trading Comm'n v. A.S. Templeton Grp., Inc.*, No. Civ. 03-4999, 2003 WL 23190194, at *11 (E.D.N.Y. Oct. 1, 2003). In other legal contexts, courts deny expedited discovery because the movant did not detail its proposed discovery requests. See *Boathouse Grp., Inc. v.*

No such perception clings to CFTC discovery requests. And yet, the rule does not differentiate between private and governmental parties.⁴⁴ It is neutral, enunciating a general prohibition against pre-26(f) discovery that controls all parties: “A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)”⁴⁵ Courts’ divergent treatment of the CFTC is incompatible with 26(d)(1)’s structure and text. Then again, the rule has little to do with whether a court will permit the CFTC to conduct accelerated discovery.⁴⁶

Indeed, over a decade’s worth of judicial rubber-stamping has reduced 26(d)(1) to near-irrelevancy, a compilation of numbers and letters that is—when acknowledged at all—referenced in the most general of terms,⁴⁷ reduced to a barely noticeable citation,⁴⁸ or paid cursory lip service.⁴⁹ Courts have treated 26(d)(1) as though it is incapable of adding anything to a mechanical outcome anathema to the robust discretion⁵⁰ that animates 26(d)(1).⁵¹ It is a discretion, however,

Tigerlogic Corp., No. 10–12125–NMG, 2011 WL 841258, at *9 (D. Mass. Mar. 7, 2011); Kabyesiza v. Rodriguez, No. 10-cv-00216-MSK-KLM, 2010 WL 3923093, at *4 (D. Colo. Oct. 1, 2010); IRC, LP v. McLean, No. 09-189-JPG-CJP, 2009 WL 839043, at *1 (S.D. Ill. Mar. 31, 2009).

⁴⁴ See FED. R. CIV. P. 26(d)(1) (“A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)”). “A party” encompasses governmental and private litigants, both of which—as 26(d)(1) commands—“[m]ay not seek discovery . . . before the parties have conferred as required by Rule 26(f).” *Id.*; see also *Webb v. CBS Broad., Inc.*, No. 08 C 6241, 2011 WL 111615, at *8 n.9 (N.D. Ill. Jan. 13, 2011) (“A party may not seek discovery before the parties’ meeting pursuant to Federal Rule of Civil Procedure 26(f).”).

⁴⁵ FED. R. CIV. P. 26(d)(1).

⁴⁶ See *infra* Appendix IV (decisions granting CFTC expedited discovery without citing FED. R. CIV. P. 26(d)(1)); see also *U.S. Commodity Futures Trading Comm’n v. Global Fin. Consulting, Inc.*, No. 1:02-CV-2394, 2002 WL 31357171, at *3 (N.D. Ga. Aug. 28, 2002) (not referencing FED. R. CIV. P. 26(d)(1)); *Commodity Futures Trading Comm’n v. First Bristol Grp., Inc.*, No. 02-61160, 2002 WL 31357411, at *1, *7 (S.D. Fla. Aug. 20, 2002) (allowing early discovery without mentioning FED. R. CIV. P. 26(d)(1)).

⁴⁷ See, e.g., *U.S. Commodity Futures Trading Comm’n v. Kis*, No. CIVA 3:06-0935, 2006 WL 3707872, at *4 (M.D. Tenn. filed Sept. 27, 2006) (“The prohibition upon discovery before the early meeting of counsel is removed pursuant to FRCP 26(d).”).

⁴⁸ See, e.g., *Groover*, 2011 WL 1490901, at *5 (“The Commission may conduct expedited discovery, removing the prohibition upon discovery before the early meeting of counsel pursuant to FRCP 26(f), in accordance with FRCP 26(d)”).

⁴⁹ See, e.g., *U.S. Commodity Futures Trading Comm’n v. M25 Inv.*, No. 3–09–cv–1831–M, 2009 WL 3740627, at *6 (N.D. Tex. Sept. 29, 2009) (“The Commission may conduct expedited discovery in advance of discovery allowed by FRCP Rule 26.”).

⁵⁰ As a general matter, United States district courts have considerable (or “robust”) discretion over discovery. Because 26(d)(1) concerns discovery—and neither its structure nor text denotes when a court should “authorize” pre-26(f) discovery—that rule imports courts’ traditional “robust” discretion. The second paragraph of this Article’s Introduction, along with its supporting citations, elucidates this general discovery principle and particular features of 26(d)(1).

⁵¹ *Commodity Futures Trading Comm’n v. Nations Inv., LLC*, No. 07-CV-61058-RWS, at 5 (N.D. Ga. filed Jan. 31, 2007), available at <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfnationsorder0>

that courts must exercise in keeping with 26(d)(1)'s structure and text.⁵² Otherwise, judicial decisions—the embodiment of such discretion—will continue to develop the doctrine illegitimately. Legitimacy can be attained if courts use a framework that connects discretion with 26(d)(1). The Author, in a previous Article (*Rescuing Expedited Discovery I*)⁵³ introduced such a framework: the “historical blueprint.”

The historical blueprint is based on a series of cases that construed and applied 26(d)(1)'s predecessor, 26(a).⁵⁴ These decisions were issued from 1939 through 1948, what *Rescuing Expedited Discovery I* labeled the ‘transformative era.’⁵⁵ The transformative era taught “[a]n overall lesson: The doctrine’s development must be tethered to the procedural rule authorizing early discovery.”⁵⁶ In other words, the doctrine’s history was characterized by ‘rule-based development,’ which “[m]andates that interpretations of a procedural rule cannot exceed a rule’s structural and textual limitations.”⁵⁷ It is rule-based development that the modern era—decisions from 2000 to 2011 that evaluated CFTC expedited discovery requests—lacks, but needs, to attain legitimacy. And it is rule-based development that the historical blueprint perpetuates, by invoking the doctrine’s history in ways that adhere to 26(d)(1)'s structure and text. By using the historical blueprint, and by revitalizing rule-based development, courts will exercise discretion commensurate with 26(d)(1)'s structure and text. In so doing, courts will legitimize CFTC expedited discovery.

73007.pdf; Commodity Futures Trading Comm’n v. Sonoma Trading Corp., No. 05-60342, 2005 WL 3742849, at *2 (S.D. Fla. Mar. 9, 2005); Commodity Futures Trading Comm’n v. Smithers, No. 05-CV-80592-DTKH, at 4 (S.D. Fla. filed June 30, 2005), available at <http://cftc.gov/files/enf/05orders/enfsmithersorder.pdf>.

⁵² Panoff, *Rescuing Expedited Discovery I*, at 657, 696.

⁵³ *Id.* at 690–96.

⁵⁴ See, e.g., *United States v. Cotton Valley Operators Comm.*, 75 F. Supp. 1, 5 (W.D. La. 1948); *Munson Line, Inc. v. Green (Munson Line II)*, 6 F.R.D. 470, 475 (S.D.N.Y. 1947); *Savage v. Isthmian S. S. Co.*, 6 F.R.D. 311, 312 (E.D. Pa. 1946); *Munson Line, Inc. v. Green (Munson Line I)*, 6 F.R.D. 14, 19 (S.D.N.Y. 1946); *Dreskin v. Zinkin*, 6 F.R.D. 615, 615 (S.D.N.Y. 1946); *Commander-Larabee Milling Co. v. Mfrs. & Traders Trust Co.*, 7 F.R.D. 168, 168 (W.D.N.Y. 1945); *Int’l Tag & Salesbook Co. v. Am. Salesbook Co.*, 6 F.R.D. 45, 48 (S.D.N.Y. 1943); *Price v. Cleveland Pneumatic Tool Co.*, 3 F.R.D. 350, 350 (S.D.N.Y. 1943); *Sund v. Club Beachcombers, Inc.*, 2 F.R.D. 246, 247 (S.D.N.Y. 1941); *Price v. Cleveland Pneumatic Tool Co.*, 3 F.R.D. 350, 350 (S.D.N.Y. 1943); *Walker v. Walker*, 1 F.R.D. 779, 779 (S.D.N.Y. 1941); *Rejsenhoff v. Colonial Navigation Co.*, 1 F.R.D. 395, 395 (S.D.N.Y. 1940); *Seman v. Leibovitz*, 1 F.R.D. 280, 281 (E.D. Pa. 1940); *Samuel Goldwyn, Inc. v. United Artists Corp.*, 35 F. Supp. 633, 638 (S.D.N.Y. 1940); *Pirmie v. Andrews*, 1 F.R.D. 252, 253 (S.D.N.Y. 1939); *Sweeney v. United Feature Syndicate, Inc.*, 29 F. Supp. 420, 421 (S.D.N.Y. 1939); *Jiffy Lubricator Co. v. Alemite Co.*, 4 F.R.D. 273, 274 (D.N.D. 1939).

⁵⁵ Panoff, *Rescuing Expedited Discovery I*, at 676–77.

⁵⁶ *Id.* at 676.

⁵⁷ *Id.* at 677.

Consequently, this Article's purpose is to legitimize CFTC expedited discovery. This Article pursues this purpose by showing courts how to apply the historical blueprint to CFTC expedited discovery requests. By applying the historical blueprint, courts will be embracing rule-based development, where determinations about allowing or denying early discovery turn on 26(d)(1)'s structure and text, a marked change from the modern era's rejection of 26(d)(1). Rule-based development will—by focusing on 26(d)(1)—legitimize CFTC expedited discovery.

In Part I, this Article describes the CFTC expedited discovery context. Then, Part II presents courts' illegitimate development of CFTC expedited discovery. Part III follows by showing how to legitimize the doctrine through the historical blueprint. Part IV concludes this Article by explaining the imperative for legitimacy: why courts should return CFTC expedited discovery to 26(d)(1).

On the one hand, the CFTC expedited discovery context exemplifies how courts have strayed from the doctrine's legal provenance. On the other hand, the context provides courts with a practical and concrete opportunity to use the past to improve the present, to validate a dynamic procedural device sufficiently flexible to meet the changing and unforeseen events comprising CFTC expedited discovery. And so, the process initiated by *Rescuing Expedited Discovery I* is taken a step further by showing courts how to apply the historical blueprint to a critical area of law, the primary objective of which is nothing less than stabilizing a reeling economy and bringing to justice those who hastened its fall.

I. RECORDKEEPING REQUIREMENTS, RESTRAINING ORDERS & GOOD CAUSE: THE CFTC EXPEDITED DISCOVERY CONTEXT

Understanding the CFTC expedited discovery context is vital to assessing the doctrine's legitimacy. That context's underlying theme is the Commission's need for information, prompted by the transactions and markets that the CFTC polices.⁵⁸ Information's centrality transcends the Commodity Exchange Act (CEA) recordkeeping requirements, ex parte restraining orders, and the Good-Cause Test—the context's core components.

This Part recounts the CFTC expedited discovery context, beginning with a brief description of the CEA and the CFTC.

⁵⁸ Scott D. O'Malia, Commissioner, U.S. Commodity Futures Trading Comm'n, Ends and Means ¶¶ 2-3, Opening Statement at Public Hearing on Consideration of Final Rules (Aug. 4, 2011) (transcript available at <http://cftc.gov/PressRoom/SpeechesTestimony/omaliastatement080411.html>).

Recordkeeping requirements are then considered, followed by restraining orders, and ending with Good Cause.

A. THE NEED FOR INFORMATION: A SUMMARY OF THE CEA & CFTC

The CFTC is an independent agency, charged with enforcing the CEA and regulating the commodity and futures markets.⁵⁹ Congress created the CFTC in 1974, though the commodity and futures markets had been regulated since the 1920s.⁶⁰ The term “commodity” encompasses a variety of items ranging from corn to frozen concentrated orange juice.⁶¹ The CEA governs certain transactions, contracts, and participants and the diverse roles each plays in volatile trillion-dollar markets.⁶² Regulation—coupled with advancing the CEA’s stated goals of preventing price manipulations, ensuring transactions’ financial integrity, and guarding against fraud—hinges on obtaining a wide array of information.⁶³ Data is compiled through recordkeeping, registration requirements, as well as CFTC inspections and investigations.⁶⁴

⁵⁹ See 7 U.S.C.A. § 1a(3) (Westlaw 2012) (defining “Commission”); *id.* § 2(a)(2)(A) (creation of Commission).

⁶⁰ COMMODITY FUTURES TRADING COMM’N, STRATEGIC PLAN FY 2011-2015, at 5, 7 (2011), available at <http://cftc.gov/ucm/groups/public/@aboutcftc/documents/file/2015strategicplan.pdf>.

⁶¹ See 7 U.S.C.A. § 1a(4) (Westlaw 2012).

⁶² Transactions occur in interstate and international commerce, contracts are for the sale of a commodity for future delivery, and participants are commodity pool operators, commodity trading advisors, floor brokers, floor traders, futures commission merchants, and introducing brokers. See 7 U.S.C.A. § 5 (Westlaw 2012) (transactions); *id.* § 1a(6)(A)(i)(I) (commodity trading advisor definition referencing contracts for sale of commodity for future delivery); *id.* § 1a(5) (commodity pool operator); *id.* § 1a(6) (commodity trading advisor); *id.* § 1a(16) (floor broker); *id.* § 1a(17) (floor trader); *id.* § 1a(20) (futures commission merchant); *id.* § 1a(23) (introducing broker).

⁶³ 7 U.S.C.A. § 5 (Westlaw 2012).

⁶⁴ 7 U.S.C.A. § 2(a)(1)(D)(iv) (Westlaw 2012) (periodic or special examinations of participants’ records pertaining to security futures); *id.* § 2(h)(5) (inspection of electronic trading facility); *id.* § 2(h)(7)(C) (price discovery information for electronic trading facilities); *id.* § 6(a)(3) (inspection of contract market or derivatives transaction execution facility manager’s written record of contract); *id.* § 6g (reporting and recordkeeping requirements for floor brokers, futures commission merchants, and floor traders); *id.* § 6i (reporting, recordkeeping, and inspections of reports of deals equal to or in excess of trading limits); *id.* § 6s(f) (reporting and recordkeeping for registered swap dealers and major swap participants); *id.* § 6s(g) (maintenance of swaps daily trading records by registered swap dealers and major swap participants); *id.* § 6t(b) (inspection of large swap dealer’s books and records); *id.* § 7(d)(17) (board of trade recordkeeping); *id.* 7a(d)(6) (board of trade daily publication of trading information); *id.* § 7b-3(f)(10)(A)(iii) (inspection and examination of swap execution facility); *id.* § 12 (information subject to public disclosure); *id.* § 12a (commodity dealers’ and associated persons’ registration); *id.* § 20 (market reports); *id.* § 21(a)-(b) (futures associations’ registration); *id.* § 24a(a)(2) (inspection and examination of swap data repositories).

B. RECORDKEEPING, REGISTRATION, INSPECTION & INVESTIGATION:
HOW THE CFTC OBTAINS INFORMATION

Under the CEA, market participants and other entities (such as electronic trading facilities and boards of trade) must maintain detailed records that the CFTC can inspect upon demand.⁶⁵ For example, floor brokers, futures commission merchants, and floor traders have to memorialize transactions, daily trades, and contracts.⁶⁶ Some participants must also register⁶⁷ with the CFTC, a process that necessitates divulging considerable data⁶⁸ about their business, location of business records, branch offices, criminal disclosures, disciplinary information, financial disclosures, and contact information.⁶⁹

On top of recordkeeping, inspection, and registration, the CFTC accumulates information by initiating investigations—including undercover operations with the Department of Justice⁷⁰—that can utilize subpoenas, require document production, and compel witnesses' attendance.⁷¹ An investigation's scope is whatever the CFTC deems relevant or material.⁷² If an investigation uncovers statutory violations, then the CFTC may pursue enforcement administratively or through the federal court system.

⁶⁵ 7 U.S.C.A. § 2(h)(5)(B)(i)(II)(ii) (Westlaw 2012) (electronic trading facility); *id.* § 7(d)(17) (boards of trade).

⁶⁶ 7 U.S.C.A. § 6g (Westlaw 2012).

⁶⁷ The CEA dictates registration requirements, identifying the participants obligated to register. *See, e.g.*, 7 U.S.C.A. § 6d(a) (Westlaw 2012) (unlawful to act as futures commission merchant or introducing broker without registration); *id.* § 6e (illegal to act as floor trader or as floor broker absent registration); *id.* § 6k (registration with the Commission is required to be associated with a futures commission merchant or with an introducing broker as a partner, officer, or employee); *id.* § 6s(a)(1) (unlawful to act as swap dealer unless registered with Commission); *id.* § 7a-1 (derivatives clearing organizations registration requirements); *id.* § 7b-3 (swap execution facility registration requirements); *id.* § 9 (CFTC's ability to exclude person from privilege of being a registered entity); *id.* § 12a (CFTC's authority to register futures commission merchants, introducing brokers, commodity trading advisors, commodity pool operators, floor brokers, and floor traders); *id.* § 21 (registered futures associations' registration with Commission); *id.* § 24a(a)(1)(A) (unlawful to use mails or instrumentality of interstate commerce to function as swap data repository absent registration).

⁶⁸ 7 U.S.C.A. § 6n (Westlaw 2012) (registration for commodity trading advisors and commodity pool operators).

⁶⁹ *See* 17 C.F.R. §3.10(a)(1)(i) (Westlaw 2011) (futures commission merchants register through Form 7-R furnished by National Futures Association). Form 7-R is available at www.nfa.futures.org/NFA-registration/templates-and-forms/Form7-R-entire.pdf.

⁷⁰ 7 U.S.C.A. § 12(a)(2) (Westlaw 2012).

⁷¹ *Id.* § 15 (Westlaw 2012).

⁷² *Id.*

C. EX PARTE STATUTORY RESTRAINING ORDERS: ENFORCING THE CEA

Pursuant to 7 U.S.C. § 13a-1, the CFTC can bring civil actions in federal court for violations of the CEA.⁷³ Complaints are filed under seal, oftentimes accompanied by ex parte motions for statutory restraining orders.⁷⁴ Proposed orders, written by the CFTC, are attached to the motions.⁷⁵ These orders are usually signed by judges with minimal alterations, especially so with regard to expedited discovery determinations.⁷⁶ Indeed, the CFTC typically seeks early discovery in a motion for a restraining order.⁷⁷ Regardless of whether discovery is authorized, restraining orders target a defendant's "documents" and "property," casting an information-gathering net over a defendant's life.⁷⁸

Under 13a-1, restraining orders are comprehensive, providing the following relief:

- Prohibiting a defendant from destroying books, records, and documents;⁷⁹

⁷³ *Id.* § 13a-1(a).

⁷⁴ *See, e.g.*, U.S. Commodity Futures Trading Comm'n v. Satterfield, No. 2:10-CV-02893-RMG, at 7 (D.S.C. filed Nov. 9, 2010), available at <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfgrahamorder110910.pdf> (filed under seal); U.S. Commodity Futures Trading Comm'n v. Midwest Land & Livestock, Inc., No. 2:10-CV-02490-EFM-KGG, at 2, 8 (D. Kan. filed Sept. 13, 2010), available at <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfvanderploegorder09132010.pdf> (filed under seal).

⁷⁵ U.S. Commodity Futures Trading Comm'n v. Int'l Foreign Currency, Inc., No. 00-1488, 2003 WL 22410201, at *1, *4 (E.D.N.Y. July 23, 2003) ("proposed" ex parte statutory restraining order allowing expedited discovery).

⁷⁶ *Compare* U.S. Commodity Futures Trading Comm'n v. Queen Shoals, LLC, No. 3:09-CV-335-RJC, at 4, 10-11 (W.D.N.C. filed Aug. 7, 2009), available at <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfqueenshoalsr008072009.pdf> (no alterations), *with* U.S. Commodity Futures Trading Comm'n v. Chilcott, No. 2:02-CV-94-FTM-29DNF, 2002 WL 1455345, at *6-7 (M.D. Fla. filed Mar. 7, 2002), available at <http://cftc.gov/files/enf/02orders/enfchilcott-sro.pdf> (denying expedited discovery).

⁷⁷ U.S. Commodity Futures Trading Comm'n v. Pippin, No. CV 05-4120, 2005 WL 3741535, at *1, *4 (E.D.N.Y. Aug. 29, 2005); U.S. Commodity Futures Trading Comm'n v. G7 Advisory Serv. LLC, No. Civ. 05-CV-80313, 2005 WL 3710161, at *1, *4 (S.D. Fla. Apr. 12, 2005). Motions for statutory restraining orders are significant because they are the filing that the CFTC uses (almost exclusively) to request expedited discovery. The information obtained through a restraining order is, in most cases, nearly identical to the information sought through expedited discovery.

⁷⁸ 7 U.S.C.A. § 13a-1(a) (Westlaw 2012); *see also* U.S. Commodity Futures Trading Comm'n v. Driver, No. SA 09-cv-0578 ODW (RZx), 2009 WL 3396172, at *2-5 (C.D. Cal. Aug. 17, 2009).

⁷⁹ U.S. Commodity Futures Trading Comm'n v. Klatch, No. 1:11-cv-05191-GBD, at 6 (S.D.N.Y. filed Aug. 3, 2011), available at

- Giving the CFTC access to inspect a defendant's books, records, and documents;⁸⁰
- Freezing a defendant's assets;⁸¹
- Compelling a defendant to identify and preserve its assets;⁸²
- Mandating financial institutions to deny a defendant access to accounts and safe deposit boxes;⁸³ and
- Forcing additional non-parties, sometimes even attorneys, to divulge any information that may be germane to a defendant's alleged violation.⁸⁴

Assets are frozen, documents must be preserved, and the Commission can sift through a near-limitless array of personal data.⁸⁵ This relief is commensurate with 13a-1's text, its focus on "documents" and "property"; the statute contemplates and allows asset freezes, access to records, and document preservation.

The statute's invocation depends on whether it appears to the CFTC that a person has, is, or is about to engage in any act deviating from the CEA.⁸⁶ If the CFTC finds such a deviation, then it can request an order by the court allowing the CFTC to inspect an individual's bank records, cell phone, tax returns, computers, tape recordings, books, records, documents, computer discs, balance sheets, income statements, accounting records, and personal correspondences⁸⁷ "[w]herever they

<http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfklatchorder0311.pdf>.

⁸⁰ U.S. Commodity Futures Trading Comm'n v. El Rhazi, No. 11-cv-02576-DLC, at 6-7 (S.D.N.Y. filed July 29, 2011), available at <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfelrhaziorder072911.pdf>.

⁸¹ U.S. Commodity Futures Trading Comm'n v. U.S. Ventures LC, No. 2:11-CV-00099-BSJ, at 4 (D. Utah filed Jan. 25, 2011), available at <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfwinsomeorde012511.pdf> (sealed).

⁸² Commodity Futures Trading Comm'n v. Int'l Funding Ass'n, No. CV031826PHXPGR, 2003 WL 22469911, at *2-3 (D. Alaska Sept. 18, 2003).

⁸³ U.S. Commodity Futures Trading Comm'n v. Trade Tech Inst., No. 11-CV-02163-GHK-PLA, at 7-9 (C.D. Cal. filed Mar. 15, 2011), available at <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enftradetechorde031511.pdf>.

⁸⁴ U.S. Commodity Futures Trading Comm'n v. Groover, No. 4:11-CV-64, 2011 WL 1490901, at *4 (E.D. Tex. Feb. 11, 2011); U.S. Commodity Futures Trading Comm'n v. E-Metal Merch., Inc., 2005 WL 3741509, at *3 (S.D. Fla. June 13, 2005).

⁸⁵ 7 U.S.C.A. § 13a-1(a) (Westlaw 2012). The line between "personal" and "business" data is faint. This exposure of "personal data" occurs when, or more precisely after, a court issues a statutory restraining order.

⁸⁶ *Id.*

⁸⁷ *Groover*, 2011 WL 1490901, at *4; U.S. Commodity Futures Trading Comm'n v. Gresham, No. 3:09-CV-508-JC, at *11-12 (N.D. Ga. filed July 2, 2009), available at <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfgreshamorder>

may be situated and whether they are in the possession of any of the Defendants or others.”⁸⁸ Importantly, courts’ main reason for issuing restraining orders is to preclude defendants from dissipating assets and destroying documents.⁸⁹ Without a restraining order, “[i]mmediate and irreparable damage to the Court’s ability to grant effective final relief for the customers in the form of monetary redress will occur.”⁹⁰ Hence, restraining orders, pursuant to 13a-1, give the Commission comprehensive access to a defendant’s information. This access is enhanced by the CFTC Good-Cause Test, which grants expedited discovery mechanically.⁹¹

D. THE GOOD-CAUSE TEST: TALISMANIC ADJUDICATION INSTEAD OF THOUGHTFUL DELIBERATION

The Good-Cause Test has emerged, since 2008, as the dominant interpretive test courts use to evaluate expedited discovery’s permissibility.⁹² The test is neither nuanced nor detailed, stating that “[g]ood cause exists for the Commission to conduct expedited discovery”⁹³ This is a conclusory pronouncement, devoid of insight or thoughtfulness, allowing expedited discovery because Good Cause⁹⁴ exists. By relying on Good Cause, courts have embraced talismanic adjudication, where outcomes turn on whether a catchphrase—“Good Cause”—is recited. Under talismanic adjudication, “[c]atchphrases

07022009.pdf; *Commodity Futures Trading Comm’n v. Lexington Royce & Assocs.*, No. 04 CV 02768, 2004 WL 856460, at *3 (S.D.N.Y. Apr. 12, 2004).

⁸⁸ *U.S. Commodity Futures Trading Comm’n v. Kim*, No. 11 CIV 1013, 2011 WL 554105, at *3 (S.D.N.Y. Feb. 15, 2011).

⁸⁹ *U.S. Commodity Futures Trading Comm’n v. Smith*, No. 1:10CV00009, 2010 WL 1759542, at *1 (W.D. Va. Feb. 23, 2010); *Commodity Futures Trading Comm’n v. Milton*, No. 10-CV-80738-KAM, at 2 (S.D. Fla. filed June 22, 2010), available at <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfrtradeorder06222010.pdf>.

⁹⁰ *U.S. Commodity Futures Trading Comm’n v. Yellowstone Partners, Inc.*, No. 5:10-CV-85-FL, 2010 WL 1780005, at *1 (E.D.N.C. Mar. 10, 2010).

⁹¹ *U.S. Commodity Futures Trading Comm’n v. ACJ Capital, Inc.*, No. 3:11-CV-01419-JAF, at 3 (D.P.R. filed May 4, 2011), available at <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfacjcapitalorde050411.pdf> (filed under seal).

⁹² See *infra* Appendix II.

⁹³ *U.S. Commodity Futures Trading Comm’n v. PMC Strategy, LLC*, No. 3:11CV73, 2011 WL 564293, at *1 (W.D.N.C. Feb. 9, 2011).

⁹⁴ This Article capitalizes Good Cause when discussing the Good-Cause Test. When addressing “good cause” in the abstract or as a judicial determination’s basis, this Article does not capitalize the phrase.

replace thought, providing little guidance for future use.”⁹⁵ This approach forsakes thoughtful deliberation, where decisions and their interpretive tests are explained.⁹⁶

E. SUMMARY: AN INFORMATION-DRIVEN CONTEXT

The CFTC expedited discovery context reflects the Commission’s need for information. The Commission uses data to regulate volatile markets and to enforce the CEA, which equips the Commission with information-gathering tools such as mandatory recordkeeping and registration requirements, as well as the ability to conduct inspections and investigations. When violations are detected, the CFTC can bring an action administratively⁹⁷ or in federal court. If the judicial process is utilized, then so too are ex parte requests for restraining orders, which if granted give the CFTC almost carte blanche access to a defendant’s data. Motions for restraining orders are also granted when the CFTC seeks expedited discovery, requests that courts have, since 2008, evaluated almost exclusively by relying on the Good-Cause Test. As Part II elaborates, the Good-Cause Test is but one of several factors contributing to CFTC expedited discovery’s illegitimacy.

II. IGNORING FED. R. CIV. P. 26(d)(1): COURTS’ ILLEGITIMATE DEVELOPMENT OF CFTC EXPEDITED DISCOVERY

According to 26(d)(1), “[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except . . . when authorized by . . . court order.”⁹⁸ The judicial inquiry, therefore, is determining when to authorize pre-26(f) discovery. This is a challenging enterprise because while 26(d)(1) permits early discovery, the rule is silent about its propriety, leaving courts “[e]ffectively on their own in determining whether to grant or deny accelerated relief.”⁹⁹ The decision is one of discretion; how courts wield this considerable

⁹⁵ Panoff, *Rescuing Expedited Discovery I*, at 674 (citing and quoting Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 455 (1899) (“It is not the first use but the tiresome repetition of inadequate catch words upon which I am observing,—phrases which originally were contributions, but which, by their very felicity, delay further analysis for fifty years.”)).

⁹⁶ Panoff, *Rescuing Expedited Discovery I*, at 674-75.

⁹⁷ Enforcement actions are brought before and decided by the Commission. 7 U.S.C.A. § 9 (Westlaw 2012); *id.* § 13a.

⁹⁸ FED. R. CIV. P. 26(d)(1).

⁹⁹ Panoff, *Rescuing Expedited Discovery I*, at 652.

discretion will, in many ways, dictate expedited discovery's legitimacy.¹⁰⁰

If courts harmonize discretion with 26(d)(1)'s structure and text, then the doctrine will become legitimate.¹⁰¹ In general, courts exercise their discretion by developing interpretive tests for procedural rules. Interpretive tests help courts understand and apply a rule. However, and as it relates to expedited discovery, “[g]lossing over 26(d)(1) creates the impression that the rule has little, if anything, to do with expedited discovery’s permissibility. This impression calls into question the validity of the doctrine’s development; to elevate court-created tests over a procedural rule is to embrace a robust form of discretion that no rule, including 26(d)(1), authorizes.”¹⁰² Interpretive tests that treat expedited discovery as a stand-alone doctrine, detached from 26(d)(1), forget that “[a] court’s ability to authorize expedited discovery emanates from an identifiable source, in this instance a specific procedural rule. Judges should not be making the doctrine up as they go but should be utilizing a provenance to respond to participants’ needs.”¹⁰³ At bottom, courts have lost track of the juridical task at hand: interpreting and applying 26(d)(1).¹⁰⁴ CFTC expedited discovery’s illegitimacy has much to do with courts failing to abide by one of law’s integral interpretive precepts—courts should construe procedural rules according to their plain meanings.¹⁰⁵ Over a decade’s worth of judicial decisions and the interpretive tests they utilize have driven a divide between 26(d)(1) and CFTC expedited discovery.

This Part studies courts’ illegitimate development of CFTC expedited discovery. It does so by first summarizing 26(d)(1)’s structure and text. Next, courts’ interpretive tests are charted, examined alongside 26(d)(1)’s details. This Part closes with judicial decisions’ recurring features, what this Article terms “Boilerplate Justice.”

¹⁰⁰ *Id.* at 652, 657.

¹⁰¹ *Id.* at 696 (“As such, the doctrine’s development—perpetuated by judicial discretion—must comport with the structure and text of 26(d)(1), and if it does, then it will become legitimate.”).

¹⁰² *Id.* at 673-74 (citing *Twentieth Century Fox Film Corp. v. Mow Trading Corp.*, 749 F. Supp. 473, 475 (S.D.N.Y. 1990) (“This Court has set forth the requirements for expedited discovery . . .”).

¹⁰³ Panoff, *Rescuing Expedited Discovery I*, at 687-88.

¹⁰⁴ *Id.* at 673.

¹⁰⁵ *See* *Bus. Guides, Inc. v. Chromatic Commc’ns Enters., Inc.*, 498 U.S. 533, 540 (1991); *Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 123 (1989) (“We give the Federal Rules of Civil Procedure their plain meaning . . .”).

A. EXPEDITED DISCOVERY'S SOURCE: 26(d)(1)'S STRUCTURE & TEXT

Though 26(d)(1) lacks a comprehensive list of mandatory elements, it does have details that should guide and confine discretion, nuances comprising 26(d)(1)'s structure and text.

1. *Structure*

Federal Rule of Civil Procedure 26(d)(1)'s structure has two parts: (i) a general prohibition against pre-26(f) discovery, and (ii) a discretionary exception to that prohibition.¹⁰⁶ The general prohibition states “[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).”¹⁰⁷ As for the discretionary exception, 26(d)(1) provides that the general prohibition applies “except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.”¹⁰⁸ Expedited discovery is the fourth exception.

The doctrine's structural status as an exception imports traditional interpretive precepts¹⁰⁹ that maintain distinctions between rules and their corresponding exceptions.¹¹⁰ These precepts are “[c]ourts construe exceptions narrowly to prevent them from subsuming their corresponding rules. Overly expansive interpretations undermine the interpretive process. Similarly, courts refrain from creating exceptions to procedural rules, believing that doing so will impede rather than advance justice.”¹¹¹ When courts determine whether to “authorize”¹¹² CFTC expedited discovery, they should recall and apply these precepts. Such a

¹⁰⁶ Panoff, *Rescuing Expedited Discovery I*, at 657-59.

¹⁰⁷ FED. R. CIV. P. 26(d)(1).

¹⁰⁸ *Id.*

¹⁰⁹ These traditional precepts should confine interpretations of 26(d)(1). They should inform a court's understanding of expedited discovery's structural significance, which will, in turn, help determine early discovery's appropriateness.

¹¹⁰ Panoff, *Rescuing Expedited Discovery I*, at 658-59. Traditional interpretive precepts include: (i) courts construe exceptions narrowly to prevent them from subsuming their corresponding rules, *Ross v. Fed. Deposit Ins. Corp.*, 625 F.3d 808, 816 (4th Cir. 2010); *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 711 (4th Cir. 2001); (ii) unduly expansive constructions undermine the interpretive process, *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Mused v. U.S.D.A.*, 169 F.R.D. 28, 35 (W.D.N.Y. 1996); and (iii) courts avoid creating exceptions to procedural rules, contending that doing so will impede rather than advance justice, *Alexander v. Forest City Pierrepoint Assocs.*, No. CV 94-3961, 1995 WL 406135, at *3 (E.D.N.Y. June 26, 1995); *see also Brockner v. McHugh*, No. 07-CV-703-JTC, 2010 WL 5072662, at *2 (W.D.N.Y. Dec. 10, 2010) (quoting *Alexander*, 1995 WL 406135, at *3).

¹¹¹ Panoff, *Rescuing Expedited Discovery I*, at 658-59.

¹¹² FED. R. CIV. P. 26(d)(1).

step would harness discretion and comport with the doctrine's structural status as an exception.

2. Text

Turning to the rule's text, 26(d)(1) involves (i) specific actors, (ii) primary and secondary conduct, and (iii) a time period.¹¹³ Actors are parties, courts, and non-parties: "A *party* may not seek discovery from *any source* before the parties have conferred as required by Rule 26(f), except . . . when authorized . . . by *court order*."¹¹⁴ Primary conduct entails seeking discovery from any source: "A party may not *seek discovery from any source . . .*"¹¹⁵ The rule's primary conduct calls to mind discovery's foundational purposes of preparing for trial, ensuring that both sides have the same evidence, and preventing "trial by surprise."¹¹⁶ Secondary conduct occurs when courts authorize discovery "by court order,"¹¹⁷ a discretionary endeavor depending on independent juridical analysis: "except . . . when *authorized . . . by court order*."¹¹⁸ Lastly, 26(d)(1)'s timeframe ranges from a complaint's filing until the 26(f) conference: "A party may not seek discovery from any source *before the parties have conferred as required by Rule 26(f) . . .*"¹¹⁹

All of these characteristics—26(d)(1)'s structure and text—should be respected by a court's interpretive test, the elements judges use to construe and apply 26(d)(1). That 26(d)(1)'s characteristics have been discarded instead of embraced evidences illegitimacy. The result is a schism between a doctrine's development and 26(d)(1)'s structure and text.

B. DISCRETION WITHOUT EXPLANATION: AUTHORIZING DISCOVERY IN THE ABSENCE OF ANY INTERPRETIVE TEST

CFTC expedited discovery's beginnings were inauspicious exercises of discretion lacking explanation. From 2000 through 2007, courts usually authorized pre-26(f) discovery without using any express interpretive test.¹²⁰ Though courts would occasionally invoke Good

¹¹³ See Panoff, *Rescuing Expedited Discovery I*, at 659–61.

¹¹⁴ FED. R. CIV. P. 26(d)(1) (emphasis added).

¹¹⁵ *Id.* (emphasis added).

¹¹⁶ Panoff, *Rescuing Expedited Discovery I*, at 686 n.195. "Trial by surprise" is a phrase courts have used in explaining one of discovery's traditional aims.

¹¹⁷ FED. R. CIV. P. 26(d)(1).

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ *Id.* (emphasis added).

¹²⁰ See *infra* Appendix I.

Cause, most merely declared discovery's permissibility, proclamations bereft of analysis.

1. *Discretion Without Explanation*

Authorizing pre-26(f) discovery without using an interpretive test¹²¹ manifested itself in four ways.¹²² Although slight variations exist, all four achieved the same result: granting the CFTC accelerated relief for no discernible reason. Those four methods are as follows:

1. The CFTC is authorized to immediately take the deposition of anyone and to demand the production of documents from anyone.¹²³
2. The prohibition against pre-26(f) discovery is removed.¹²⁴
3. Expedited discovery is authorized and may commence forthwith.¹²⁵
4. The CFTC is granted limited immediate discovery.¹²⁶

¹²¹ Authorizing discovery—without any explanation as to why doing so is proper—can neither be described as nor mistaken for “analysis.” Instead, it is nothing more than a judicial decree, a raw exertion of power. The analysis, if any was conducted at all, must be expressed within the confines of a judicial decision. Discretion without explanation does no such thing. There is no tangible proof that 26(d)(1) influenced a court's determination to authorize CFTC expedited discovery.

¹²² See *infra* Appendix I.

¹²³ U.S. Commodity Futures Trading Comm'n v. Advent Capital Partners, Ltd., No. 1:02-CV-1381, 2002 WL 31357169, at *3 (N.D. Ga. May 22, 2002); U.S. Commodity Futures Trading Comm'n v. Luger, No. 02-80435, 2002 WL 1789768, at *3 (S.D. Fla. June 3, 2002); U.S. Commodity Futures Trading Comm'n v. Offshore Fin. Consultants of Fla., Inc., No. Civ.A. 02-60769, 2002 WL 1788031, at *7 (S.D. Fla. June 5, 2002); U.S. Commodity Futures Trading Comm'n v. Nat'l Bullion & Coin, Inc., No. 00-6885-CV-ZLOCH, at 16-17 (S.D. Fla. filed June 29, 2000), available at <http://cftc.gov/files/enf/00orders/enfnbc.pdf>.

¹²⁴ U.S. Commodity Futures Trading Comm'n v. Liberty Mut., No. 1:07-CV-21267-JAL, at 6-7 (S.D. Fla. filed May 16, 2007), available at <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfsupamaorder.pdf>; U.S. Commodity Futures Trading Comm'n v. FX First, Inc., No. SACV 03-1454-JVS, 2003 WL 23195524, at *2 (N.D. Cal. Oct. 15, 2003) (consent order); U.S. Commodity Futures Trading Comm'n v. Am. Derivatives Corp., No. 05-CV-7192-RWS, at 8-9 (N.D. Ga. filed Sept. 26, 2005), available at <http://cftc.gov/files/enf/05orders/enfamericaderivativesorder.pdf>.

¹²⁵ U.S. Commodity Futures Trading Comm'n v. Sonoma Trading Corp., No. 05-60342, 2005 WL 3742849, at *2 (S.D. Fla. Mar. 9, 2005); U.S. Commodity Futures Trading Comm'n v. Smithers, No. 05-CV-80592-DTKH, at 4 (S.D. Fla. filed June 30, 2005), available at <http://cftc.gov/files/enf/05orders/enfsmithersorder.pdf>; U.S. Commodity Futures Trading Comm'n v. Nations Inv., LLC, No. 07-CV-61058-RWS, at 5 (N.D. Ga. filed Jan. 31, 2007), available at <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfnationsorder073007.pdf>.

¹²⁶ U.S. Commodity Futures Trading Comm'n v. Schotz, No. 04-CV-8889-SJO, at 8-9 (C.D. Cal. filed Oct. 27, 2004), available at <http://cftc.gov/files/enf/04orders/enf-schotz-sro.pdf>.

As can be seen, discretion without explanation “authorize[s]”¹²⁷ expedited discovery without articulating why accelerated relief is appropriate or how it is consistent with 26(d)(1). Judges exercise their discretion—by permitting early discovery—in a vacuum, devoid of illustrating how the circumstances surrounding the CFTC’s request coincide with 26(d)(1). But “[d]iscretion is more than decreeing a motion’s fate; it is the reasoned exercise of choice,¹²⁸ a thoughtful consideration and deliberation of law’s interactions with life.”¹²⁹ The CFTC’s reasons for seeking expedited discovery must be scrutinized through 26(d)(1). And this scrutiny should be chronicled, memorialized in the judicial decision that grants or denies expedited discovery.

2. Shortcomings

Permitting pre-26(f) discovery without invoking an interpretive test denigrates 26(d)(1)’s secondary conduct and actors. Secondary conduct—“authorized by court order”—hinges on discretion, the reasoned exercise of choice.¹³⁰ A judge’s choice, within 26(d)(1), is finite between authorizing or denying accelerated relief.¹³¹ When this choice lacks an interpretive test, is attenuated from 26(d)(1), and is devoid of discernible reasoning, it amounts to an “unreasoned” exercise of choice.¹³² In short, it resembles arbitrary force.¹³³ Arbitrariness, almost as a general proposition, is inherently illegitimate, contrary to the judicial function that is central to the rule’s secondary conduct.¹³⁴

¹²⁷ FED. R. CIV. P. 26(d)(1).

¹²⁸ See Jesse N. Panoff, *Debtors, Creditors, Default Judgments, & Discretion: Why Rule 62(b)(4) Will Become One of the Most Important Federal Rules of Civil Procedure*, 44 CREIGHTON L. REV. 227, 240 (2010).

¹²⁹ Panoff, *Rescuing Expedited Discovery I*, at 675 (citing Learned Hand, *The Speech of Justice*, 29 HARV. L. REV. 617, 621 (1916) (“[I]n the end they are charged with choosing but of choosing well.”)); see also Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 467-68 (1916) (articulating the nexus between life and law); Louis D. Brandeis, *The Opportunity in the Law*, 3 COMMW. L. REV. 22, 23 (1905) (“Indeed it is a maxim of the law: Out of the facts grows the law; that is, propositions are not considered abstractly, but always with reference to facts.”).

¹³⁰ See Panoff, *Debtors, Creditors, Default Judgments, & Discretion: Why Rule 62(b)(4) Will Become One of the Most Important Federal Rules of Civil Procedure*, 44 CREIGHTON L. REV. at 240.

¹³¹ See Panoff, *Rescuing Expedited Discovery I*, at 651–52.

¹³² *Id.* at 673-74.

¹³³ See generally *Foman v. Davis*, 371 U.S. 178, 182 (1962) (observing that within FED. R. CIV. P. 15 context rendering a decision without offering a justification “is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.”); *Lemons v. Skidmore*, 985 F.2d 354, 358 (7th Cir. 1993) (“When the trial judge delegates a decision, and gives no reason for the decision, that is not an exercise of discretion but an absence of and an abuse of discretion.”).

¹³⁴ See generally *United States v. Rhine*, 37 F.3d 525, 542 (5th Cir. 2011) (arbitrary judicial decisions embody an individual jurist’s preferences or prejudices).

Within 26(d)(1), the judicial function, while discretionary, is linked to a specific task. A court, as one of the actors under 26(d)(1), is charged with effectuating the rule's secondary conduct by interpreting and applying 26(d)(1).¹³⁵ When courts "authorize"¹³⁶ discovery without an interpretive test, they appear to be making the doctrine up as they go, insinuating that expedited discovery is court-created, to be expanded or contracted on a judge's whim.¹³⁷ Aggrandizing 26(d)(1)'s judicial function clashes with the rule's prescribed role for courts. Discretion without explanation and its appearance of arbitrary creativity should be rejected.

C. TURNING AN EXCEPTION INTO A RULE, ABANDONING THE FEDERAL RULES, & DIFFERENTIATING THE CFTC: THE GOOD-CAUSE TEST

Beginning in 2008, the Good-Cause Test has become courts' predominant interpretive test.¹³⁸ It consists of the following: "Good cause exists for the plaintiff [CFTC] to conduct expedited discovery"¹³⁹ This standard, while at first glance appearing to be an improvement over discretion without explanation, is little more than a hollow catchphrase, incapable of adding any insight into a court's expedited discovery evaluation.

1. *The Good-Cause Test*

Good Cause is analytically anemic, conditioning early discovery upon talismanic adjudication where a phrase's utterance conjures a legal result.¹⁴⁰ Through talismanic adjudication "[c]atchphrases replace thought, providing little guidance for future use."¹⁴¹ Under the current

¹³⁵ See Panoff, *Rescuing Expedited Discovery I*, at 659, 695.

¹³⁶ FED. R. CIV. P. 26(d)(1).

¹³⁷ Panoff, *Rescuing Expedited Discovery I*, at 688.

¹³⁸ See *infra* Appendix II.

¹³⁹ See U.S. Commodity Futures Trading Comm'n v. ACJ Capital, Inc., No. 3:11-CV-01419-JAF, at 3 (D.P.R. filed May 4, 2011), available at <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfacjcapitalorde r050411.pdf> (filed under seal).

¹⁴⁰ Panoff, *Rescuing Expedited Discovery I*, at 673.

¹⁴¹ *Id.* at 674 (quoting Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 455 (1899) ("It is not the first use but the tiresome repetition of inadequate catch words upon which I am observing,—phrases which originally were contributions, but which, by their very felicity, delay further analysis for fifty years.")).

model, if Good Cause exists, then expedited discovery is allowed.¹⁴² The test is whether “[g]ood cause exists for the Commission to conduct expedited discovery.”¹⁴³ To date, however, not a single CFTC decision has explained what Good Cause is or where it comes from—it just “exists.”¹⁴⁴

2. *Shortcomings*

Rescuing Expedited Discovery I cautioned, “[t]he phrase ‘good cause’ is not new; it carries connotations adverse to expedited discovery’s status as an exception. By and large, good-cause tests are notoriously easy to satisfy, risking converting an exception into the rule.”¹⁴⁵ And that is exactly what has happened with CFTC expedited discovery.

Rule 26(d)(1)’s classification of expedited discovery as an exception—memorialized in the rule’s discretionary exception—¹⁴⁶ means that accelerated relief should be denied more often than it is granted, lest the exception overwhelm the rule.¹⁴⁷ From 2008 to 2011, under the Good-Cause Test, courts have denied the CFTC expedited discovery only once.¹⁴⁸ Accelerated relief’s nearly guaranteed authorization transforms the doctrine’s status as an exception into the rule, contrary to 26(d)(1)’s discretionary exception. The Good-Cause Test does not interpret 26(d)(1); it rewrites it. Such an alteration of 26(d)(1) reveals another flaw: the tacit failure of judges to follow the Federal Rules of Civil Procedure.

¹⁴² See, e.g., *U.S. Commodity Futures Trading Comm’n v. People’s Alt., Inc.*, No. 2:10-cv-07013-GAF-E, at 3 (C.D. Cal. filed Sept. 22, 2010) (“Good cause also exists to permit immediate expedited discovery pursuant to the Federal Rules of Civil Procedure . . .”), available at <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfpeoplesorder092210.pdf>.

¹⁴³ *U.S. Commodity Futures Trading Comm’n v. PMC Strategy, LLC*, No. 3:11CV73, 2011 WL 564293, at *1 (W.D.N.C. Feb. 9, 2011).

¹⁴⁴ *U.S. Commodity Futures Trading Comm’n v. Prestige Ventures Corp.*, No. 5:09-cv-01284-R, at 3, 16 (W.D. Okla. filed Nov. 20, 2009), available at <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfprestigeorder11202009.pdf> (sealed).

¹⁴⁵ Panoff, *Rescuing Expedited Discovery I*, at 670 (citing *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1252, 1259 (9th Cir. 2010); *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 187 (1st Cir. 2004)).

¹⁴⁶ FED. R. CIV. P. 26(d)(1) (“[e]xcept . . . when authorized by . . . court order.”).

¹⁴⁷ See, e.g., *Ross v. Fed. Deposit Ins. Corp.*, 625 F.3d 808, 816 (4th Cir. 2010).

¹⁴⁸ *Commodity Futures Trading Comm’n v. UForex Consulting, LLC*, 551 F. Supp. 2d 513, 516 (W.D. La. 2008) (denying expedited discovery because it was “premature”).

Judges, no less than any other legal participant, must adhere to rules' boundaries.¹⁴⁹ This principle is rooted in Fed. R. Civ. P. 1¹⁵⁰ and in how courts conceptualize the Fed. R. Civ. P. as a statute.¹⁵¹ A commitment to following the Fed. R. Civ. P. sends a message to litigants about a rule's binding force.¹⁵² Within Fed. R. Civ. P. 26(d)(1), adherence materializes in the general prohibition that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)."¹⁵³ The general prohibition is clear; it forbids "seeking discovery" before the 26(f) meeting.¹⁵⁴ When courts habitually grant expedited discovery requests through the Good-Cause Test, they signal the irrelevancy of the prohibition, sapping it of legal force.

The Good-Cause Test's last shortcoming—on top of transforming an exception into a rule and betraying the general prohibition within 26(d)(1)—is that it causes courts to treat the CFTC differently from other litigants.¹⁵⁵ This is so because the Good-Cause Test does not erect any meaningful barriers or constraints on discretion. The CFTC's success in obtaining early discovery—through the Good-Cause Test—speaks to courts' willingness to permit CFTC pre-26(f) discovery. Tellingly, other contexts use so-called good-cause tests. However, the results are not so one-sided; private litigants, unlike the Commission, do not almost always obtain accelerated relief.¹⁵⁶ The rule's reference to "parties" does not

¹⁴⁹ *Westland Oil Co. v. Firestone Tire & Rubber Co.*, 3 F.R.D. 55, 56 (D.N.D. 1943); *Walling v. W. Va. Pulp & Paper Co.*, 2 F.R.D. 416, 419 (E.D.S.C. 1942).

¹⁵⁰ FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81."); *McLaughlin v. Copeland*, 435 F. Supp. 513, 521 (D. Md. 1977); *Wild v. Payson*, 7 F.R.D. 495, 499 (S.D.N.Y. 1946).

¹⁵¹ *Green Constr. Co. v. Williams Form Eng'g Corp.*, 101 F.R.D. 12, 13 (W.D. Mich. 1984); *United States v. Brandt*, 8 F.R.D. 163, 164 (D. Mont. 1948); *Kuenzel v. Universal Carloading & Distrib. Co., Inc.*, 29 F. Supp. 407, 409 (E.D. Pa. 1939); *Barrezueta v. Sword S.S. Line, Inc.*, 27 F. Supp. 935 (S.D.N.Y. 1939).

¹⁵² *Canister v. Leahy*, 182 F.2d 510, 514 (3d Cir. 1950) ("The Rules are rules of procedure. They must be adhered to."); *Beasley v. United States*, 81 F. Supp. 518, 527 (E.D.S.C. 1948).

¹⁵³ FED. R. CIV. P. 26(d)(1).

¹⁵⁴ *See, e.g., Webb v. CBS Broad., Inc.*, No. 08 C 6241, 2011 WL 111615, at *8 n.9 (N.D. Ill. Jan. 13, 2011) ("A party may not seek discovery before the parties' meeting pursuant to Federal Rule of Civil Procedure 26(f).").

¹⁵⁵ Admittedly, pursuant to 7 U.S.C. § 13a-1, some differentiation exists; the CEA permits the CFTC to acquire ex parte relief that private litigants would have a more difficult time obtaining. Consider that in the administrative context, preliminary injunctions and restraining orders are evaluated by different standards, with lower thresholds for an agency to overcome. *See, e.g., U.S. Commodity Futures Trading Comm'n v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 676-77 (S.D.N.Y. 1979) (showing of irreparable harm unnecessary).

¹⁵⁶ *See MRP, Inc. v. Moreman*, No. 3:10-CV-707, 2011 WL 61177, at *2 (W.D. Ky. Jan. 7, 2011) ("The information MRP seeks through expedited discovery in this case is exceedingly broad."); *Avaya, Inc. v. Acumen Telecom Corp.*, No. 10-cv-03075-CMA-BNB, 2011 WL 9293, at *2 (D. Colo. Jan. 3, 2011) ("In this case, the requested discovery is not limited or narrowly tailored, but is sweeping in its scope."); *Fifth Element Creative, LLC v. Kirsch*, Civil Action No. 5:10-cv-

justify distinguishing the CFTC from private litigants.¹⁵⁷ For instance, if a private litigant requests “discovery” in the abstract,¹⁵⁸ then most courts would suspect abusive discovery, where the aim is not to uncover a case’s facts, but to gain a tactical advantage over an adversary.¹⁵⁹ Yet, under Good Cause, “discovery” in the abstract is routinely given to the CFTC. Such a differentiation is unsupported by 26(d)(1)’s treatment of “parties.” Good Cause’s bad consequences do not deserve judicial perpetuation.

D. TRANSITORY OUTLIERS: FOUR ALTERNATIVE INTERPRETIVE TESTS TO DEVELOPING CFTC EXPEDITED DISCOVERY

Courts primarily use either discretion without explanation, or the Good-Cause Test to develop CFTC expedited discovery, to determine when to allow accelerated relief.¹⁶⁰ Since 2000, four alternatives—all transitory outliers—have cropped up sporadically and have been used only in a handful of cases.¹⁶¹ Though their impact is marginal, these alternatives are worth exploring in order to paint a comprehensive picture of the doctrine’s illegitimate development.

255-KKC, 2010 WL 4102907, at *2 (E.D. Ky. Oct. 18, 2010) (discovery requests overly broad and not narrowly tailored to obtain information relevant to preliminary injunction motion’s determination); *Wheeler v. HXI, LLC*, No. 10-cv-145-JD, 2010 WL 3023518, at *2 (D.N.H. July 28, 2010) (“[T]he request is not narrowly tailored or sufficiently specific, and risks converting the expedited discovery process into a fishing expedition.”); *Landwehr v. F.D.I.C.*, No. 09-0716 (RMU), 2010 WL 2572077, at *2 (D.D.C. June 28, 2010) (“Moreover, there is no indication that this expedited discovery would be narrowly tailored, as it was in the cases relied on by the plaintiffs.”); *L’Occitane, Inc. v. Trans Source Logistics, Inc.*, 2009 WL 3746690, at *2 (D. Md. 2009) (“Moreover, the Court does not find Plaintiff’s request to depose Defendant Cates to be narrowly tailored as it does not set forth the subjects upon which it would depose Mr. Cates.”); *Sunflower Elec. Power Corp. v. Sebelius*, No. 08-2575-EFM-DWB, 2009 WL 774340, at *4 (D. Kan. Mar. 20, 2009) (“The title of the present renewed motion refers to ‘limited, expedited discovery’, but there is no claim that the proposed deposition of the Governor will be limited in scope or duration in any manner. The court can only conclude that Sunflower is, in reality, attempting to pursue very broad discovery from the Governor concerning all aspects of the present case.”).

¹⁵⁷ See Panoff, *Rescuing Expedited Discovery I*, at 663–64.

¹⁵⁸ “Discovery in the abstract” is when a movant asks a court to authorize “discovery.” The particular type of discovery (e.g., depositions, requests for production, interrogatories, requests for admissions, written depositions, physical inspections), scope (subject matter), and timeframe are omitted. A litigant just wants discovery in the abstract.

¹⁵⁹ One form of abuse, associated with excessive discovery requests, is “extortionate discovery.” See *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 849-50 (7th Cir. 2010), *judgment vacated*, 131 S. Ct. 3060 (2011); *FM Indus., Inc. v. Citicorp Credit Serv., Inc.*, 614 F.3d 335, 339 (7th Cir. 2010).

¹⁶⁰ See *infra* Appendices I, II.

¹⁶¹ See *infra* Appendix III.

1. *Transitory Outliers*

The alternative tests have the same general flaws as discretion without explanation and Good Cause. They all omit meaningful analysis and gloss over 26(d)(1).¹⁶² They are broad conditions precedent to early discovery's propriety.¹⁶³

1. There is a need to permit expedited discovery to ensure the protection of Defendants' customers' interests.¹⁶⁴
2. Expedited discovery is proper because of an undisclosed "emergency."¹⁶⁵
3. "This is a proper case for . . . granting expedited discovery."¹⁶⁶
4. Expedited discovery is authorized because an ex parte statutory restraining order was proper.¹⁶⁷

2. *Shortcomings*

The first alternative conceptualizes discovery robustly, running up against the rule's primary conduct—"seek discovery from any source."¹⁶⁸ The rule's primary conduct evokes discovery's foundational purposes: preparing for trial, ensuring that both sides have the same evidence, and eluding trial by surprise.¹⁶⁹ The vague desire to "protect investors' interests" falls outside of these core purposes. It also injects another actor into 26(d)(1)'s primary conduct: non-party investors. Injecting additional actors into the rule's primary conduct interpolates

¹⁶² *See id.*

¹⁶³ *See id.*

¹⁶⁴ U.S. Commodity Futures Trading Comm'n v. First Am. Inv. Serv., Inc., No. 04-CV- — - DGP, at 4-5 (S.D. Fla. filed June 10, 2004), *available at* <http://cftc.gov/files/enf/04orders/enffirstamerican-order.pdf>.

¹⁶⁵ Commodity Futures Trading Comm'n v. Zelener, No. Civ.A. 03 C 4346, 2003 WL 22359573, at *1 (N.D. Ill. June 30, 2003).

¹⁶⁶ Commodity Futures Trading Comm'n v. First Bristol Grp., Inc., No. 02-61160, 2002 WL 31357411, at *1, *7 (S.D. Fla. Aug. 20, 2002); *see also* U.S. Commodity Futures Trading Comm'n v. Premium Income Corp., No. 05-CV-0416-JJ, at 2, 13 (N.D. Tex. filed Mar. 2, 2005), *available at* <http://cftc.gov/files/enf/05orders/enf-premium-income-corp-order.pdf>; U.S. Commodity Futures Trading Comm'n v. Orion Int'l, Inc., No. 03-CV-603-GD, at 2, 13 (D. Or. filed May 8, 2003), *available at* <http://cftc.gov/files/enf/03orders/enforion-sro.pdf>.

¹⁶⁷ Commodity Futures Trading Comm'n v. Yanev, No. 2:05CV900, 2005 WL 2991180, at *3 (S.D. Ohio Oct. 11, 2005).

¹⁶⁸ FED. R. CIV. P. 26(d)(1).

¹⁶⁹ *See Panoff, Rescuing Expedited Discovery I*, at 686 n.195.

rather than interprets 26(d)(1);¹⁷⁰ primary conduct is textually confined to parties seeking discovery.¹⁷¹

The second alternative prevents meaningful evaluation because the term “emergency” is not explicated.¹⁷² At a minimum, this omission is critical because of 26(d)(1)’s timeframe. If the “emergency” can be addressed after the 26(f) conference, then discovery need not occur immediately. Likewise, if the “emergency” is not discovery-related, then 26(d)(1) is inapplicable.

The third alternative diminishes 26(d)(1)’s reference to non-parties, encompassed within “any source.”¹⁷³ Because the general prohibition precludes a party from “seek[ing] discovery from any source,” 26(d)(1) implicitly acknowledges that non-parties have the ability to resist unauthorized discovery requests.¹⁷⁴ Resistance is meaningful only if non-parties know when it would be worthwhile to do so, something the third alternative frustrates by allowing discovery in “proper cases.”¹⁷⁵ Without judicial elaboration on why a given case is “proper,” non-parties cannot evaluate when or whether to file motions to quash.¹⁷⁶ The result is that whenever a court identifies a “proper case” for early discovery, non-parties must comply irrespective of whether a court might reevaluate¹⁷⁷ its previous determination. This outcome nullifies 26(d)(1)’s reference to non-parties.

The fourth and final alternative is mechanical; if a 13a-1 restraining order is proper, then expedited discovery is granted.¹⁷⁸ To begin with, mechanical invocations of expedited discovery weaken if not remove 26(d)(1) discretion, a choice that should be based on that rule’s contours. Under the fourth alternative, a court’s decision hinges on 13a-1, not

¹⁷⁰ See generally *Harris v. Nelson*, 394 U.S. 286, 298 (1969) (“We have no power to rewrite the Rules by judicial interpretations.”).

¹⁷¹ FED. R. CIV. P. 26(d)(1) (“A party may not seek discovery from any source”); see also Panoff, *Rescuing Expedited Discovery I*, at 659.

¹⁷² See *Commodity Futures Trading Comm’n v. Zelener*, No. Civ.A. 03 C 4346, 2003 WL 22359573, at *1 (N.D. Ill. June 30, 2003).

¹⁷³ See FED. R. CIV. P. 26(d)(1) (“A party may not seek discovery from any source”).

¹⁷⁴ See Panoff, *Rescuing Expedited Discovery I*, at 659-60.

¹⁷⁵ *Commodity Futures Trading Comm’n v. First Bristol Grp., Inc.*, No. 02-61160, 2002 WL 31357411, at *1, *7 (S.D. Fla. Aug. 20, 2002); see also *U.S. Commodity Futures Trading Comm’n v. Premium Income Corp.*, No. 05-CV-0416-JJ, at 2, 13 (N.D. Tex. filed Mar. 2, 2005), available at <http://cftc.gov/files/enf/05orders/enf-premium-income-corp-order.pdf>; *U.S. Commodity Futures Trading Comm’n v. Orion Int’l, Inc.*, No. 03-CV-603-GD, at 2, 13 (D. Or. filed May 8, 2003), available at <http://cftc.gov/files/enf/03orders/enforion-sro.pdf>.

¹⁷⁶ *Premium Income Corp.*, No. 05-CV-0416-JJ, at 2, 13; *Orion Int’l, Inc.*, No. 03-CV-603-GD, at 2, 13; *First Bristol Grp., Inc.*, 2002 WL 31357411, at *1, *7.

¹⁷⁷ A reevaluation would have to be prompted by a non-party.

¹⁷⁸ *Commodity Futures Trading Comm’n v. Yanev*, No. 2:05CV900, 2005 WL 2991180, at *3 (S.D. Ohio Oct. 11, 2005).

26(d)(1). Again, courts issue restraining orders when the CFTC satisfies 13a-1. Consequently, this last alternative displaces 26(d)(1):¹⁷⁹ so long as the CFTC can meet 13a-1, accelerated relief will be allowed. By eclipsing 26(d)(1) and by mechanizing a discretionary process, the fourth alternative tramples the rule's secondary conduct.

E. BOILERPLATE JUSTICE: CFTC DECISIONS' RECURRING FEATURES

CFTC decisions are homogeneous, are written by the CFTC, and never quote 26(d)(1), recurring features this Article dubs "Boilerplate Justice." Boilerplate Justice erodes the rule's secondary conduct, trivializes 26(d)(1)'s treatment of actors, and eviscerates the rule's discretionary exception.

1. *Homogeneity*

CFTC decisions possess nearly identical structures and details.¹⁸⁰ Decisions begin with jurisdictional findings, followed by a summary of the relief "good cause" permits.¹⁸¹ Then, a definitional section is offered, usually covering "documents," "assets," "defendants," and "relief defendants."¹⁸² Decisions close by detailing the relief granted.¹⁸³ Instead of assessing a 26(d)(1) request independently, courts adopt CFTC positions wholesale, departing from the independent juridical evaluation,

¹⁷⁹ *Id.*

¹⁸⁰ U.S. Commodity Futures Trading Comm'n v. Capitalstreet Fin., LLC, No. 3:09-CV-387-RJC, at 3, 6-7 (W.D.N.C. filed Sept. 9, 2009), available at <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfcapitalstreetorder09092009.pdf>; U.S. Commodity Futures Trading Comm'n v. Healy, No. 1:09-CV-1331-CCC, at 19-20 (M.D. Pa. filed July 13, 2009), available at <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfhealyorder07132009.pdf>; U.S. Commodity Futures Trading Comm'n v. Capital Blu Mgmt., LLC, No. 6:09-CV-508-JA, at 3, 16 (M.D. Fla. filed Mar. 23, 2009), available at <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfcapitalbluorder03232009.pdf> (filed under seal); U.S. Commodity Futures Trading Comm'n v. Palmer, No. 1:09-CV-00076-EJL, at 2, 14 (D. Idaho filed Feb. 26, 2009), available at <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfpalmerorder02262009.pdf>.

¹⁸¹ *Capitalstreet Fin.*, No. 3:09-CV-387-RJC, at 3, 6-7; *Healy*, No. 1:09-CV-1331-CCC, at 19-20; *Capital Blu Mgmt.*, No. 6:09-CV-508-JA, at *3, 16 (filed under seal); *Palmer*, No. 1:09-CV-00076-EJL, at 2, 14.

¹⁸² *Capitalstreet Fin.*, No. 3:09-CV-387-RJC, at 3, 6-7; *Healy*, No. 1:09-CV-1331-CCC, at 19-20; *Capital Blu Mgmt.*, No. 6:09-CV-508-JA, at *3, 16 (filed under seal); *Palmer*, No. 1:09-CV-00076-EJL, at 2, 14.

¹⁸³ *Capitalstreet Fin.*, No. 3:09-CV-387-RJC, at 3, 6-7; *Healy*, No. 1:09-CV-1331-CCC, at 19-20; *Capital Blu Mgmt.*, No. 6:09-CV-508-JA, at *3, 16 (filed under seal); *Palmer*, No. 1:09-CV-00076-EJL, at 2, 14.

which the rule's secondary conduct demands. Homogeneity—assembly line adjudication that manufactures one-size-fits-all decisions—is not accidental; it is the natural outgrowth of CFTC-written decisions in which legally binding determinations are drafted and crafted by a litigant as opposed to a judge.¹⁸⁴ This homogeneity is not legal analysis, it is rote parroting.

2. CFTC-Written Decisions

At least since 2000, the CFTC has written the orders allowing itself early discovery.¹⁸⁵ While attorney-written decisions are legally binding, they still raise concerns about legitimacy by blurring the lines that separate interested advocates from disinterested adjudicators.¹⁸⁶ The assumption is that attorneys argue and judges decide; decisions are accepted because they are presumably written by a disinterested arm of the state, rather than a zealous advocate.¹⁸⁷ CFTC-written decisions contradict this assumption.¹⁸⁸ Moreover, these decisions ignore 26(d)(1)'s insistence that expedited discovery must be “[a]uthorized by . . . *court* order.”¹⁸⁹ The rule links courts with the secondary conduct of authorizing discovery. This connection fixes courts' obligation to determine the appropriateness of early discovery.¹⁹⁰ CFTC written decisions sever this link, revealing courts' abdication of their 26(d)(1) duty to decide discovery's propriety.

3. Never Quoting FED. R. CIV. P. 26(d)(1)

As bad as homogeneity is and as troubling as Commission-written decisions are, both are trumped by CFTC decisions' third common feature: never quoting Fed. R. Civ. P. 26(d)(1).¹⁹¹ This practice removes

¹⁸⁴ *Capitalstreet Fin.*, No. 3:09-CV-387-RJC, at 3, 6-7; *Healy*, No. 1:09-CV-1331-CCC, at 19-20; *Capital Blu Mgmt.*, No. 6:09-CV-508-JA, at *3, 16 (filed under seal); *Palmer*, No. 1:09-CV-00076-EJL, at 2, 14.

¹⁸⁵ See *infra* Appendices I–III.

¹⁸⁶ See Jesse N. Panoff, *Why State Trial Court Judges Should Write Their Own Decisions: Transforming the Current System*, 51 S. TEX. L. REV. 307, 331(2009).

¹⁸⁷ *Id.* at 331-32.

¹⁸⁸ All of this is further compounded by an “insidiousness [that] exists because the practice of attorney-written decisions occurs in the dark; most people, especially litigants, do not know that attorneys pen the very decisions that impact their lives and livelihoods.” *Id.* at 332. CFTC decisions are the product of ex parte motions for restraining orders that are, as with the complaint, filed under seal.

¹⁸⁹ FED. R. CIV. P. 26(d)(1) (emphasis added).

¹⁹⁰ *Id.*

¹⁹¹ See *infra* Appendices I–III.

the rule's structure and text from the doctrine's development, thereby trivializing 26(d)(1)'s significance and ignoring the doctrine's status as an exception. Instead of looking to 26(d)(1) when considering a CFTC request, courts tacitly consult an extra-textual factor: the movant's identity.¹⁹² When the CFTC requests early discovery, it is irrelevant whether such relief is commensurate with 26(d)(1)'s guidelines. Instead, what matters is that the CFTC is seeking accelerated relief, transforming an explicit exception into the rule.¹⁹³

F. SUMMARY: ILLEGITIMATE INTERPRETIVE TESTS BREED ILLEGITIMATE DECISIONS

Discretion without explanation, Good Cause, and the four occasional alternatives are interpretive tests that override 26(d)(1). They are illegitimate, generating decisions that overlook the rule's general prohibition, discretionary exception, primary and secondary conduct, references to actors, and timeframe. As for CFTC-written decisions—the embodiment of these illegitimate processes—their core features amount to Boilerplate Justice, where independent juridical analysis has been traded in for mechanized acquiescence, resulting in the Commission's unrivaled success with obtaining expedited discovery.

For the past eleven years, the CFTC has obtained expedited discovery with astounding success because courts have ceded the doctrine to the CFTC, tilting what should be an interpretive endeavor to almost always favoring the Commission. This is not the playing field set by 26(d)(1). This is not the discretionary approach the rule's perpetuation demands. This is, instead, nothing more than a doctrine's illegitimate development, the invariable outcome of what has become an entrenched abdication of the judicial process.

III. THE HISTORICAL BLUEPRINT: HOW COURTS CAN LEGITIMIZE CFTC EXPEDITED DISCOVERY

Rescuing Expedited Discovery I analyzed the doctrine's forgotten history.¹⁹⁴ Particular attention was given to the transformative era, a collection of decisions rendered and principles cultivated from 1939 to

¹⁹² See *infra* Appendix I.

¹⁹³ See, e.g., *Commodity Futures Trading Comm'n v. Nations Inv., LLC*, No. 07-CV-61058-RWS, at 5 (N.D. Ga. filed Jan. 31, 2007); *Commodity Futures Trading Comm'n v. Sonoma Trading Corp.*, No. 05-60342, 2005 WL 3742849, at *2 (S.D. Fla. Mar. 9, 2005); *Commodity Futures Trading Comm'n v. Smithers*, No. 05-CV-80592-DTKH, at 4 (S.D. Fla. filed June 30, 2005), available at <http://cftc.gov/files/enf/05orders/enfsmithersorder.pdf>.

¹⁹⁴ See Panoff, *Rescuing Expedited Discovery I*, at 676-89.

1948.¹⁹⁵ The transformative era furnished an analytical blueprint for legitimizing expedited discovery.¹⁹⁶ The blueprint fosters legitimacy by embracing the doctrine's traditional principles and internalizing 26(d)(1)'s structure and text.¹⁹⁷ The aim is to ensure that courts assess expedited discovery's propriety in accordance with 26(d)(1)'s parameters by engaging in rule-based development.¹⁹⁸

This Part shows how courts can legitimize CFTC expedited discovery by starting with a review of the historical blueprint and traditional principles. Next, the blueprint is applied to CFTC expedited discovery. Finally, context-specific suggestions are offered, unique to CFTC discovery, that will eliminate Boilerplate Justice. The blueprint delineated in *Rescuing Expedited Discovery I* is, in *this* Article, utilized to rescue the doctrine from the CFTC and return it to 26(d)(1).

A. A TEMPLATE FOR LEGITIMACY: THE BLUEPRINT & TRADITIONAL PRINCIPLES

During the transformative era, expedited discovery experienced two strands of development; the first involved courts, the second implicated litigants.¹⁹⁹ The blueprint incorporated these strands by limiting early discovery “[t]o two categories: (1) instances when a court will make a decision before a 26(f) conference; and (2) scenarios where something will happen that makes taking early discovery absolutely necessary.”²⁰⁰ Each category asks five questions.

1. *The Historical Blueprint's Category Two*

CFTC expedited discovery effectively concerns why the Commission needs accelerated relief, triggering Category Two:

1. Is something going to happen that makes taking discovery now—before the 26(f) conference—absolutely necessary?

¹⁹⁵ *Id.* at 676-81.

¹⁹⁶ *Id.* at 689.

¹⁹⁷ *Id.* at 692-95.

¹⁹⁸ Rule-based development is the understanding that “[t]he doctrine's development must be tethered to the procedural rule authorizing early discovery.” *Id.* at 676.

¹⁹⁹ The first strand dealt with courts' need for discovery before rendering a decision, usually on a motion to dismiss for lack of jurisdiction. The second concerned litigants' immediate need for discovery—something was going to happen that made taking discovery now necessary. *See id.* at 690-92.

²⁰⁰ *Id.* at 690.

2. What is the proof or evidence of the event and its consequences?
3. Will expedited discovery avoid the event's consequences?
4. Is the requested discovery's scope confined to the event, evading the event's consequences, the time available to conduct discovery, and the time remaining before the event occurs?
5. What will happen if expedited discovery is denied?²⁰¹

These five questions perpetuate 26(d)(1)'s structure and text and the doctrine's traditional principles: necessity, discretion, scope, and prejudice.²⁰²

2. *The Traditional Principles*

The principle of necessity asked why a litigant needed discovery immediately; the "need" must not simply be stated, but proven.²⁰³ Discretion fostered procedural regularity, with courts refusing to expand the concept of "need" unduly.²⁰⁴ Scope helped litigants prove that a discovery request was genuine and not abusive; the professed Necessity must be reflected in the discovery sought.²⁰⁵ Prejudice scrutinized consequences, what would happen to a litigant if discovery requests were denied.²⁰⁶

These principles, along with 26(d)(1)'s structure and text, animate the historical blueprint. Thus, if courts apply the blueprint to CFTC requests, then they will be utilizing an interpretive test that directs their attention to 26(d)(1)'s details, thereby exercising discretion commensurate with that rule.

B. LEGITIMACY THROUGH HISTORY: APPLYING THE BLUEPRINT TO CFTC EXPEDITED DISCOVERY

Most decisions involving CFTC expedited discovery requests do not describe why the Commission needs expedited discovery—the express reason why discovery must occur before the 26(f) conference.²⁰⁷ Though

²⁰¹ *Id.* at 691.

²⁰² *Id.* at 691-92.

²⁰³ *Id.* at 682-83.

²⁰⁴ *Id.* at 683-84.

²⁰⁵ *Id.* at 685-86.

²⁰⁶ *Id.* at 686-87.

²⁰⁷ U.S. Commodity Futures Trading Comm'n v. PrivateFX Global One Ltd., SA, No. 09-CV-
— -SL, at 3, 14 (S.D. Tex. filed May 21, 2009), *available at*

courts often enumerate *how* the CFTC may use the information once it is discovered, courts do not mention or inquire into the Commission's need for pre-26(f) discovery.²⁰⁸ This omission is fatal under the blueprint, failing to satisfy the first question which would render the remaining inquiries moot. Nevertheless, in order to show courts how to apply the blueprint, this Article suggests some of the more likely reasons that the Commission could offer for needing expedited discovery: asset depletion and document destruction. These reasons are drawn from, and correlate with, the types of discovery that the CFTC routinely requests as well as the topics such discovery covers.

1. *Question One: The Pre-26(f) Event*

The blueprint's first question asks, "[w]ill something happen that makes taking discovery before the 26(f) conference absolutely necessary?"²⁰⁹ CFTC decisions often mention asset dissipation and document destruction as justifications for granting restraining orders that impose asset freezes, document preservation, and document investigation.²¹⁰ If a defendant will transfer assets or destroy documents before the 26(f) conference, then both would be compelling pre-26(f) events that might make taking discovery "absolutely necessary." This is so because the CFTC could argue that without immediate discovery, assets may be hidden or documentary evidence could be destroyed.

<http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enprivateforde r05212009.pdf> (sealed); U.S. Commodity Futures Trading Comm'n v. CRW Mgmt. LP, No. 3:09-CV-0408-EK, at 3, 15 (N.D. Tex. filed Mar. 4, 2009), *available at* <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfcrworder0304 2009.pdf>; U.S. Commodity Futures Trading Comm'n v. Walsh, No. 09-CV-1749-GBD, at 3, 16-17 (S.D.N.Y. filed Feb. 25, 2009), *available at* <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfwalshorder02 252009.pdf>; U.S. Commodity Futures Trading Comm'n v. Rolando, No. 08-CV- ——— -PCD, at 2-3, 12 (D. Conn. filed Jan. 15, 2008), *available at* <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfrolandosorde r.pdf>.

²⁰⁸ *PrivateFX Global One Ltd., SA*, No. 09-CV- ——— -SL, at 14 (sealed). Common examples of how the Commission will use discovery or the purposes discovery will serve include determining the full extent of a defendant's alleged wrongdoing, locating a defendant's customers, and clarifying various funds' sources. *Id.* These examples do not address why the Commission has a pressing need—one that must be satisfied before the 26(f) conference—for expedited discovery.

²⁰⁹ Panoff, *Rescuing Expedited Discovery I*, at 691.

²¹⁰ U.S. Commodity Futures Trading Comm'n v. Supama Int'l DMCC, No. 07-CV-2770-RJH, at 2 (S.D.N.Y. filed Apr. 5, 2007), *available at* <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfsupamaorder. pdf>; U.S. Commodity Futures Trading Comm'n v. Rodriguez, No. 06-CV-0855-KMW, at *2-3 (S.D.N.Y. filed Feb. 3, 2006), *available at* <http://cftc.gov/ucm/groups/public/@Irenforcementactions/documents/legalpleading/enfrodriquezorde r.pdf>.

In contrast, CFTC decisions also note that early discovery will enable the Commission to fulfill its statutory duties, determine the full extent of a defendant's wrongdoing, and protect investors or customers from further harm—examples of how the CFTC will use discovery or the purposes discovery will serve.²¹¹ These examples, however, would not satisfy the blueprint's first inquiry, as none provides a specific or concrete event that is likely to occur before the 26(f) meeting. Furthermore, such examples—if offered by the CFTC as to why it needs early discovery—contravene 26(d)(1). Vague statutory duties could be invoked in every case, thereby eviscerating 26(d)(1)'s discretionary exception. Determining a defendant's wrongdoing outstrips the rule's timeframe, an aim that should instead play itself out over a lawsuit's duration. And protecting investors or customers from further harm is an aim that defies the rule's primary conduct and its connection with discovery's practical and foundational purposes.²¹²

2. *Question Two: Proof of the Pre-26(f) Event*

Asset dissipation and document destruction must be proven rather than merely alleged.²¹³ It would not be enough for the CFTC to announce, even in the form of a declaration, that it has some generalized reason to believe that a defendant, or a non-party, will hide assets or destroy documents before the 26(f) conference. Particularized proof must be offered to a court.

3. *Question Three: Avoiding the Event's Consequences*

Expedited discovery's advisability, under the blueprint's third question, turns on whether discovery will help a movant avoid the event's consequences.²¹⁴ The Commission would have to show that early discovery would evade pre-26(f) asset depletion or document destruction.

²¹¹ U.S. Commodity Futures Trading Comm'n v. Owen, No. 3:09cv484/MCR/EMT, 2009 WL 4781903, at *1-2, *4 (N.D. Fla. Nov. 9, 2009); U.S. Commodity Futures Trading Comm'n v. M25 Inc., No. 3-09-cv-1831-M, 2009 WL 3740627, at *1, *6 (N.D. Tex. Sept. 29, 2009); U.S. Commodity Futures Trading Comm'n v. Khanna, No. 09cv1783 BEN (CAB), 2009 WL 3415352, at *2, *7 (S.D. Cal. Aug. 18, 2009); U.S. Commodity Futures Trading Comm'n v. Barki, LLC, No. 3:09CV106, 2009 WL 1203409, at *2, *8 (W.D.N.C. Mar. 17, 2009); U.S. Commodity Futures Trading Comm'n v. Donnelly, No. 3:09CV00016, 2009 WL 890615, at *2, *5 (W.D. Va. Mar. 11, 2009); U.S. Commodity Futures Trading Comm'n v. Sun Platinum Grp., LLC, No. 03 CV 7112, 2003 WL 22469913, at *3 (S.D.N.Y. Sept. 12, 2003).

²¹² Panoff, *Rescuing Expedited Discovery I*, at 686 n.195.

²¹³ See *id.* at 683.

²¹⁴ *Id.* at 691.

4. *Question Four: The Requested Discovery's Scope*

Assuming the CFTC has satisfactorily described and proven a pre-26(f) event, and documented how expedited discovery would help avoid the event's consequences, the CFTC's discovery requests cannot be unbound. The methods sought to be used along with the breadth of information desired must be confined to "[t]he event, evading the event's consequences, the time available to conduct discovery, and the time remaining before the event occurs."²¹⁵ Discovery's scope, in other words, must reflect the CFTC's need. This proportionality would be a substantial change for the Commission, deviating from the expansive discovery courts routinely allow.

Since 2000, CFTC expedited discovery has been achieved in three ways. First, courts have allowed the CFTC to engage in undefined "discovery," the limits of which are seemingly set by the Commission.²¹⁶ Second, courts have consistently authorized customized depositions. These customized depositions allow for more than the standard ten total depositions,²¹⁷ an unlimited ability to re-depose a deponent,²¹⁸ depositions that last more than seven hours,²¹⁹ and deposing prisoners.²²⁰ Third, defendants have less than thirty days to respond to requests for production of documents.²²¹ Such discovery—authorized without courts substantially delving into applicable procedural rules—is ungainly, and under the fourth question would have to be refined.

²¹⁵ *Id.*

²¹⁶ U.S. Commodity Futures Trading Comm'n v. Weinberg, No. 02-02094-CV-RSWL-RNB, at *2, *8 (C.D. Cal. filed Mar. 12, 2002), available at <http://cftc.gov/files/enf/02orders/enfweinberg-sro.pdf>.

²¹⁷ U.S. Commodity Futures Trading Comm'n v. Efrosman, No. 05 Civ.8422 KMW, 2005 WL 3832923, at *4-5 (S.D.N.Y. filed Sept. 30, 2005); U.S. Commodity Futures Trading Comm'n v. Eustace, No. 05CV2973, 2005 WL 3740316, at *7 (E.D. Pa. June 23, 2005).

²¹⁸ U.S. Commodity Futures Trading Comm'n v. Cromwell Fin. Serv., Inc., No. Civ. 05-CV-210-JD, 2005 WL 3724872, at *2 (D.N.H. 2005); U.S. Commodity Futures Trading Comm'n v. Fleury, No. 03-61199-CIV, 2003 WL 22359517, at *7 (S.D. Fla. June 20, 2003).

²¹⁹ U.S. Commodity Futures Trading Comm'n v. Yellowstone Partners, Inc., No. 5:10-CV-85-FL, 2010 WL 1780005, at *1, *4 (E.D.N.C. Mar. 10, 2010); U.S. Commodity Futures Trading Comm'n v. Smith, No. 1:10CV00009, 2010 WL 1759542, at *2, *4-5 (W.D. Va. Feb. 23, 2010).

²²⁰ U.S. Commodity Futures Trading Comm'n v. Kim, No. 11 CIV 1013, 2011 WL 554105, at *3 (S.D.N.Y. Feb. 15, 2011); U.S. Commodity Futures Trading Comm'n v. Valko, No. 06-60001-CIV, 2006 WL 2620197, at *4 (S.D. Fla. filed Jan. 3, 2006); U.S. Commodity Futures Trading Comm'n v. Lake Dow Capital, LLC, No. 05-CV-2709, 2005 WL 3741510, at *6-7 (N.D. Ga. Oct. 19, 2005); Commodity Futures Trading Comm'n v. First Bristol Grp., Inc., No. 02-61160, 2002 WL 31357411, at *7 (S.D. Fla. Aug. 20, 2002).

²²¹ U.S. Commodity Futures Trading Comm'n v. Driver, No. SA 09-cv-0578 ODW (RZx), 2009 WL 3396172, at *5 (C.D. Cal. Aug. 17, 2009); U.S. Commodity Futures Trading Comm'n v. Pippin, No. CV 05-4120, 2005 WL 3741535, at *4 (E.D.N.Y. Aug. 29, 2005).

The Commission's discovery, the breadth of information sought, and the methods requested to be used must be calibrated to asset dissipation or document destruction. More precisely, the CFTC's proposed discovery must be limited to the event, evading the event's consequences, the time available to conducting discovery, and the time remaining before the event occurs.²²² This precision is essential in order to preserve 26(d)(1)'s timeframe.

5. *Question Five: The Consequences of Denying Expedited Discovery*

Even if the Commission can satisfactorily answer the blueprint's four questions, the CFTC will still have to grapple with "[w]hat will happen if expedited discovery is denied?"²²³ It is at this point that the CFTC would face its greatest obstacle in obtaining accelerated relief. This is so because of 13a-1 and the restraining orders courts usually grant the Commission.²²⁴

Recall that the most prevalent reasons that courts issue restraining orders are to prevent asset dissipation and document destruction.²²⁵ In fact, 13a-1's text explicitly addresses these concerns, which in part is

²²² See Panoff, *Rescuing Expedited Discovery I*, at 691.

²²³ *Id.*

²²⁴ Under question 3, expedited discovery may avoid asset depletion or document destruction. But these outcomes are also achievable—for the CFTC—through statutory means. Thus, under question 5, if expedited discovery is denied, then the CFTC would still be able to obtain the identical outcomes that expedited discovery may effectuate. In the non-CFTC context, consider a would-be deponent who a movant claims is terminally ill but cannot so prove with any documentary evidence. The movant requests expedited discovery, arguing that the would-be deponent will likely die before the 26(f) meeting, making it impossible to obtain the deponent's testimony unless the deposition occurs before the 26(f) meeting. So, under question 3, a deposition (expedited discovery) would avoid the alleged outcome: the loss of the would-be deponent's testimony. However, a court—in its discretion—may determine that because of insufficient evidence (e.g., no proof of a terminal illness), denying expedited discovery will not preclude the movant from conducting a post-26(f) deposition. Under those circumstances, the event (the loss of the would-be deponent's testimony) is unlikely to occur if the deposition is not taken before the 26(f) conference. See, e.g., *Paul v. Aviva Life & Annuity Co.*, No. 3-09-CV-1490-B, 2009 WL 3815949, at *1 (N.D. Tex. Nov. 12, 2009) (denying motion for expedited discovery after would-be deponent stated in a sworn declaration that he had no reason to believe that his medical condition would prevent him from testifying a year later); *Borom v. Merrillville*, No. 2:07 CV 98, 2007 WL 1797639, at *6 (N.D. Ind. June 19, 2007) (finding that age of eighty-year-old witness, without more evidence regarding his health, was insufficient to grant expedited discovery).

²²⁵ *U.S. Commodity Futures Trading Comm'n v. Smith*, No. 1:10CV00009, 2010 WL 1759542, at *1 (W.D. Va. Feb. 23, 2010); *Commodity Futures Trading Comm'n v. Milton*, No. 10-CV-80738-KAM, at 2 (S.D. Fla. filed June 22, 2010), available at <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfrtradeorder06222010.pdf>.

why courts (i) freeze defendants' assets;²²⁶ (ii) prohibit defendants from destroying books, records, and documents;²²⁷ (iii) give the CFTC access to these same informational sources;²²⁸ (iv) compel defendants to identify and preserve their assets;²²⁹ (v) require financial institutions to deny defendants access to their accounts;²³⁰ and (vi) force additional non-parties to divulge information germane to defendants' alleged violations.²³¹

Hence, 13a-1 restraining orders contemplate most, if not all, of the untoward consequences of denying the CFTC asset or document discovery requests. Specifically, if a court denies the CFTC such discovery, then—because of 13a-1 restraining orders' sweeping provisions—the consequences will not be as dire as in the absence of these orders. Frozen assets cannot be transferred. Unfettered access to a defendant's documents “wherever they may be situated and whether they are in the possession of any of the Defendants or others”²³² frustrates document destruction. And restraining orders are granted *ex parte*, issued under seal, and thus can be effectuated quickly, before a defendant has time to react. The blueprint's fifth and final inquiry would force the CFTC—and more importantly courts—to seriously evaluate expedited discovery's propriety.

Underlying the fifth question is the traditional principle of prejudice and 26(d)(1)'s discretionary exception.²³³ This principle and the discretionary exception emphasize that the doctrine is an exception to the

²²⁶ U.S. Commodity Futures Trading Comm'n v. U.S. Ventures LC, No. 2:11-CV-00099-BSJ, at 4 (D. Utah filed Jan. 25, 2011), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfwinosomeorde r012511.pdf>.

²²⁷ U.S. Commodity Futures Trading Comm'n v. Klatch, No. 1:11-cv-05191-GBD, at 6 (S.D.N.Y. filed Aug. 3, 2011), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfklatchorder08 0311.pdf>.

²²⁸ U.S. Commodity Futures Trading Comm'n v. El Rhazi, No. 11-cv-02576-DLC, at 6-7 (S.D.N.Y. filed July 29, 2011), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfelrhaziorder0 72911.pdf>.

²²⁹ Commodity Futures Trading Comm'n v. Int'l Funding Ass'n, No. CV031826PHXPGR, 2003 WL 22469911, at *2-3 (D. Alaska Sept. 18, 2003).

²³⁰ U.S. Commodity Futures Trading Comm'n v. Trade Tech Inst., No. 11-CV-02163-GHK-PLA, at 7-9 (C.D. Cal. filed Mar. 15, 2011), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enftradetechorde r031511.pdf>.

²³¹ U.S. Commodity Futures Trading Comm'n v. Groover, No. 4:11-CV-64, 2011 WL 1490901, at *4 (E.D. Tex. Feb. 11, 2011).

²³² U.S. Commodity Futures Trading Comm'n v. Kim, No. 11 CIV 1013, 2011 WL 554105, at *3 (S.D.N.Y. Feb. 15, 2011).

²³³ See Panoff, *Rescuing Expedited Discovery I*, at 691-92.

rule, a categorization that means accelerated relief should be denied more frequently than it is allowed—the traditional interaction between a rule and its exception.²³⁴

6. *The Practical & Theoretical Ramifications of Denying Expedited Discovery*

A decision to deny expedited discovery²³⁵ affirms the doctrine's status as an exception, respects 26(d)(1)'s general prohibition, maintains the rule's treatment of actors, focuses primary conduct on discovery's foundational purposes, gives direction and boundaries to the secondary conduct of authorizing accelerated relief, and advances 26(d)(1)'s timeframe. The decision to grant or to deny a motion for expedited discovery reserves one of law's most dynamic tools for those instances where a litigant's needs are so compelling that discovery must occur before the rule 26(f) conference. It is this understanding of the practical and theoretical ramifications of a denial that the historical blueprint respects because it is an understanding that permeates 26(d)(1)'s structural and textual nuances.²³⁶

C. PRACTICAL REFORMS FOR A PRACTICAL DOCTRINE: THE DEMISE OF BOILERPLATE JUSTICE

The historical blueprint pursues legitimacy by giving courts a framework that helps them exercise discretion commensurate with the structure and text of 26(d)(1). Within the CFTC context, however, several practical steps—unique to CFTC early discovery—can be taken to promote the doctrine's legitimate development. These steps reflect modern exigencies, current realities that were not present during the transformative era.

Nonetheless, the doctrine's flexibility—its capacity to respond to litigants' and courts' needs—allows for such accommodation, speaking to 26(d)(1)'s practical-responsiveness.²³⁷ The steps that follow are

²³⁴ *Ross v. Fed. Deposit Ins. Corp.*, 625 F.3d 808, 816 (4th Cir. 2010); *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 711 (4th Cir. 2001).

²³⁵ "Decision" refers to judicial determinations in general, and CFTC expedited discovery decisions (written orders) in particular.

²³⁶ See Panoff, *Rescuing Expedited Discovery I*, at 691-92.

²³⁷ See generally *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting) ("In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken."), *overruled by California v. Thompson*, 313 U.S. 109 (1941); see also *Jaybird Mining Co. v. Weir*, 271 U.S. 609, 619 (1926) (Brandeis, J., dissenting) ("It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is

designed to eliminate Boilerplate Justice, an assembly-line approach to adjudication where judges abandon the very analytical independence 26(d)(1) demands.

1. *Judge-Written Decisions*

The first step toward legitimacy is judge-written decisions, a reform that would overturn two recurring traits of Boilerplate Justice: homogeneity and CFTC-written decisions. If judges write CFTC expedited discovery decisions, then variety would occur, bringing an end to eleven years of decisions that are nearly identical structurally and substantively. On a slightly different level, judge-written decisions would preserve a more detailed record on appeal, as they would explicate *why* a judge denied or authorized early discovery.²³⁸ Additionally, judge-written decisions would affirm the general assumption that attorneys argue and judges decide, bolstering participants' willingness to accept and to follow a court's determinations.²³⁹

2. *Quoting FED. R. CIV. P. 26(d)(1)*

As for 26(d)(1), it should be quoted in CFTC decisions, a precursor to and a prerequisite of thoughtful interpretation and application. Rules are not to be understood by their corresponding numbers but are to be comprehended through their structure and text, a process thwarted when a rule is not quoted. The systematic failure to quote 26(d)(1) belies a cavalier approach to expedited discovery, one that places too little value in a rule too invaluable to ignore. Quoting 26(d)(1) affirms that rule's centrality in ascertaining expedited discovery's propriety, a discretionary determination to allow or to deny pre-26(f) discovery. Judge-written decisions and quoting 26(d)(1) are practical reforms for a practical

not allowed to end with its enunciation, and that an expression in an opinion yields later to the impact of facts unforeseen."); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 236 (1924) (Brandeis, J., dissenting) ("The process of inclusion and exclusion, so often applied in developing a rule, cannot end with its first enunciation. The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law."); BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 138 (Yale University Press 1963) (1924) (referencing Justice Brandeis's process of inclusion and exclusion) (quoting *W.C. Dawson & Co.*, 264 U.S. at 236).

²³⁸ Homogeneous decisions, by nature and definition, omit detailed analysis, leaving appellate courts guessing about the rationale behind any given decision. *See generally* *Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, 496 F.3d 769, 770 (7th Cir. 2007) ("The judge did not explain her reason for issuing the order or the thinking behind the asset freeze in particular.');

²³⁹ Jesse N. Panoff, *Why State Trial Court Judges Should Write Their Own Decisions: Transforming the Current System*, 51 S. TEX. L. REV. 307, 331-32 (2009).

doctrine, the development of which can be legitimized through the historical blueprint.

IV. THE IMPERATIVE FOR LEGITIMACY: WHY COURTS SHOULD RETURN CFTC EXPEDITED DISCOVERY TO FED. R. CIV. P. 26(d)(1)

CFTC expedited discovery is a microcosm of courts' systemic illegitimate development of expedited discovery.²⁴⁰ While the need for legitimacy permeates multiple legal contexts, it is felt especially acutely within CFTC expedited discovery, owing to an unprecedented doctrinal expansion that can only be described as excessive.

Legitimacy is imperative not because of theoretical impulses, but instead due to practical reasons. Those reasons are explored below, the collective import of which is an urgency for legitimacy, to be heeded by courts and hastened by a restoration of the judicial function that is so pivotal to confronting the very problems 26(d)(1) can help resolve.

A. THE ECONOMY, SWAPS, & ACHIEVABLE IMPROVEMENT: THE REASONS FOR LEGITIMACY

As *Rescuing Expedited Discovery I* observed, the doctrine's "[l]egitimacy is vital because 26(d)(1) is impacting today's most pressing issues. If the doctrine is illegitimate, then so too will be its results, casting doubt on decisions too important to undermine."²⁴¹ CFTC decisions are important because they involve markets that contributed to this country's economic crises.

1. *CFTC Decisions' Impact on the Economy*

The \$40 trillion commodity futures and options markets—volatile and susceptible to abuse—were some of the forces behind this country's financial woes.²⁴² The interconnectivity between these markets and our society's financial concerns is considerable; when courts rule on CFTC requests for expedited discovery, they are making determinations that influence this country's economy, a significant consequence deserving careful and thoughtful deliberation.

²⁴⁰ Panoff, *Rescuing Expedited Discovery I*, at 671-73.

²⁴¹ *Id.* at 689.

²⁴² Gary Gensler, Chairman, U.S. Commodity Futures Trading Comm'n, Bringing Transparency to the Swaps Markets ¶ 9, Remarks at the National Association of Corporate Treasurers Conference (June 2, 2011) (transcript available at <http://cftc.gov/PressRoom/SpeechesTestimony/opagensler-83.html>).

2. *The \$300 Trillion Swaps Market*

CFTC decisions' interrelatedness with the economy is about to grow by 300 trillion dollars, the swaps market's approximate value.²⁴³ With the passage of the Dodd-Frank Act, Congress has entrusted the CFTC with over-the-counter derivatives.²⁴⁴ This expanded authority will likely result in an increased number of CFTC expedited discovery requests. In turn, courts will be issuing more decisions that have a bearing on yet another crucial financial market, further enhancing the impact these decisions have on the economy. Either courts can continue to allow the Commission unfettered discovery that contravenes 26(d)(1), or courts can hold the CFTC to the details and limits embodied in that rule's structure and text. Whichever way courts move, the decisions they render will have consequences for more peoples' lives and livelihoods, given the Commission's expanded power over swaps.

3. *Achievable Legitimacy*

In addition to impacting the economy and the CFTC's new authority over swaps, there is a further rationale for legitimizing CFTC expedited discovery: The CFTC expedited discovery context is amenable to legitimization, a fertile ground for advances that will strengthen a doctrine equipped to help courts and litigants respond to some of our time's gravest challenges. Again, expedited discovery's illegitimacy is astoundingly pervasive, spanning diverse legal areas and topics; the CFTC arena is but a subset of a much larger doctrinal morass. And yet, this niche area of the law—given its comparatively narrow focus—is well suited to embrace and make adjustments essential to the doctrine's vitality, alterations that will show courts in other legal fields how to develop the doctrine more in keeping with 26(d)(1).

For starters, context-specific alterations such as judge-written decisions and quoting 26(d)(1) are readily achievable reforms that fuse 26(d)(1) with the doctrine's development. Applying the historical blueprint will harmonize discretion with 26(d)(1)'s structure and text, yielding decisions that respect rather than replace that rule, eventually fostering rule-based development. The CFTC context provides courts with a unique opportunity to legitimize expedited discovery by applying the blueprint to discovery requests that have for the past eleven years

²⁴³ COMMODITY FUTURES TRADING COMM'N, CHAIRMAN'S TRANSMITTAL LETTER, PRESIDENT'S BUDGET & PERFORMANCE PLAN: FISCAL YEAR 2012 (2011), available at <http://cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcbudget2012.pdf>.

²⁴⁴ *Id.*

eclipsed 26(d)(1). Legitimizing CFTC expedited discovery would be the germination of a much larger process of reuniting a useful doctrine with its legal source.

CONCLUSION

Those who violate the CEA should be brought to justice for harms inflicted on individuals and on markets. In the pursuit of civil justice, the CFTC has an array of information-gathering tools critical to achieving accountability. Recordkeeping, registration, inspection, and investigation aid the CFTC in regulating trillion-dollar markets and enforcing the CEA, the statutory basis for such data-collecting mechanisms. Particularly, and as it relates to enforcement, 7 U.S.C. § 13a-1 is a powerful positive law, with its efficacy turning on courts' textual and structural fidelity.

The same holds for 26(d)(1) and the dynamic doctrine emanating from that rule: expedited discovery. The doctrine's vitality depends on courts' adherence to 26(d)(1)'s structure and text; expedited discovery is neither a stand-alone judicial creation nor a featureless device to be used as a governmental body—such as the CFTC—desires. It is the product of a procedural rule's particularized features, deserving of the same respect and adherence afforded 7 U.S.C. § 13a-1. Unfortunately, courts have all but erased 26(d)(1) from CFTC expedited discovery. The doctrine's development—dictated not by courts but by the CFTC, shaped not by a procedural rule's contours but by the Commission's desire for information—is illegitimate, as evidenced by eleven years' worth of decisions that have denied the CFTC pre-26(f) discovery only twice.

The CFTC's unmatched record does not, in and of itself, establish illegitimacy; it is illegitimacy's result, not its cause. Rather, illegitimacy's cause is an all-too-complicit federal judiciary that has relinquished 26(d)(1) to the CFTC, signing off on CFTC-authored decisions that sometimes permit boundless "discovery" without any articulated justification. This is not expedited discovery; it is excessive discovery. This is not discretion; it is abdication. This is not the rule-based development courts cultivated during the doctrine's transformative era, the analytical genesis behind *Rescuing Expedited Discovery I's* historical blueprint.

In the end, the blueprint shows courts how to legitimize CFTC expedited discovery. With the Commission's added authority over the swaps market and the significant impact CFTC decisions have on this country's economy, the call for legitimacy cannot be louder; it is a call that must now be heard and acted upon by courts, those responsible for the doctrine's development, those empowered with the requisite

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discretion to do so legitimately, those capable of rescuing expedited discovery from the CFTC and returning it to 26(d)(1).

APPENDIX I: DISCRETION WITHOUT EXPLANATION

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APPENDIX II: THE GOOD-CAUSE TEST

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<http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfcapitalstreetorder09092009.pdf>; U.S. Commodity Futures Trading Comm'n v. Queen Shoals, LLC, No. 3:09-CV-335-RJC, at *4, *10-11 (W.D.N.C. filed Aug. 7, 2009), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfqueenshoalssro08072009.pdf>; U.S. Commodity Futures Trading Comm'n v. Healy, No. 1:09-CV-1331-CCC, at *19-20 (M.D. Pa. filed July 13, 2009), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfhealyorder07132009.pdf>; U.S. Commodity Futures Trading Comm'n v. Gresham, No. 3:09-CV-508-JC, at *3-4, *12-13 (N.D. Ga. filed July 2, 2009), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfgreshamorder07022009.pdf>; U.S. Commodity Futures Trading Comm'n v. Strongbow Inv. GP, LLC, No. 09-CV-497-SS, at *3, *10 (W.D. Tex. filed June 30, 2009), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfstrongboworder06302009.pdf> (filed under seal); U.S. Commodity Futures Trading Comm'n v. SNC Asset Mgmt., No. 09-CV-2555-MMC, at *3, *9 (N.D. Cal. filed June 10, 2009), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfsncassetsro06102009.pdf>; U.S. Commodity Futures Trading Comm'n v. PrivateFX Global One Ltd., SA, No. 09-CV- ——— - SL, at *3, *14 (S.D. Tex. filed May 21, 2009), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfprivatefxorder05212009.pdf> (sealed); U.S. Commodity Futures Trading Comm'n v. Capital Blu Mgmt., LLC, No. 6:09-CV-508-JA, at *3, 16 (M.D. Fla. filed Mar. 23, 2009), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfcapitalbluorder03232009.pdf> (filed under seal); U.S. Commodity Futures Trading Comm'n v. CRW Mgmt. LP, No. 3:09-CV-0408-EK, at *3, *15 (N.D. Tex. filed Mar. 4, 2009), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfcrworder03042009.pdf>; U.S. Commodity Futures Trading Comm'n v. Palmer, No. 1:09-CV-00076-EJL, at *2, *14 (D. Idaho filed Feb. 26, 2009), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfpalmerorder02262009.pdf>; U.S. Commodity Futures Trading Comm'n v. Walsh, No. 09-CV-1749-GBD, at *3, *16-17 (S.D.N.Y. filed Feb. 25, 2009), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfwalshorder02252009.pdf>; U.S. Commodity Futures Trading Comm'n v. Forte, No. 09-CV-00064-PSD, at *2-3, *9 (E.D. Pa.

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No. 04-CV-80562-KLR, at *2, *8 (S.D. Fla. filed June 23, 2004), *available at* http://cftc.gov/files/enf/04orders/enfnnext_financial-order.pdf (filed under seal); U.S. Commodity Futures Trading Comm'n v. Bibas Levy Corp., No. Civ. 03-22624, 2003 WL 23190190, at *1, *5 (S.D. Fla. Oct. 20, 2003); U.S. Commodity Futures Trading Comm'n v. Emerald Worldwide Holdings Inc., No. CV03-8339, 2003 WL 23109216, at *1, *4 (C.D. Cal. Nov. 18, 2003); U.S. Commodity Futures Trading Comm'n v. Int'l Foreign Currency, Inc., No. 00-1488, 2003 WL 22410201, at *1, *4 (E.D.N.Y. July 23, 2003); U.S. Commodity Futures Trading Comm'n v. Weinberg, No. 02-02094-CV-RSWL-RNB at *2, *8, *available at* <http://cftc.gov/files/enf/02orders/enfweinberg-sro.pdf>; U.S. Commodity Futures Trading Comm'n v. Rego Gainer Fin., Inc., No. 02-1417-CV-DT-MCX, at *2-3, *7-8 (C.D. Cal. filed Feb. 19, 2002), *available at* <http://cftc.gov/files/enf/02orders/enfregogainer-order.pdf>.

APPENDIX III: INFREQUENT ALTERNATIVES

Commodity Futures Trading Comm'n v. Yanev, No. 2:05CV900, 2005 WL 2991180, at *3 (S.D. Ohio Oct. 11, 2005); U.S. Commodity Futures Trading Comm'n v. Premium Income Corp., No. 05-CV-0416-JJ, at *2, *13 (N.D. Tex. filed Mar. 2, 2005), *available at* <http://cftc.gov/files/enf/05orders/enf-premium-income-corp-order.pdf>; U.S. Commodity Futures Trading Comm'n v. Eustace, No. 05CV2973, 2005 WL 3740316, at *1, *7 (E.D. Pa. June 23, 2005); U.S. Commodity Futures Trading Comm'n v. First Am. Inv. Serv., Inc., No. 04-CV- — - DGP, at *4-5 (S.D. Fla. filed June 10, 2004), *available at* <http://cftc.gov/files/enf/04orders/enffirstamerican-order.pdf>; Commodity Futures Trading Comm'n v. Zelener, No. Civ.A. 03 C 4346, 2003 WL 22359573, at *1 (N.D. Ill. June 30, 2003); U.S. Commodity Futures Trading Comm'n v. Orion Int'l, Inc., No. 03-CV-603-GD, at *2, *13 (D. Or. May 8, 2003), *available at* <http://cftc.gov/files/enf/03orders/enforion-sro.pdf>; Commodity Futures Trading Comm'n v. First Bristol Grp., Inc., No. 02-61160, 2002 WL 31357411, at *1, *7 (S.D. Fla. Aug. 20, 2002).

APPENDIX IV: CFTC DECISIONS THAT DO NOT CITE FED. R. CIV. P.
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U.S. Commodity Futures Trading Comm'n v. People's Alt., Inc., No. 2:10-CV-07013-GAF, at *3, *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfpeoplesorder092210.pdf>; U.S. Commodity Futures Trading Comm'n v. Driver, No. SA 09-cv-0578 ODW (RZx), 2009 WL 3396172, at *5 (C.D. Cal. Aug. 17, 2009); U.S. Commodity Futures Trading Comm'n v. Cornerstone Capital Mgmt., LLC, No. 07-CV-0274-RWS, at *17-18 (N.D. Ga. Jan. 31, 2007), *available at* <http://cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfcornerstoneorder.pdf>; U.S. Commodity Futures Trading Comm'n v. Valko, No. 06-60001-CIV, 2006 WL 2620197, at *4 (S.D. Fla. Jan. 4, 2006); U.S. Commodity Futures Trading Comm'n v. Lake Dow Capital, LLC, No. 05-CV-2709, 2005 WL 3741510, at *6-7 (N.D. Ga. Oct. 19, 2005); Commodity Futures Trading Comm'n v. Yanev, No. 2:05CV900, 2005 WL 2991180, at *3 (S.D. Ohio Oct. 11, 2005); U.S. Commodity Futures Trading Comm'n v. Cromwell Fin. Serv., Inc., No. Civ. 05-CV-210-JD, 2005 WL 3724872, at *2 (D.N.H. June 13, 2005); Commodity Futures Trading Comm'n v. Sonoma Trading Corp., No. 05-60342, 2005 WL 3742849, at *2 (S.D. Fla. Mar. 9, 2005); Commodity Futures Trading Comm'n v. Smithers, No. 05-CV-80592-DTKH, at *4 (S.D. Fla. June 30, 2005), *available at* <http://cftc.gov/files/enf/05orders/enfsmithersorder.pdf>; U.S. Commodity Futures Trading Comm'n v. Int'l Berkshire Grp. Holdings, Inc., No. 05-CV-61588-CMA, at *9 (S.D. Fla. Sept. 29, 2005), *available at* <http://cftc.gov/files/enf/05orders/enfberkshireassetfreezeorder.pdf>; Commodity Futures Trading Comm'n v. Lexington Royce & Assocs., No. 04 CV 02768, 2004 WL 856460, at *3 (S.D.N.Y. Apr. 12, 2004); U.S. Commodity Futures Trading Comm'n v. Schotz, No. 04-CV-8889-SJO, at *8-9 (C.D. Cal. Oct. 27, 2004), *available at* <http://cftc.gov/files/enf/04orders/enf-schotz-sro.pdf>; U.S. Commodity Futures Trading Comm'n v. First Liberty Grp., Inc., No. 04-CV-7609-RWS, at *7-8 (S.D.N.Y. Sept. 27, 2004), *available at* http://cftc.gov/files/enf/04orders/enffirstliberty_order.pdf; U.S. Commodity Futures Trading Comm'n v. Foreign Fund, No. 04-CV-0898-RLE, at *6-7 (S.D.N.Y. Nov. 16, 2004), *available at* <http://cftc.gov/files/enf/04orders/enf-remcocapital-order.pdf>; U.S. Commodity Futures Trading Comm'n v. First Am. Inv. Serv., Inc., No. 04-CV- — -DGP, at *4-5 (S.D. Fla. June 10, 2004), *available at* <http://cftc.gov/files/enf/04orders/enffirstamerican-order.pdf>; U.S. Commodity Futures Trading Comm'n v. A.S. Templeton Grp., Inc., No.

Civ. 03-4999, 2003 WL 23190194, at *11 (E.D.N.Y. Oct. 1, 2003); Commodity Futures Trading Comm'n v. Int'l Funding Ass'n, No. CV031826PHXPGR, 2003 WL 22469911, at *2-3 (D. Alaska Sept. 18, 2003); U.S. Commodity Futures Trading Comm'n v. Sun Platinum Grp., LLC, No. 03 CV 7112, 2003 WL 22469913, at *3 (S.D.N.Y. Sept. 12, 2003); Commodity Futures Trading Comm'n v. Zelener, No. Civ.A. 03 C 4346, 2003 WL 22359573, at *1 (N.D. Ill. June 30, 2003); U.S. Commodity Futures Trading Comm'n v. Investors Freedom Club, L.C., No. 8:03-CV-54-T-17TGW, at *5 (M.D. Fla. Jan. 13, 2003), *available at* <http://cftc.gov/files/enf/03orders/enfifc-order.pdf> (sealed); U.S. Commodity Futures Trading Comm'n v. Global Fin. Consulting, Inc., No. 1:02-CV-2394, 2002 WL 31357171, at *3 (N.D. Ga. Aug. 28, 2002); Commodity Futures Trading Comm'n v. First Bristol Grp., Inc., No. 02-61160, 2002 WL 31357411, at *1, *7 (S.D. Fla. Aug. 20, 2002); U.S. Commodity Futures Trading Comm'n v. Int'l Fin. Serv. (New York) Inc., No. 02-CIV.5497 GEL, 2002 WL 1801723, at *7 (S.D.N.Y. July 17, 2002); U.S. Commodity Futures Trading Comm'n v. Offshore Fin. Consultants of Fla., Inc., No. Civ.A. 02-60769, 2002 WL 1788031, at *7 (S.D. Fla. June 5, 2002); U.S. Commodity Futures Trading Comm'n v. Luger, No. 02-80435, 2002 WL 1789768, at *3 (S.D. Fla. June 3, 2002); U.S. Commodity Futures Trading Comm'n v. Advent Capital Partners, Ltd., No. 1:02-CV-1381, 2002 WL 31357169, at *3 (N.D. Ga. May 22, 2002); U.S. Commodity Futures Trading Comm'n v. Nat'l Bullion & Coin, Inc., No. 00-6885-CV-ZLOCH, at *16-17 (S.D. Fla. filed June 29, 2000), *available at* <http://cftc.gov/files/enf/00orders/enfnbc.pdf>.