

Securities Regulation Daily Wrap Up, TOP STORY—7th Cir.: Appellate panel urged to reject CFTC’s mandamus petition, while CFTC Commissioners seek to intervene, (Oct. 8, 2019)

Securities Regulation Daily Wrap Up

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By [Brad Rosen, J.D.](#)

The defendants assert that the Commission failed to establish the necessary conditions for the issuance of a writ of mandamus, and thus, the district court should move forward with a contempt hearing and testimony from three of the agency’s commissioners.

In response to the CFTC’s recent Petition for Writ of Mandamus filed with the Seventh Circuit Court of Appeals, Defendants, Kraft Foods Group Inc. and Mondelez Global LLC, provide a number of reasons why the appellate panel should reject the Commission’s mandamus petition and the relief that it seeks. If the CFTC’s writ of mandamus was issued, a contempt hearing in the district court requiring the attendance and sworn testimony of three commissioners would be barred, and the case might be reassigned from Judge Robert Blakey to a different district court judge (*CFTC v. Kraft Foods Group, Inc.*, October 7, 2019).

The dispute in [this case](#) revolves around the CFTC’s purported breach of a [consent order](#) entered on August 14, 2019 settling a long-running market manipulation enforcement action pending in the district court. Paragraph 8 of that consent order limited public statements by the parties regarding the settlement. After an emergency hearing held on August 19, 2019, the district court set [an evidentiary hearing](#) to consider contempt and sanctions in connection with the CFTC and various personnel’s conduct with regard to post-settlement press releases on the agency’s website. That prompted the Commission to file [its mandamus petition](#).

Two issues to be considered, and three conditions to be satisfied. According to the defendants’ response, the only two issues actually before the Court are: (1) whether the Judge Blakey can hold a hearing to determine compliance with the consent order and to determine an appropriate contempt sanction if it has been violated, and (2) whether Judge Blakey can order certain "high ranking" CFTC officials to testify. According to the defendants, the answer to both questions is "yes." The defendants also identify three conditions that must be satisfied in order to grant a writ of mandamus and claim the CFTC has failed to do so.

The CFTC has not shown Judge Blakey took any inappropriate action. The defendants assert that the CFTC failed to demonstrate that the district court judge took any action that so far exceeded the proper bounds of judicial discretion so as to be usurpative in nature. The defendants contend that CFTC failed to satisfy this condition because:

- There is no improper criminal inquest pending or threatened in the district court, contrary to the CFTC’s assertion;
- Judge Blakey’s decision to hold a hearing to determine compliance with the consent order is not a clear-cut abuse of power or usurpation of power; and
- Judge Blakey has the authority to take testimony from the commissioners to find facts relevant to the contempt proceeding.

The writ of mandamus is premature and unnecessary. The fact that Judge Blakey has not made any ruling on defendants’ contempt motion, including the substantive legal arguments the CFTC has presented to the appellate court is another reason to reject the Commission’s mandamus petition. It also represents another required condition that has not be satisfied. The defendants also note that once the district court’s ruling occurs, it will be reviewable through the normal appellate process.

No showing has been made that a writ is appropriate under the circumstances. The defendants note that the law requires that a writ of mandamus should not issue for "anything less than an extraordinary situation." They assert that the CFTC has offered no argument on this point other than to rehash its view that high-ranking commissioners should not be compelled to testify. The defendants contend those kind of concerns do not merit mandamus relief. The defendants also argue that directing a district court not to hold a hearing would encroach on the special role district judges play in managing ongoing litigation and holding litigants accountable through their contempt power.

Judge Blakey also believes the appeal is premature. Judge Blakey took the appellate court up on its offer elected to file [a response to the CFTC's mandamus petition](#). The judge noted that the exact nature and scope of Kraft's contempt motion has been in flux, and as a result, had not had an opportunity to rule on the important questions of privilege or other procedural objections. Accordingly, Judge Blakey concluded that the appeal was premature and the CFTC's petition for mandamus should be denied.

Commissioners look to step in. Separately, Chairman Heath Tarbert, as well as Commissioners Dan Berkovitz and Rostin Behnam, together filed [a Motion to Intervene or Alternatively For Leave to File Amicus Brief](#) with the Seventh Circuit in this matter. In support of the motion, the commissioners point out that the district court has required their presence at the stayed evidentiary hearing, plans to question them, read them their Miranda rights, and will subject them to cross-examination, with a possible criminal contempt referral to the U.S. Attorney's Office.

The commissioners also referred to the potential sanctions that the district court is contemplating, which include civil contempt, referral for a potential investigation into criminal contempt, or findings of ethical violations. Accordingly, they assert the appellate court's decision on the Commission's mandamus petition will determine substantial rights of the commissioners and chairman while their interests are not adequately represented by any existing party. Accordingly, they contend their intervention in this proceeding is warranted.

The case is [No. 19-2769](#).

Attorneys: Daniel Davis and Jennifer Ellen Smiley for the CFTC. Dean N. Panos, Kevin McCall, Nicole Allen, and Thomas E. Quinn (Jenner & Block LLP) and Gregory S. Kaufman (Eversheds Sutherland) for Kraft Foods Group, Inc. and Mondelez Global LLC. Zachary Fardon, Christopher O'Malley, and Patrick Otlewski (King and Spalding LLP) for Heath Tarbert, Dan Berkovitz, Rostin Behnam, James McDonald, Susan Gradman, Robert Howell, Stephanie Reinhart, and Neel Chopra.

Companies: Kraft Foods Group, Inc.; Mondelez Global LLC; Mondelez International, Inc.

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