

Securities Regulation Daily Wrap Up, TOP STORY—7th Cir.: Let the sunshine in—Appellate court unseals documents in high-stakes CFTC-Kraft Foods dispute, (Oct. 3, 2019)

Securities Regulation Daily Wrap Up

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

In lifting the veil on a trove of documents previously kept out of the public eye, the Seventh Circuit has provided a window into the ongoing battle between the CFTC and Kraft/Mondelez over the Commission's purported breach of a key settlement provision.

The Seventh Circuit Court of Appeals has unsealed the docket and released numerous documents in the long-running *CFTC v. Kraft Foods* litigation as called for in [its recent order](#). For the first time, an unredacted version of Kraft's motion for contempt, which places Commission leadership in a less than favorable light, has been made publicly available. Also, at the center of the document release is the CFTC's Petition for Writ of Mandamus, where the propriety of the lower court proceeding, as well as the conduct of District Court Judge Blakey, are questioned (*CFTC v. Kraft Foods Group, Inc.*, September 13, 2019).

The current dispute in [this case](#) centers around the CFTC's purported breach of the [consent order](#) entered on August 14, 2019 which settled the case. Paragraph 8 of the consent order limited public statements about the matter by the parties to the terms of settlement and references to public documents.

The unredacted motion for contempt. Kraft's unredacted contempt motion brings a number of assertions, previously unknown to the public, to light. In support of defendants' claim that the CFTC and its Commissioners engaged in a deliberate, orchestrated effort to violate the Court's consent order, the motion alleges:

- On July 31, 2019, the CFTC's Director of Enforcement, Jamie McDonald, requested a call with defendants and their counsel to seek defendants' consent to remove Paragraph 8 from the consent order;
- During the call, McDonald represented that he was making the request on behalf of two unnamed commissioners who wanted the provision removed. He also represented that the purpose of his request was not because any particular commissioner intended to make a statement; rather, it was to vindicate the principle that the CFTC and its commissioners should not be restricted in their ability to speak about settlements or underlying cases;
- McDonald did not inform defendants that the CFTC did not believe its commissioners were bound by the consent order, which would have obviated the need for his request in the first place, nor did McDonald disclose to defendants that Commissioners Berkovitz and Behnam intended to ignore Paragraph 8 regardless of defendants' response; and
- Defendants rejected McDonald's request informing him that they viewed Paragraph 8 as a critical part of the agreement and that removing it would require the parties to start negotiating from scratch, including a renegotiation of the settlement amount.

The defendants' contempt motion is contained in CFTC's mandamus petition in exhibit ECF No. 316.

The CFTC's mandamus petition. The Commission's mandamus petition contains a forceful defense by the Commission and its leadership around the settlement and subsequent public statements. The petition also includes a full-throated attack against District Court Judge Blake for his handling of the matter. For its relief the CFTC is seeking that the appellate court (1) vacate orders setting an unlawful judicial inquest hearing; (2) conduct no such hearings; (3) if the hearing must go forward, reassign the case to a different district judge.

Some of the CFTC's key assertions in the petition include:

- The district court envisions a hybrid criminal and civil evidentiary hearing in response to a motion for civil contempt filed by litigants who contend that certain public statements by the CFTC and two of its Commissioners were inconsistent with a provision in a consent order. By issuing these orders, the CFTC claims, "the district court has so far exceeded the proper bounds of judicial discretion as to be legitimately considered usurpative in character or in violation of a clear and indisputable legal right, or at the very least, patently erroneous and that the injury caused by the challenged orders cannot be repaired by any means other than mandamus";
- Commissioners Behnam and Berkovitz explained their legal bases for issuing their statement. First, referencing the agency's interpretation of Paragraph 8, they explained that the paragraph, on its face, "only limits the statements of the Commission as a collective body. Individual Commissioners, speaking in their own capacities, retain their right and ability to speak fully and truthfully about this matter." Second, they noted that CEA Section 2(a)(10)(C) prohibits the CFTC from restricting individual Commissioners from stating their views on official CFTC determinations;
- The contempt motion makes no textual arguments about the consent order. Rather, it rests primarily on a series of inflammatory factual accusations, unsupported by any declaration or affidavit, falsely accusing the CFTC, commissioners, and staff of "a deliberate, orchestrated effort to violate" the consent order;
- District courts are prohibited by Supreme Court and Circuit precedent, and by the Federal Rules of Criminal Procedure, from conducting inquisitorial proceedings or investigations of allegations of out-of-court contempt; and
- The district court's plan has not followed, and appears not to contemplate following, clearly established Constitutional protections applicable to criminal contempt proceedings, and it does not conform to the Federal Rules of Criminal Procedure.

Next steps. The appellate court has ordered the defendants and other parties-in interest to file a response to the CFTC's mandamus petition by October 7, 2019. Judge Blakey may also file a response by that date as well if he so chooses.

Two other documents unsealed by the Seventh Circuit include the [CFTC's Motion for a Stay of Proceedings in the District Court](#), as well as the [Defendant's Unopposed Motion to Supplement Short Record](#).

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

Attorneys: Daniel Davis and Jennifer Ellen Smiley for the CFTC. Dean N. Panos (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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