No. 19-2769

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: COMMODITY FUTURES TRADING COMMISSION, Petitioner, U.S. COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. KRAFT FOODS GROUP, INC. and MONDELĒZ GLOBAL LLC, Defendants.	Petition for Writ of Mandamus to the United States District Court for the Northern District of Illinois United States District Court for the Northern District of Illinois, No. 15 C 2881, Judge John Robert Blakey

UNOPPOSED MOTION TO SUPPLEMENT SHORT RECORD[1]

Pursuant to Federal Rule of Appellate Procedure 21(a)(2)(C), parties-in-interest Kraft Foods Group, Inc. and Mondelēz Global LLC ("Defendants") move to supplement the short record with the district court filings included as exhibits to this motion, most of which were filed after the CFTC filed its petition in this Court.

[1] In paragraph 4 below, this motion also addresses the Court's September 26, 2019 Order as it relates to placing papers filed in this Court in the public record.

Defendants have consulted with counsel for the petitioner CFTC, who do not oppose this motion.

In support of this motion, Defendants state as follows:

1. On September 13, 2019, the petitioner CFTC filed its petition for a writ of mandamus in this Court and attached certain supporting documents it believed necessary to comply with Federal Rule of Appellate Procedure 21(a)(2)(C) (the "Short Record").

2. Because the CFTC filed its petition before the September 23, 2019 briefing deadline in the district court, however, the CFTC's Short Record does not include parts of the record that may be essential to understand the matters set forth in the petition. See Fed. R. App. 21(a)(2)(C). Specifically, the Short Record does not include:

- The CFTC's supplemental brief in opposition to Defendants' motion for contempt, Dkt. No. 334;
- The CFTC's additional supplemental memorandum regarding privileges it planned to assert at the hearing, Dkt. No. 337;
- Defendants' supplemental brief in support of their contempt motion and in opposition to the CFTC's motion to vacate the hearing, Dkt. No. 339;
- A motion by Commissioners Berkovitz and Behnam and Chairman Tarbert for a status conference, Dkt. No. 344;

- Defendants' response to the Commissioners' motion for a status conference, Dkt. No. 351.

3. Accordingly, Defendants have attached to this motion the filings discussed above, all of which were filed in this district court after the CFTC's petition for a writ of mandamus and which are essential for a complete record, consistent with Rule 21(a)(2)(C). *See* Exs. 1 through 5.

4. In keeping with this Court's September 26, 2019 order denying the CFTC's motion to file under seal, Defendants are not seeking to file the included materials under seal. Defendants filed their initial motion for contempt in the district court under seal and in public redacted form to comply with the district court's Consent Order. Defendants filed their subsequent briefs under seal to comply with the district court's August 19 Order that future filings be under seal, which the Court ordered by agreement of the parties and in part to protect the confidential nature of its settlement conferences. *See* Dkt. Nos. 319; 326 at 32:7-25. Because this Court denied the CFTC's motion to file similar materials under seal on the basis of the district court's order, however, Defendants are not seeking to file the attached materials under seal. Any such motion

would be based on the same reason as the CFTC's motion, *see* App. Dkt. No. 3, and Defendants are not aware of any statute or recognized privilege that requires secrecy as identified in this Court's September 26, 2019 Order.

WHEREFORE, Defendants respectfully request that this Court grant their motion to supplement the short record to include the district court filings attached as Exhibits 1 through 5 to this motion.

Dated: October 1, 2019

Respectfully submitted,

KRAFT FOODS GROUP, INC. and MONDELĒZ GLOBAL LLC

/s/ Dean N. Panos

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No. 19-2769

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: COMMODITY FUTURES TRADING COMMISSION, Petitioner, U.S. COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. KRAFT FOODS GROUP, INC. and MONDELĒZ GLOBAL LLC, Defendants.	Petition for Writ of Mandamus to the United States District Court for the Northern District of Illinois United States District Court for the Northern District of Illinois, No. 15 C 2881, Judge John Robert Blakey

AFFIDAVIT OF THOMAS E. QUINN

Thomas E. Quinn, being first duly sworn upon oath, deposes and states as follows:

1. I have personal knowledge of the facts stated herein.

2. I am an associate at the law firm of Jenner & Block LLP, 353 N. Clark, Chicago, Illinois 60654, counsel for parties-in-interest Kraft Foods Group, Inc. and Mondelēz Global LLC.

3. I certify that the filings attached as Exhibits 1 through 5 are true and correct copies of the documents filed in the district court at Dkt. Nos. 334, 337, 339, 344, and 351.

4. On October 1, 2019, I conferred with Daniel Davis, counsel for the petitioner CFTC, who stated that the CFTC has no objection to the motion to supplement the short record with the attached filings.

FURTHER AFFIANT SAYETH NOT.

/s/ Thomas. E. Quinn
Thomas E. Quinn

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case may not CM/ECF users. I have emailed and mailed by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following participants:

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By: /s/ Thomas E. Quinn

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S. COMMODITY FUTURES TRADING COMMISSION, **Plaintiff,** **v.** **KRAFT FOODS GROUP, INC. and MONDELĒZ GLOBAL LLC,** **Defendants.**	**Civil Action No: 15-2881** **Hon. John Robert Blakey**

PLAINTIFF U.S. COMMODITY FUTURES TRADING COMMISSION'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR CIVIL CONTEMPT

UNDER SEAL

Paragraph 8 of the Consent Order is clear on its face that it restricts only a "party" in this action—Defendants[1] and the CFTC. (ECF No. 310 at 3, § I, ¶ 8.) No individual Commissioner is a party to the Order. Stymied by the text the parties agreed to, the Motion relies not on any principled interpretation of the Consent Order, but on a false and wholly irrelevant conspiracy theory. The sole threshold questions here are who is a "party" and did any "party" violate the text of the Consent Order. That is true not only as a matter of law, but pursuant to the agreement itself—the Consent Order mandates that "[n]othing" outside the written text of the document can modify its meaning. (ECF No. 310 at 6, § IV, ¶ 6.) Kraft cannot change that either.

Indeed, if the Court were to determine that the word "party" could somehow include individual Commissioners,[2] Paragraph 8 would be invalid. Section 2(a)(10)(C) of the Commodity Exchange Act ("CEA") explicitly prohibits the CFTC from restricting an individual Commissioner from issuing a concurring or dissenting statement in connection with an official CFTC determination. 7 U.S.C. § 2(a)(10)(C). The CFTC therefore does not have the authority to enter into a Consent Order that contains such a restriction and has operated accordingly. If the Court believes that Paragraph 8 does that, the restriction cannot remain in the agreement consistent with federal law. There is no contempt and Kraft's motion must be denied.[3]

BACKGROUND

The CFTC is an independent federal agency charged with enforcing the CEA, 7 U.S.C. §§ 1, *et seq*. Its responsibilities include policing "futures" markets against the use of

[1] Defendants Kraft Foods Group, Inc. and Mondelēz Global LLC are referred to herein either as "Kraft" or "Defendants."

[2] The term "Commissioner" is used herein to mean any of the five members of the CFTC including the Chairman, except where specifically referring to the Chairman.

[3] The CFTC submits this supplemental brief in accordance with the Court's August 19, 2019 minute order regarding supplemental filings and memoranda of law. (ECF No. 319.) The CFTC has moved for an order vacating the evidentiary hearing. *See* Emergency Motion to Vacate or Stay (ECF No. 324). In the event that the hearing will take place, the CFTC anticipates submitting additional filings regarding immunity and evidentiary privileges in accordance with the same minute order.

manipulative or deceptive devices. The CFTC alleged in its Complaint that Defendants violated the CEA by, among other things, using a manipulative device in connection with wheat futures trades on the Chicago Board of Trade, reaping approximately $5.4 million in illicit profits. (ECF No. 1, ¶¶ 1, 40.) Although the Consent Order is clear on its face—and therefore should be the end of the inquiry as to its meaning—Defendants' motion resorts to a settlement conspiracy story riddled with conjecture and inflammatory allegations related to settlement discussions and attempts to take the Court on a completely irrelevant journey to determine willfulness, which the motion simultaneously admits is unnecessary to rule on the motion (ECF No. 316 at 4-5).

A. The March 2019 Settlement Conference.

On March 22, 2019, this Court held a settlement conference, and at the conclusion of the conference, went on the record to "articulate the material terms for the record." Mar. 22, 2019 Sealed Tr. at 4. Among these was a provision that "[n]either party" could make a statement about the case other than to refer to the terms of the settlement agreement or to public documents filed in the case. *Id*. The Court added that approval by the Commission "pursuant to its rules and regulations" was also "a material term." *Id*. at 6. Subsequently, the parties agreed on language of a Consent Order settling the case that included the agreed-upon material terms.

B. The Full Commission Must Approve Official Actions By Majority Vote Through Specific Codified Procedures.

The CFTC voted to approve the Consent Order pursuant to applicable rules and regulations. The CFTC consists of five members appointed by the President and confirmed by the Senate. 7 U.S.C. § 2(a)(2)(A). No more than three members may be of the same political party. *Id*. Each enjoys a degree of autonomy. One serves as Chairman, *id*. § 2(a)(2)(B), and exercises the executive and administrative functions of the CFTC, including the authority to appoint and direct the CFTC's staff, *id*. § 2(a)(6)(A). There is an exception, however, for

"[p]ersonnel employed regularly and full time in the immediate offices of Commissioners other than the Chairman." *Id.* § 2(a)(6)(D). Each Commissioner appoints, directs, and oversees his or her own staff. This structure resembles the division of authority in a federal court where the chief judge hires and oversees most of the court's personnel, but not staff members of other judges. Commissioners' offices prepare their own speeches, statements, and policy papers. Each Commissioner enjoys attorney-client privilege with his or her own staff counsel.

On August 19, the Court inquired whether the Commissioners are "agents" of the CFTC. They are not.[4] Like other multi-member agencies, the CFTC's authority "runs to it as 'an entity apart from its members'," and only "its institutional decisions *** bear legal significance." *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1169 (D.C. Cir. 2016). Only a majority of Commissioners "is empowered to act for the body." *Id.* (citation omitted).[5] Voting follows one of two codified procedures: a Commission meeting or the "seriatim" process. 17 C.F.R. § 140.12. Seriatim involves each Commissioner receiving a packet that includes a statement of and basis for the proposed action, and a sheet for each Commissioner to record his or her vote. Commissioners vote serially. The CFTC approved the Kraft settlement via this process.[6]

Individual Commissioners regularly issue separate statements in connection with an official action. Those are not subject to review by or vote of the Commission. Section 2(a)(10)(C) of the CEA requires that the Commission publish "any" such statement "in full":

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[4] Unlike CFTC staff, who are agents when they act or speak on behalf of the CFTC.

[5] The CFTC's regulations specify how the Commission exercises its authority, including by voting, 17 C.F.R. § 140.12, and through Commission-approved delegations to individuals in specified circumstances, *e.g., id.* § 140.11 (emergency action by a single commissioner). There is no applicable delegation here. Thus, no Commissioner had express or implied authority to speak for the Commission on this matter, and none purported to do so. Indeed, Commissioners typically include a statement to this effect in their public remarks. *See, e.g.*, Keynote Address of Commissioner Dan M. Berkovitz at Energy Risk 2019, Houston, TX, May 14, 2019 ("[T]he views I express today are my own and do not represent the views of the Commission, its staff, or any of my fellow Commissioners."); *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/opaberkovitz3.

[6] The Commissioners could not deliberate as a group in private, because the Government in the Sunshine Act, 5 U.S.C. § 552b, generally prohibits a quorum of the Commission (*i.e.*, three or more members), from doing so, absent public notice of the meeting and the application of a specific exemption to close such meeting. No such closed meeting was noticed or held.

> Whenever the Commission issues for official publication any opinion, release, rule, order, interpretation, or other determination on a matter, ***the Commission shall provide that any dissenting, concurring, or separate opinion*** by any Commissioner on the matter ***be published in full*** along with the Commission opinion, release, rule, order, interpretation, or determination.

7 U.S.C. § 2(a)(10)(C) (emphases added). The provision therefore "compels the disclosure of the viewpoints of all of the Commissioners on a given matter, whether they are in the majority or in the minority." 137 Cong. Rec. S4599-01 (April 17, 1991) (statement of Sen. Lugar), 1991 WL 60789 at *7. Because individual Commissioners' statements are not subject to a majority vote, they are not "collective, institutional action," *Public Citizen*, 839 F.3d at 1170, and they "cannot be considered as an official expression of the will and the intent" of the Commission, *SEC v. Nat'l Student Mktg. Corp.*, 68 F.R.D. 157, 160 (D.D.C. 1975).

C. The Court Entered the Consent Order and the CFTC Issued a Press Release with Links to a Statement of the CFTC and a Statement of Commissioners Behnam and Berkovitz Speaking in Their Own Capacities, and Not for the Agency.

On August 14, 2019, the Court entered the Consent Order settling the case. It includes the limitation in Paragraph 8 on the right of any "party" to make public statements:

> Neither party shall make any public statement about this case other than to refer to the terms of this settlement agreement or public documents filed in this case, except any party may take any lawful position in any legal proceeding, testimony, or by court order.

(ECF No. 310 at 3, § I, ¶ 8.)

The Consent Order also includes an integration clause in which the parties agreed that "[n]othing" outside the written text of the document itself modifies its meaning:

> Entire Agreement and Amendments: This Consent Order incorporates all of the terms and conditions of the settlement among the parties hereto to date. Nothing shall serve to amend or modify this Consent Order in any respect whatsoever, unless: (a) reduced to writing; (b) signed by all parties hereto; and (c) approved by order of this Court.

(ECF No. 310 at 6, § IV, ¶ 6.) The Consent Order further recited that the Commission had acted pursuant to the CEA, which, as noted above, includes the requirement that the Commission publish all statements by individual Commissioners. 7 U.S.C. § 2(a)(10)(C).

On August 15, the district court dismissed the action with prejudice. (*See* ECF No. 311.) The CFTC then issued a press release ("Press Release"), including a three-sentence quote by the Chairman about the importance of wheat markets and about market manipulation generally:

> America is the breadbasket of the world; wheat markets are its heart. Market manipulation inflicts real pain on farmers by denying them the fair value of their hard work and crops . . . [i]t also hurts American families by raising the costs of putting food on the table. Instances of market manipulation are precisely the kinds of cases the CFTC was founded to pursue.

(*See* ECF No. 316, Ex. 1.) The quote said nothing about Defendants or, as Defendants admit in a footnote, any allegation in the case (*see* ECF No. 316 at 4 n.3). The Press Release also linked to: (1) a "Statement of the Commission" (*id.*, Ex. 2) approved by all five Commissioners ("Commission Statement"); and (2) a "Statement of Commissioners Dan M. Berkovitz and Rostin Behnam Regarding the Commission's Settlement with Kraft Foods Group, Inc. and Mondelēz Global LLC," in "their own capacities" as "[i]ndividual Commissioners" (*id.*, Ex. 3).[7]

SUMMARY OF ARGUMENT

For the following reasons, the Court must deny Kraft's motion:

First, no Commissioner violated Paragraph 8, because no individual Commissioner is a "party" to the case. The Court must interpret the Consent Order as it would any other contract, confining its analysis to the four corners of the document, and giving each word its ordinary meaning. *See infra* Section I. Unless a person has violated an "unequivocal command" that leaves "no reasonable doubt" as to "what" is prohibited and "who" is bound, the Court may not

[7] It is clear from the terms of their concurring statement that Commissioners Berkovitz and Behnam were speaking in their individual capacities as Commissioners and not on behalf of the entire Commission.

hold them in contempt. *Id*. at p. 7. In that inquiry, the Court may not consider extrinsic evidence. *Id.* at pp. 7-8. Kraft in fact *agreed* in the Consent Order that no extrinsic evidence can modify the terms of the settlement, *id.* at 7-8, 9, and does not even argue that any Commissioner violated an unequivocal command within the document. Nor could they. Thus, no individual Commissioner is bound by Paragraph 8, and the Court may not hold any individual in contempt.

Second, Section 2(a)(10)(C) requires the CFTC to publish in full any separate statement of a Commissioner in connection with an official Commission determination. 7 U.S.C. § 2(a)(10)(C). Therefore, if the Court were to determine that individual Commissioners are somehow "parties" within the meaning of Paragraph 8 or are otherwise restrained by it, the paragraph is invalid, and the Court must strike it from the Consent Order.

Third, nothing in any statement by the CFTC or the Commissioners violates Paragraph 8. Kraft complains about four quotes from the Commission itself, but all four are either permissibly confined to the terms of the settlement and public documents filed in the case (as expressly permitted by Paragraph 8), or do not refer to Defendants or any allegation against them and are therefore outside the scope of the provision. Accordingly, the Court may not hold the agency in contempt.

Fourth, the CFTC, Commissioners, and CFTC staff possess several immunities and privileges that support confining the threshold inquiry regarding the proper interpretation of the Consent Order to the four corners of the document.

ARGUMENT

I. No Commissioner Violated an "Unequivocal Command," as Required to Support a Finding of Contempt.

A court must interpret a consent decree as it would any contract. *Bailey v. Roob*, 567 F.3d 930, 940 (7th Cir. 2009). The document's meaning resides within its "four corners," *United*

States v. Armour & Co., 402 U.S. 673, 682 (1971), the "plain language" controls, *United States v. City of Northlake*, 942 F.2d 1164, 1167 (7th Cir. 1991), and the Court must give each term its ordinary meaning, *United States v. Huebner*, 752 F.2d 1235, 1244 (7th Cir. 1985).[8]

A court may hold a person in contempt of a consent decree only if that person violated a provision that "sets forth in specific detail an unequivocal command which the party in contempt violated." *Manez v. Bridgestone Firestone N. Am. Tire, LLC*, 533 F.3d 578, 591 (7th Cir. 2008). The provision must leave "no reasonable doubt" either about "what behavior" is prohibited or "*who*" is subject to the command. *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 17 (1st Cir. 1991) (emphasis added). That requires "clear and unambiguous" notice to the alleged contemnor that the order "is directed *at them*." *Id*. (emphasis added). A court must read a decree "to mean rather precisely what [it] say[s]" and cannot "bootstrap" in a "legally separate person." *NBA Props., Inc. v. Gold*, 895 F.2d 30, 32-33 (1st Cir. 1990) (Breyer, J.).

While, in other contexts, a court may rely on extrinsic evidence to interpret an ambiguous consent decree, it may *never* do so for contempt, because "the very ambiguity necessitating such evidence rules out the possibility that the respondent has violated the *unequivocal* command of a court order." *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir. 1993) (emphasis in original).

In this case, the Consent Order itself also prohibits Kraft from relying on extrinsic facts: Paragraph 6 of part IV states that the "Consent Order incorporates all of the terms and conditions of the settlement" and "[n]othing shall serve to amend or modify it" without further "writ[ten]" agreement "approved by an order of this Court." (ECF No. 310 at 6, § IV, ¶ 6.) This

[8] The D.C. Circuit has held that courts should defer to an agency's reasonable construction of the terms of a contract, settlement agreement, or other document that creates legal rights. *See A/S Ivarans Rederi v. United States*, 938 F.2d 1365, 1368-69 (D.C. Cir. 1991). *But see Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1570-71 (D.C. Cir. 1987) (applying *Chevron* framework to interpretation of contracts, but expressing concern where the agency is self-interested).

"integration clause" is just as binding in a consent decree as in any other contract. *See J.C.C. Food & Liquors v. United States*, 133 F.3d 555, 558 n.3 & 559 (7th Cir. 1998). Kraft agreed to it and cannot disavow it simply because it regrets limiting Paragraph 8 with the word "party."

The word "party" is unambiguous. It means "[o]ne by or against whom a lawsuit is brought." *Black's Law Dictionary* (11th ed. 2019); *see also* 5 U.S.C. § 551(3) (defining "party" in relevant part as "a person or agency named or admitted as a party"). The CFTC brought this lawsuit as an agency; no individuals are parties; and the Consent Order correctly identifies the parties, "Plaintiff U.S. Commodity Futures Trading Commission" and "Defendants Kraft Foods Group, Inc. and Mondelēz Global LLC." (ECF No 310 at 1.) Because this plain language "unambiguously provides an answer to the question at hand, the inquiry is over," *City of Northlake*, 942 F.2d at 1167 (citation omitted), and the Court may not hold any individual non-party Commissioner in contempt for their statements.

If there were any doubt that "party" means what it says, language elsewhere in the decree confirms that it means a plaintiff or defendant: Paragraph 10 of part IV applies the Court's injunction not only to Defendants, but also more broadly:

> . . . upon Defendants, upon ***any person under their authority or control,*** and upon ***any person who receives actual notice of this Consent Order insofar as he or she is acting in active concert or participation with Defendants***.

(ECF No. 310 at 7, § IV, ¶ 10 (emphases added).) Where a contract uses "substantially different words to address analogous issues," that "signifies a different approach." *Taracorp, Inc. v. NL Indus., Inc.*, 73 F.3d 738, 744 (7th Cir. 1996). Unlike Paragraph 10, the agreed-upon language of Paragraph 8 does not reach anyone who is not a "party"—the Defendants and the agency.

For a consent decree to bind both a government entity and the individuals within it, the order must say so explicitly. *See, e.g.*, *Spallone v. United States*, 493 U.S. 265, 268 (1990)

(binding "the City of Yonkers, its officers, agents, employees, successors, and all persons in active concert or participation with any of them"); *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) (enjoining the Attorney General "and all acting under her direction and control"). In *Spallone*, the Supreme Court held that it was an "abuse of discretion" to impose contempt sanctions against four members of the Yonkers city council for disobeying a consent decree, when only the city itself and a city agency were parties to the litigation or named in the relevant provision. 493 U.S. at 274. Contempt could not lie against the individual councilmembers despite the fact that the city's legislative powers were vested in the council, and for "all practical purposes" the city could act only "through the city council." *Id.* at 269; *see also Kohn v. Mucia*, 776 F. Supp. 348, 356 (N.D. Ill. 1991) (dismissing suit against individual officials acting in their official capacity as redundant to suit against the city itself). Thus, where a multi-member agency like the CFTC is the named party in a lawsuit, its constituent members are not parties and may not be held in contempt of an order that makes no direct reference to them. *See Union Pac. R. Co. v. Village of S. Barrington*, 958 F. Supp. 1285, 1291 (N.D. Ill. 1997) (dismissing all claims against municipal board members because "[i]t is well-settled law that claims against municipal officials in their official capacities are really claims against the municipality and, thus, are redundant when the municipality is also named as a defendant").

Defendants do not even claim that Paragraph 8 unambiguously binds individual Commissioners. They say that was its "*purpose*" and that "the Court knows" it was "a critical issue during settlement discussions" (ECF No. 316 at 2) (emphasis in original), and they give a fictional account of a sweeping conspiracy to violate the order. But neither Kraft's purposes, nor even the Court's, are relevant except as stated with precision in the order's text, *Armour*, 402 U.S. at 682; *Project B.A.S.I.C.*, 947 F.2d at 18, and the Court may not consider extrinsic

evidence, both as a matter of law and as agreed to by the parties in the Consent Order (ECF No. 310 at 6, § IV, ¶ 6.) Nor is Kraft's conspiracy story even relevant, because, Kraft concedes, intent is not even an element of civil contempt. (ECF No. 316 at 4.)

Defendants complain that the CFTC as an entity is "amorphous." (ECF No. 316 at 6). This is absurd. And as Defendants admit, *they* are the ones who "insist[ed] on the terms" of this language, which they describe as "heavily negotiated." (*Id.* at 7 n.5, 9.) And if the reference in Paragraph 8 to a "party" were too "amorphous," that would "rule[] out" holding the Commissioners in contempt for violating it. *See D. Patrick*, 8 F.3d at 460.[9]

Finally, Defendants assert that the CFTC "endorsed" the Concurrence by linking to it in the press release. (ECF No. 316 at 6.) But common sense says sharing a link is not an endorsement. In any event, given the requirement of Section 2(a)(10)(C), providing a link to the Concurrence in the press release cannot be contemptuous.

Accordingly, no individual Commissioner's statement (including the Chairman's quote) is within the scope of Paragraph 8.

II. If Paragraph 8 Bars Individual Commissioners from Making Statements, the Court Must Strike It from the Consent Order.

The CFTC could not and did not bargain away the individual Commissioners' rights under CEA Section 2(a)(10)(C) to publish "in full" "any dissenting, concurring, or separate opinion." 7 U.S.C. § 2(a)(10)(C). Parties may not agree in a consent order to "take action that conflicts with or violates the statute upon which the complaint was based." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 526 (1986). Thus, if the Court determines that Paragraph 8 unequivocally proscribes individual Commissioners from

[9] What Defendants did secure was a restriction on what CFTC staff (*i.e.*, non-Commissioners) can say about the settlement, and where they are acting as agents of the Commission. As Defendants point out, when the CFTC settles an administrative enforcement action, it typically will issue official findings in its own name. (*See* ECF No. 316 at 2.) That is the sort of statement the CFTC agreed to refrain from issuing here.

publishing their own views on why they voted for the settlement, the provision would violate Section 2(a)(10)(C), and the Court must strike it from the Consent Order. The rest of the Consent Order would remain in force. (ECF No. 310 at 6, § IV, ¶ 7 ("If any provision or if the application of any provision or circumstance is held invalid, then the remainder of th[e] Consent Order . . . shall not be affected by the holding.").)

III. No Statement by the Commission, the Chairman, or the Commissioners[10] Violates Paragraph 8.

Kraft objects to four sentences from the Commission itself, which it claims violate Paragraph 8 (ECF No. 316 at 8), and also appears to raise passing grievances about the Chairman's quote in the Press Release without directly challenging it. All of these objections are based on self-serving and tendentious readings of the documents at issue, and would require an unreasonable interpretation of Paragraph 8 to which the CFTC never agreed. Kraft's collection of gripes is also trivial to the point where Kraft cannot claim any plausible harm. For example:

1. "The $16 million penalty is approximately three times defendants' alleged gain."

This is a permissible reference to "the terms of th[e] settlement agreement [and] public documents filed in the case": The Complaint alleges that Kraft earned more than $5.4 million from CEA violations (ECF No. 1, ¶¶ 25, 40); and the Consent Order imposes a penalty of $16 million, an amount 2.96 times as large (ECF No. 310 at 4, § III, ¶ 1). This sentence revealed no new information and could not plausibly have harmed Kraft.

[10] Paragraph 8 does not bind individual Commissioners, as discussed *supra*. Even if the Court finds that Paragraph 8 binds individual Commissioners or that the individual Commissioners' statements are attributable to the Commission, the statements in the Concurrence do not violate Paragraph 8. The Concurrence was largely devoted to general legal and policy considerations regarding the settlement of government enforcement cases, the implications of settlements that do not include explicit findings, and the need for CFTC commissioners to be able to publicly express their views on public matters. In addition, the statement explained why these Commissioners voted for the Consent Order based on their personal beliefs. The statements about the case specifically do not extend beyond information available in public documents.

2. "We are pleased to bring this matter to a successful resolution, which terminates more than four years of litigation."

This is a permissible reference to the collective "terms of th[e] settlement," including the fact that the case was resolved, and to the 2015 date of the Complaint. The anodyne phrase "[w]e are pleased to bring this matter to a successful resolution" after four years of litigation does not imply "a victory for the agency" as Kraft suggests (ECF No. 316 at 2)—there is no such thing as "unsuccessfully" bringing a matter to a resolution, and there is no possible harm to Kraft caused by this statement. Indeed, Kraft could have said the same thing.

3. "The Commission believes that the Consent Order advances our mission of fostering open, transparent, and competitive markets."

This is a permissible reference to the "terms of th[e] settlement agreement [and] public documents filed in the case." The phrase "fostering open, transparent, and competitive markets" is from the CFTC's public mission statement, which derives from the purpose provision of the CEA. *See* 7 U.S.C. § 5.[11] The Complaint states that the CFTC's mission is enforcing the CEA, and it cites the statute in full. The fact that that the Commission believes the settlement advances its mission says nothing beyond the fact that it settled the case (because it obviously would not have otherwise settled), let alone information that could possibly harm Kraft.

4. "We do not expect the Commission to agree to similar language in the future, except in limited situations where our statutory enforcement mission of preventing market manipulation is substantially advanced by the settlement terms and the public's right to know about Commission actions is not impaired."

Kraft misrepresents this as stating "[the CFTC] only agrees to limitations such as those in Paragraph 8 'where our statutory enforcement mission of preventing market manipulation is substantially advanced by the settlement terms'." (ECF No. 316 at 8.) The actual text is a statement about what the CFTC expects to do "in the future." The Consent Order does not apply

[11] The exact phrase "foster[]open, transparent, and competitive markets" appears in the CFTC's public mission statement, published at https://www.cftc.gov/About/MissionResponsibilities/index.htm.

to any future cases. The only reference to this case is the phrase "similar language," which is a permissible reference to "terms of th[e] settlement."

5. "'America is the breadbasket of the world; wheat markets are its heart. Market manipulation inflicts real pain on farmers by denying them the fair value of their hard work and crops,' said Chairman Heath P. Tarbert. 'It also hurts American families by raising the costs of putting food on the table. Instances of market manipulation are precisely the kinds of cases the CFTC was founded to pursue'."

The Chairman's quote in the Press Release nowhere mentions the Defendants or this case and is a generic statement about the importance of American wheat and the Commission's commitment to policing markets against manipulation. Defendants misrepresent it as stating that "the settlement remedied conduct that inflicted 'real pain on farmers'" and "hurt American families," but elsewhere admit that the quote does not refer to the allegations against Kraft. (ECF No. 316 at 3-4 & n.3 ("The CFTC never alleged that Kraft deprived farmers of the fair value of their hard work and crops, nor that Kraft raised the cost of putting food on the table.").) Accordingly, the Chairman's quote does not violate the Consent Order.[12]

* * *

Defendants' objections are based on an overbroad and unreasonable interpretation of the Consent Order. The CFTC did not agree to it, and the CEA does not countenance it. Nor would the Seventh Circuit, which recognizes a strong public interest in "presumptively public" government. *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (2000). Because the Court's reading of Paragraph 8 must be based on the plain text of the Consent Order and may not violate applicable federal law, Defendants' self-serving interpretation to the contrary cannot hold.

[12] In addition to being a general statement about the CFTC's enforcement priorities, as discussed *supra*, because the quote is attributed (and attributable) only to the Chairman, it is not covered by Paragraph 8 in any event.

IV. Applicable Immunities and Privileges Support Confining the Contempt Analysis to the Four Corners of the Consent Order

The Commission, Commissioners, and Commission staff possess several immunities and privileges that provide additional reasons to enforce the standards for evaluating civil contempt and interpreting consent decrees described above.[13] First, to the extent the Commission, its members, or staff perform "certain functions analogous to those of a prosecutor," they receive absolute immunity from suit for the performance of those functions. *Butz v. Economou*, 438 U.S. 478, 515 (1978) ("The Commodity Futures Trading Commission, for example, may initiate proceedings whenever it has 'reason to believe' that any person 'is violating or has violated any of the provision of this chapter or of the rules, regulations, or orders of the Commission.'"). *See also Barr v. Mateo*, 360 U.S. 564 (1959) (acting director of government agency enjoys absolute immunity against claim of libelous statement in press release). Even if absolute immunity does not apply, government officials receive qualified immunity for performing official functions. In other words, "government officials performing discretionary functions generally are shielded for liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Officials who meet this standard should not be subject "to the costs of

[13] As the CFTC noted in its Motion to Continue, the Department of Justice ("DOJ") accepted representation on behalf of those individuals ordered to testify at the October 2 hearing and initially assigned the case to the U.S. Attorneys' Office for the Northern District of Illinois. On September 11, 2019, DOJ informed the CFTC that representation will be reassigned to private counsel. As some of these immunities and privileges apply to individuals as opposed to the CFTC, the CFTC preemptively raises them here and does not waive for itself or for any of the individuals ordered to testify on October 2 any applicable immunity or privilege. The arguments raised here should in no way be deemed to waive or limit any assertions of immunity or privilege by any of the individuals ordered to testify on October 2. Indeed, members of the Commission (including the Chairman) and CFTC staff are not legally allowed to testify unless and until the Commission authorizes them to do so. 17 C.F.R. § 144.3(b) ("In any proceeding, an employee or former employee of the Commission shall not testify concerning non-public matters related to the business of the Commission unless authorized to do so by the Commission upon the advice of the General Counsel."); *id.* § 144.0(a) ("Employee as used in this Part includes both members and employees of the Commission."); *see also id.* § 144.5 (describing considerations regarding requests for oral testimony). A CFTC attorney lacks authority to accede to a request for testimony without first receiving Commission approval.

trial or the burdens of broad-reaching discovery." *Id.* at 817-18.[14] This test emphasizes the "objective reasonableness of an official's conduct" and seeks to avoid "disruption of government." *Id.* at 818.

In addition, the deliberative process privilege and attorney-client privilege either severely or entirely limit additional discovery into the agency's deliberations that led to the Commission's vote on the Consent Order.[15] "The deliberative process privilege protects communications that are part of the decision-making process of a governmental agency." *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (citation omitted). This privilege promotes "frank discussion of legal and policy matters [that] is essential to the decision-making process of a governmental agency." *Id.* Only "a sufficient showing of a particularized need to outweigh the reasons for confidentiality" defeats the privilege. *Id.* If the information sought is not relevant, like the information sought here, the privilege controls. *Id.* at 1390.

Second, the attorney-client privilege applies to both communications between the Commission and its counsel and to members of the Commission and their respective counsel. *See In re Grand Jury Investigation*, 399 F.3d 527, 533 (2d Cir. 2005); *In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir. 1998). These privileges and immunities all reinforce the wisdom of following the standard for evaluating civil contempt and consent decrees described in Part I.

CONCLUSION

For the foregoing reasons, the Court should deny Kraft's Motion. In the alternative, it should strike Paragraph 8 from the Consent Order.

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[14] Cases regarding absolute immunity and qualified immunity arise primarily in constitutional torts or Section 1983 cases against government officials for monetary damages. The same rationale for those immunities applies with equal force to a civil contempt proceeding, particularly one to enforce a private claim.

[15] In accordance with the Court's August 19, 2019 minute order regarding supplemental filings and memoranda of law, (ECF No. 319), the CFTC anticipates submitting additional filings asserting any privileges that it will claim with respect to the evidentiary hearing currently set for October 2, 2019.

Date: September 12, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2019, I served the foregoing on all counsel of record via the Court's ECF system.

/s/Daniel J. Davis

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S. COMMODITY FUTURES TRADING COMMISSION, **Plaintiff,** **v.** **KRAFT FOODS GROUP, INC. and MONDELĒZ GLOBAL LLC,** **Defendants.**	**Civil Action No: 15-2881** **Hon. John Robert Blakey**

PLAINTIFF U.S. COMMODITY FUTURES TRADING COMMISSION'S MEMORANDUM REGARDING PRIVILEGES THAT WOULD APPLY AT AN EVIDENTIARY HEARING ON DEFENDANTS' MOTION FOR CONTEMPT

UNDER SEAL

The Commodity Futures Trading Commission ("CFTC" or "Commission") respectfully submits this supplemental memorandum of law in accordance with the Court's order dated August 19, 2019 (ECF No. 319), to explain the privileges that the CFTC would assert should the hearing scheduled for October 2, 2019, occur. For many reasons, the hearing as planned is unnecessary and should not proceed. (*See, e.g.*, ECF No. 324.) But if it does, the testimony will be limited by several privileges. The Commission does not yet know specifically what will be asked, so it is only possible to address this topic at a high level of generality. However, the subjects discussed at the August 19, 2019 hearing suggest that the questioning would intrude impermissibly upon communications protected by the deliberative process and attorney-client

privileges, and the protections of attorney work product.[1] In particular, no Commissioner, including the Chairman, has any non-privileged information relevant to this proceeding, and the CFTC will accordingly assert the deliberative process privilege on a blanket basis with respect to their testimony. The CFTC requests that the Court rule on the assertion of the deliberative process privilege before October 2, 2019, so that the CFTC can consider and seek immediate appellate review of any adverse ruling on the CFTC's deliberative process privilege claim, and so that counsel for the CFTC has adequate time to consult with the Commission about the possibility of appeal, as required under Illinois Rule of Professional Conduct 1.6.[2]

The Commission will assert privileges as to other witnesses' testimony on a question-by-question basis.[3]

ARGUMENT:

A Hearing Would Implicate Information Protected by Multiple Privileges.

Defendants' Contempt Motion is premised on the false allegation that "the CFTC and its Commissioners engaged in a deliberate, orchestrated effort to violate the Court's Consent Order within minutes of its entry." (ECF No. 316 at 1.)[4] There is no evidence to support that, nor

[1] This brief addresses privileges belonging to the CFTC as an entity. Communications between individual Commissioners and their own staff may be subject to an independent deliberative-process or attorney-client privilege that belongs to those individual Commissioners. The CFTC does not waive any privilege belonging to any individual. In addition, under the common interest doctrine, the attorney-client privilege extends to communications among CFTC attorneys and attorneys for the individuals whom the Court has ordered to be present for the contempt hearing insofar as the CFTC and the individuals share common legal interests. The CFTC also reserves the right to assert any other privileges or objections that may apply to any specific question.

[2] Illinois Rules of Professional Conduct provide that in the event of an adverse ruling on a "nonfrivolous" privilege claim, "the lawyer must consult with the client about the possibility of appeal." Ill. R. Prof'l Conduct (2010) R. 1.6 cmt. 15.

[3] Because CFTC attorney Scott Williamson was going to be out of the country for the original date of the evidentiary hearing (September 12, 2019), the Court's docket entry indicates that Mr. Williamson would need to file a sworn factual proffer. Should the evidentiary hearing occur on October 2, 2019, as currently scheduled, Mr. Williamson will be available to testify in person as to non-privileged matters.

[4] Defendants Kraft Foods Group, Inc., and Mondelēz Global LLC are herein referred to collectively as "Defendants."

would it be relevant even if that false story were true. *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir. 1993) (holding that a court may not consider extrinsic evidence to determine whether a party is in contempt of a written order); *CFTC v. Premex, Inc.*, 655 F.2d 779, 782-83 (7th Cir. 1981) (holding that intent is irrelevant on a motion for contempt). Indeed, Defendants conceded as much in their Contempt Motion (ECF No. 316 at 4), and tellingly did not even ask for an evidentiary hearing to prove their conspiracy theory in the first place. It was only when, at the August 19, 2019 hearing, the Court indicated mistakenly that it needed evidence to "make findings on state of mind," "the totality of the circumstances," and other issues (ECF No. 326 at 6-7), that Defendants suddenly decided they needed a fishing expedition into the Commission's internal communications and deliberations. The Commission need not, however, divulge such information.[5]

The Commission anticipates that it would assert privileges in response to questions covering subjects including, but not necessarily limited to, the following:

[5] At the August 19 hearing, the court discussed whether the CFTC itself would assert the Fifth Amendment privilege against self-incrimination, and counsel did so protectively. However, on further consideration, the privilege does not apply. The Fifth Amendment "applies only to natural individuals," *see Braswell v. United States*, 487 U.S. 99, 101 (1988), and does not apply to collective entities – organizations recognized as an independent entity apart from its individual members. *See Bellis v. United States*, 417 U.S. 85, 91 (1974).

- Commissioners' deliberations on how to vote during the seriatim process;
- Settlement proposals;
- Mediation or settlement planning or strategy;
- Strategy and planning concerning communications with Defendants and their representatives, and any analysis of such communications;
- Interpretation of any term in the Consent Order, both before and after the Court entered it;
- Whether any proposed action would comply with the terms of the Consent Order;
- Drafting, planning, analyzing, or considering statements to be made, if any, upon the Court's entry of the Consent Order, including but not limited to the Press Release, Statement of the Commission, or the Concurrence (collectively the "Statements"); and
- Section 2(a)(10)(C) of the Commodity Exchange Act, 7 U.S.C. § 2(a)(10)(C).

a. Communications protected by the deliberative process privilege, to which no exception applies.

"The deliberative process privilege protects communications that are part of the decision-making process of a governmental agency." *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-152 (1975)). A communication is protected if it is "predecisional in the sense that it is actually antecedent to the adoption of an agency policy, and deliberative in the sense that it is actually . . . related to the process by which policies are formulated." *Enviro Tech Int'l, Inc. v. U.S. E.P.A.*, 371 F.3d 370, 375 (7th Cir. 2004) (internal quotations and citation omitted); *see also Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (deliberative process privilege applies when the information is inter- or intra-agency, predecisional, and deliberative).

The privilege covers deliberations directly involving high-ranking officials, *United States v. Zingsheim*, 384 F.3d 867, 872 (7th Cir. 2004) (citing *Cheney v. District Court*, 542 U.S. 367 (2004); *United States v. Nixon*, 418 U.S. 683 (1974)), and also deliberations of other staff so long as the elements are satisfied, *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482-83 (2d Cir. 1999). The communications need not reflect the policy of the agency itself—the personal

opinions of the writer will suffice, so long as the communication is predecisional and deliberative. *S.E.C. v. Sentinel Mgmt. Grp., Inc.*, No. 07 C 4684, 2010 WL 4977220, at *3 (N.D. Ill. Dec. 2, 2010) (citing *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)); *Bobkoski v. Bd. of Educ. of Cary Consol. Sch. Dist. 26*, 141 F.R.D. 88, 93 (N.D. Ill. 1992); *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 80 (2d Cir. 2002). The privilege also covers "factual matters inextricably intertwined with" predecisional deliberations. *Enviro Tech Int'l, Inc.*, 371 F.3d at 375.

"[I]n the vast majority of cases," an agency's internal discussions about litigation are "protected by the privilege." *Bobkoski*, 141 F.R.D. at 93; *see, e.g.*, *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 939 (10th Cir. 2005) (reasons for government's motion to dismiss *qui tam* case protected by deliberative process privilege). Discussions about settlement strategy in particular "necessarily involve a governmental entity's deliberative process whereby the entity's members review and select among various options presented." *Bobkoski*, 141 F.R.D. at 93; *see also Tumas v. Bd. of Educ. of Lyons Twp. High Sch. Dist. No. 204*, No. 06 C 1943, 2007 WL 2228695, at *2 (N.D. Ill. July 31, 2007) (protecting school board's "litigation strategy . . . including the possibility of settlement").

Deliberative process privilege covers not only deliberations about the agency or officials' underlying activities, but also the "decision of how and what to communicate to the public, which is a decision in and of itself." *N.H. Right to Life v. U.S. Dep't of Health & Human Servs.*, 778 F.3d 43, 53–54 (1st Cir. 2015) (holding that communications about "the Department's decision . . . to publicly announce" an action were protected); *Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Lynch*, 156 F. Supp. 3d 101, 111–12 (D.D.C. 2016) (documents "about how to respond to . . . media inquiries" were protected); *see Judicial Watch v.*

U.S. Dep't of Homeland Sec., 736 F. Supp. 2d 202, 208 (D.D.C. 2010) (similar); *ICM Registry, LLC v. U.S. Dep't of Commerce*, 538 F. Supp. 2d 130, 137 (D.D.C. 2008) (internal e-mails about how to present an agency decision to the public were covered); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Labor*, 478 F. Supp. 2d 77, 83 (D.D.C. 2007) (email messages discussing the agency's response to news article were covered).[6]

Defendants in this case are explicitly targeting communications about the CFTC's settlement strategy, formulation of the Statements, and the legal analysis contained within the Concurrence. But the deliberative process privilege protects communications within the CFTC that relate to the categories listed above, *supra* p. 3, including but not limited to litigation or settlement strategy, or to the making or formulation of any of the Statements, or other actual or contemplated public communication.

1. Defendants have no particularized need for materials protected by the deliberative process privilege.

The deliberative process privilege is a qualified one, but only a showing of a sufficient particularized need that outweighs the reasons for confidentiality can overcome it. *Farley*, 11 F.3d at 1389. Where information is not relevant to the controversy before the court, a party cannot, as a matter of law, make a showing of need. *See id*. at 1389-90. In other words, relevance is necessary but not sufficient, and particularized need is a higher standard. Moreover, even where there is a particularized need, the court is required to "balance" that consideration "against their nature and the effect of disclosure on the government." *Id.* at 1390. The

[6] Certain courts in the Southern District of New York have taken a more restrictive approach about agency "messaging," by limiting the privilege to messaging decisions tied with the agency's central policy mission. *See New York v. U.S. Dep't of Commerce*, No. 18-CV-2921, 2018 WL 4853891 (S.D.N.Y. Oct. 5, 2018). The court has explained that "the privilege protects only those 'messaging' communications that are both 'predecisional' and 'deliberative' with respect to a 'messaging' decision of the type that Congress has actually (if perhaps only impliedly) asked the agency to make." *Id*. at *2. Deliberations regarding the Statements are protected under that test too. *See, e.g.*, 7 U.S.C. § 2(a)(10)(C) (requires that the Commission publish any Commissioner's concurrence or dissent).

Defendants cannot even establish relevance, let alone a particularized need or that the balance of considerations favors breaking the privilege.

Internal communications within the CFTC are not relevant, because the Contempt Motion depends on whether the Statements themselves violate the text of the Consent Order. Neither intent nor any other facts or circumstances are in issue. *D. Patrick*, 8 F.3d at 460; *Premex*, 655 F.2d at 782-83. That is true both as a matter of law and under the Consent Order itself. (ECF No. 310, § 4, ¶ 6 (providing that the Consent Order "incorporates all of the terms and conditions" and "[n]othing" modifies or amends it without written agreement and the Court's approval).) Because Defendants cannot show relevance, they *a fortiori* cannot show particularized need. *Farley*, 11 F.3d at 1389-90 (holding that relevance is insufficient).

It would also inflict serious harm on the government to intrude here on the deliberative process. "The deliberative process privilege protects agencies from being 'forced to operate in a fishbowl'." *Elec. Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 7 (D.C. Cir. 2014) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)). It is imperative that when settlements are discussed within an agency, when a decision-maker must interpret a court order, or when policy-makers are determining how to vote, they and agency staff may engage in "frank discussion" without fear that "each remark is a potential item of discovery and front-page news." *See Klamath Water Users Protective Ass'n*, 532 U.S. at 9. The policy considerations are heightened in a situation like this one involving what government officials may communicate to the public. These considerations substantially outweigh Defendants' belief that the CFTC and certain Commissioners were wrong about the Consent Order, and their professed need to probe how it is that it came about.

2. Defendants' false conspiracy story cannot overcome the deliberative process privilege.

Defendants' specious allegations of misconduct do not impact the result. While "the deliberative process privilege yields 'when government misconduct is the focus of the lawsuit'," *United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 527 (N.D. Ind. 2005) (quoting *Tri–State Hosp. Corp. v. United States*, 226 F.R.D. 118, 134–35 (D.D.C. 2005)), that "exception is simply a restatement of the principle that the deliberative process privilege does not apply when the government's intent is at issue." *Id*. Intent is at issue only where a party's claim rests on the government's decision-making process itself. *Id*.; *see also Saunders v. City of Chicago*, Nos. 12 C 9158, 12 C 9170 & 12 C 9184, 2015 WL 4765424, at *17–18 (N.D. Ill. Aug. 12, 2015) (intent must be necessary to prove the claim). As Defendants admit, that is not the case for their claims. (ECF No. 316 at 4.)

Moreover, Defendants cannot overcome the privilege through accusations unsupported by evidence. "The purpose of the deliberative process privilege would be defeated if all a party had to do was claim misconduct every time it did not like the outcome of a government decision or policy and they wanted access to the thought process." *Convertino v. U.S. Dep't of Justice*, 674 F. Supp. 2d 97, 105 (D.D.C. 2009). Accordingly, the burden is not "upon the government to prove a negative, *i.e.*, to prove in the first instance that a document does *not* reveal any government misconduct." *Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice*, 102 F. Supp. 2d 6, 15 (D.D.C. 2000); *see also Lahr v. NTSB*, 569 F.3d 964, 980 (9th Cir. 2009) ("[D]isproving the general, substantive allegations of misconduct is not the government's obligation."); *see also In re United States*, 398 F.3d 615, 618 (7th Cir. 2005) ("[T]he United States Attorney is not answerable to a judge for the deliberations among his staff. . . . A federal court must evaluate

lawyers' final submissions-that is, must review outputs rather than inputs. . . . The Judicial Branch is limited to assessing counsel's public deeds.").

Defendants' attempt to substantiate their allegations is misguided. First, they opine that it is "obvious from the statements at issue that the CFTC, its Commissioners, and possibly certain of its enforcement lawyers and General Counsel, assisted with drafting all three statements while they waited for the Court to ender the Consent Order." (ECF No. 316 at 6.) But that is not "obvious"—it is made up. All Commissioners have their own legal advisors, and both authors of the Concurrence are lawyers—one previously served as senior counsel to the CFTC's Senate oversight committee, and the other was the agency's General Counsel. More importantly, consulting counsel before acting is evidence of *good* faith, not bad. Second, Defendants note that the Statements were released "simultaneously as part of a coordinated effort." (*Id.*) But nobody disputes that the Press Release contained a link to the other two statements, or that the Commission's press office would have received the Concurrence from the concurring Commissioners or their staff. That is not a conspiracy, and it is no basis to intrude upon the agency's deliberative process.

b. Communications protected by the attorney-client privilege, to which no exception applies.

Defendants insinuate that if CFTC Commissioners or staff consulted attorneys, that is evidence of wrongdoing. (ECF No. 326 at 8-9; ECF No. 316 at 6.) The *opposite* is true: People consult lawyers "to find out how to obey the law," *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (citation omitted), or out of "due care" to ensure that a contemplated action is legal, *Hildebrand v. Steck Mfg. Co.*, 279 F.3d 1351, 1355 (Fed. Cir. 2002). "Much of what lawyers actually do for a living consists of helping their clients comply with the law." *United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996). That is not nefarious—it is the fundamental purpose

of consulting a lawyer before acting. *Id.* ("Lawyers are constantly called upon to tell people, in advance of action or developed controversy, what their duties are to other people and to the government."); *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 30 (N.D. Ill. 1980) (rejecting characterization as an effort to "get around" the law). The purpose of the attorney-client privilege is to encourage those consultations. *Upjohn Co.*, 449 U.S. at 389.

"The attorney-client privilege protects communications made in confidence by a client and a client's employees to an attorney, acting as an attorney, for the purpose of obtaining legal advice." *Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 618 (7th Cir. 2010) (citing *Upjohn Co.*, 449 U.S. at 394–99; *Trammel v. United States*, 445 U.S. 40, 51 (1980)). It applies both to private parties and attorney-client communications within government. *Zingsheim*, 384 F.3d at 871; *In re Grand Jury Investigation*, 399 F.3d 527, 532-33 (2d Cir. 2005); *In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir. 1998). Indeed, the privilege takes on additional importance in the government context, because it protects not only the attorney-client relationship in the immediate litigation, it also serves a broader public interest in the ability of government officials to obtain "the confidential advice of counsel regarding the legal consequences of their past and present activities and how to conform their future operations to the requirements of the law." *Sandra T.E.*, 600 F.3d at 621.

Defendants' false allegations of a conspiracy change nothing. They do not, for example, provide any basis for the crime-fraud exception. *United States v. BDO Seidman, LLP*, 492 F.3d 806, 818 (7th Cir. 2007). To invoke that exception, a party must demonstrate—using evidence—probable cause to believe that (1) "a crime or fraud has been attempted or committed;" and (2) "the [attorney-client] communications were in furtherance thereof." *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d763, 769 (7th Cir. 2006) (citing *In re Richard Roe, Inc.*, 68 F.3d 38,

40 (2d Cir. 1995)). At all points, the information sought must be relevant to the underlying inquiry. As explained above, any invocation of the crime-fraud exception here would fail at this first step. But even if Defendants could satisfy the relevance requirement, that would be insufficient: Evidence that communications were relevant to crime or fraud is not enough; the communications must have been intended by the client to facilitate or conceal the unlawful activity. *In re Richard Roe, Inc.*, 68 F.3d at 40. Thus, the exception generally will not apply "where a client seeks counsel's advice to determine the legality of conduct before taking action." *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 642 (8th Cir. 2001) (citations omitted).

The required probable cause cannot be established by allegations or speculation; a party invoking the exception must "present prima facie evidence that gives color to the charge by showing some foundation in fact." *United States v. Boender*, 649 F.3d 650, 655–56 (7th Cir. 2011) (quoting *BDO Seidman*, 492 F.3d at 818). Such evidence then allows the district court to require the party asserting privilege "to come forward with an explanation for the evidence offered against [it]." *Id.* The district court then exercises its discretion in accepting or rejecting the explanation. If necessary, the court may examine the communications to determine whether the objective was crime or fraud—but *only* if there is a "showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Id.* (quoting *United States v. Zolin*, 491 U.S. 554, 572 (1989)).

Defendants have no such evidence, because there is none. The only evidence they supply consists of the Statements themselves, which lend no support to their conspiracy theory. All Defendants can point to is a legal justification in the Concurrence with which they disagree.

That is no evidence at all, nor is their string of unfounded and false accusations. There is no basis here to intrude upon attorney-client communications.

c. Communications protected by the work-product doctrine, for which there is no substantial need that justifies requiring disclosure.

Defendants' accusations may implicate communications with or at the direction of attorneys in anticipation of litigation for the purpose of analyzing and preparing aspects of this case. For example, Defendants may be attempting to put at issue settlement strategy. Those communications are protected work product. *Sandra T.E.*, 600 F.3d at 618 (citing Fed. R. Civ. P. 26(b)(3); *United States v. Nobles*, 422 U.S. 225, 238–39 (1975); *United States v. Smith*, 502 F.3d 680, 689 (7th Cir. 2007)). The privilege protects "mental processes of the attorney." *Klamath Water Users Protective Ass'n*, 532 U.S. at 8 (citation omitted). Its purpose "is to establish a zone of privacy in which lawyers can analyze and prepare their client's case free from scrutiny or interference by an adversary." *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006) (citation omitted).

Work-product protection is qualified, but it may only be overcome by showing of substantial need by the party seeking discovery of the privileged materials. *See* Fed. R. Civ. P. 26(b)(3); *Hobley*, 433 F.3d at 949–50. For all the reasons given, no extrinsic evidence is relevant to Defendants' Contempt Motion, much less could there be a need sufficient to overcome the work-product privilege. *See Farley*, 11 F.3d at 1389-90.

CONCLUSION

For the foregoing reasons, the bulk of what Defendants appear to seek at the October 2 hearing is likely to be privileged.

Date: September 23, 2019 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2019, I served the foregoing on all counsel of record via the Court's ECF system.

/s/Daniel J. Davis

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

U.S. COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. KRAFT FOODS GROUP, INC. and MONDELĒZ GLOBAL LLC, Defendants.	)	Case No. 15 C 2881 Judge John Robert Blakey

DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR CONTEMPT, SANCTIONS, AND OTHER RELIEF AND IN OPPOSITION TO THE CFTC'S MOTION TO VACATE THE OCTOBER 2, 2019 HEARING

FILED UNDER SEAL

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INTRODUCTION

The CFTC concedes that Section I, Paragraph 8, of the Consent Order ("Paragraph 8") applies to it, and prohibits the CFTC and the entirety of its staff from "mak[ing] any public statement about this case other than to refer to the terms of this settlement agreement or public documents filed in this case . . . ." Dkt. No. 310 at § I.8. The CFTC is therefore in contempt, and Defendants are entitled to relief, for any statements made by the CFTC that violate Paragraph 8.

At the same time, the CFTC asserts that the very Commissioners who comprise and control the CFTC can say whatever they want because they are somehow not part of the CFTC and thus not subject to the prohibition in Paragraph 8. The CFTC claims to rely on the plain language of the Consent Order to support its position, yet it points to no language that limits the application of Paragraph 8 to only some members of the CFTC, nor does it identify language which exempts from Paragraph 8 Commissioners issuing official statements, such as those at issue here.

Contrary to the CFTC's tortured reading, the unambiguous language of Paragraph 8 makes clear that Paragraph 8 applies to the CFTC in its entirety, including all of its constituent parts. This interpretation of Paragraph 8 is consistent with a common sense reading of its terms, as well as the relevant provisions of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* ("CEA"), all of which make clear that the CFTC is comprised of, and necessarily includes, its Commissioners.

The CFTC and certain Commissioners have also twice admitted through their words and conduct that the CFTC and Commissioners are bound by Paragraph 8. As Defendants demonstrate, before the Commissioners voted to approve the settlement agreement, CFTC Enforcement Division attorneys (on two occasions) told Defendants' counsel and corporate representatives that certain Commissioners wanted to remove Paragraph 8 because they did not

want to be limited by a court as to what they could say about the case. During those communications, the CFTC's Director of Enforcement stated the Commissioners' desire to remove Paragraph 8 was a matter of principle and not because any Commissioner wanted to make a statement about the case. Defendants refused to remove Paragraph 8, and the Commissioners voted unanimously to approve the Consent Order, including Paragraph 8.

The CFTC makes several ancillary arguments in an attempt to avoid Paragraph 8, all of which are meritless. First, the CFTC contends that neither it, nor the Commissioners, violated Paragraph 8 by posting the Commissioners' statement to the CFTC website because the CEA required the CFTC to post that statement. *See, e.g.*, Dkt. No. 334 at 1 (relying on 7 U.S.C. § 2(a)(10)(C)). That is simply untrue. As made clear by its title, Section 2(a)(10)(C) applies to the transmission of budget requests and legislative recommendations to congressional committees, not to statements about enforcement actions, which are governed by 7 U.S.C. § 12 (titled "Public disclosure"). Section 12 does not require the CFTC or Commissioners to make any statements, and in fact appears to prohibit portions of the statements at issue. Moreover, even if Section 2(a)(10)(C) did apply to the type of statements at issue here, the CFTC's obligation to publish a Commissioner's statement under that provision applies only when the CFTC first makes a statement itself, which it had no obligation to do.

The CFTC's arguments as to why the substance of all three statements comport with Paragraph 8 also fail. The CFTC's and Commissioners' statements impermissibly, and in some instances falsely, characterize the case and the settlement in direct contravention of Paragraph 8. Indeed, the CFTC fundamentally ignores that the statements of the CFTC and Commissioners are almost entirely devoted to commentary about the settlement, including their claim that Defendants manipulated the market—which Defendants did not admit and continue to deny.

These are precisely the types of statements Paragraph 8 prohibits. The CFTC's contrary view depends on an unreasonable interpretation of Paragraph 8 that is inconsistent with its unequivocal language, and guts Paragraph 8 of any meaning, in direct contravention of basic contract interpretation principles that require the Court to give effect to Paragraph 8's clear terms.

Finally, the CFTC's argument that Defendants have no remedy to redress the CFTC's and Commissioners' significant and numerous violations of the Consent Order fails because neither sovereign immunity, nor any other privilege or protection, applies to the relief Defendants are requesting as identified in this motion.

ARGUMENT

I. Paragraph 8 Applies To Statements By The CFTC, Its Chairman, And Its Other Commissioners

The CFTC's chief argument in response to Defendants' motion is that its Commissioners' statement is not subject to Paragraph 8 because the Commissioners are "legally distinct" from the CFTC. *See* Dkt. No. 318 at 1. The CFTC also claims the Commissioners are not subject to Paragraph 8 because that provision applies only to a "party," which means only "the agency as a legal entity" but not the individuals who comprise it. *Id*. at 2; *see also* Dkt. No. 334 at 8. Neither variation of the argument excuses compliance. The Commissioners are part of the CFTC and the only ones who can bind the agency to a settlement. *See infra* § I.A. They are bound as any other officer, director, or employee of a party would be. *Infra* § I.B. They admitted they were bound. *Infra* § I.C. And even if the Commissioners truly were "legally distinct" non-parties, they are subject to the Consent Order's prohibition on statements pursuant to Federal Rule of Civil Procedure 65. *Infra* § I.D. In fact, as far as Defendants can tell, the CFTC's August 15, 2019 "Statement of the Commission" marks the first time any federal agency has claimed its

commissioners, acting in their official capacities, are not subject to the prohibitions in an agreement they voted for and approved on the agency's behalf just days before.

A. Paragraph 8 restricts the statements of the Commissioners because they are part of the CFTC

Despite filing four substantive briefs in this case, the CFTC has identified no authority for its novel view that the Commissioners are "legally distinct" from the CFTC and thus exempt from court orders directed to the agency.[1] There is no such authority because it would conflict with the plain text of the CEA, the structure of the CFTC organization, and the Commissioners' role in this case—all of which demonstrate the Commissioners are part of the CFTC.

The CEA makes clear the Commissioners are, in fact, the CFTC. As enforcement counsel told this Court, the CFTC "*is composed of* and governed by five Commissioners." Ex. 5 (citing 7 U.S.C. § 4a(a)(2)) (emphasis added); *see also* 7 U.S.C. § 2(a)(2)(A) (the CFTC "shall be composed of five Commissioners"). The CEA empowers the Commissioners, and only the Commissioners, to "exercise all the powers of the Commission." *Id*. at § 2(a)(3). The structure of the organization confirms the same. On its own website, the CFTC states that "[t]he CFTC organization *consists of the Commissioners*, the offices of the Chairman, and the agency's operating units," and provides the organizational chart attached as Exhibit 6.[2]

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[1] In its first response, the CFTC relied on its supposed obligation to publish Commissioners' statements as a basis for the broader argument that Commissioners are completely separate from the agency. *See* Dkt. No. 318 at 1-2. The CFTC appears to have abandoned that position in its subsequent filings, nor does the argument make sense. Congress enacted the provision on which the CFTC relies, 7 U.S.C. § 2(a)(10)(C), in 1992—18 years after it created the CFTC in 1974. If Congress intended to alter something as fundamental as the official status of Commissioners, that intent would be evident in the legislative history. It is not. *See infra* § III.A.

[2] *See* CFTC Organization, available at https://www.cftc.gov/About/CFTCOrganization/index.htm (last visited September 21, 2019) (last updated August 19, 2019).The organizational chart is available by clicking on the "CFTC Organization" hyperlink on the website, or at https://www.cftc.gov/About/CFTCOrganization/index.htm.

As it relates to this case, the Commissioners were the *only* individuals authorized to initiate the litigation and then settle it on behalf of the CFTC. Ex. 5. The Commissioners even participated in the settlement negotiations when they directed enforcement lawyers to ask Defendants to remove Paragraph 8. The Commissioners are the individuals who comprise the CFTC as an "entity" and are the ones responsible for conducting its affairs, which they did by authorizing this litigation, negotiating the terms of the settlement, and ultimately approving it. They are not "legally distinct" in any relevant respect.[3]

B. The Commissioners are subject to the restriction in Paragraph 8 just as any party officer, director, or employee is subject to the same restriction

The CFTC's alternative theory, that Paragraph 8 does not bind the Commissioners because it applies only to a "party" entity in the abstract, is similarly untenable. The CFTC claims that its "staff" (who it does not identify) remain subject to the restrictions of Paragraph 8, but offers no plausible reason—or reference to relevant language or authority—to support distinguishing between its staff and the Commissioners.[4] Of course, the CFTC assured the Court that *Defendants'* officers, directors, and employees are bound by Paragraph 8. *See* Dkt. No. 326 at 14:3-21 (Court: "Do you think . . . the CEO of Kraft or the board of directors can issue their

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[3] Despite the CFTC's claim that its Commissioners issued the statements in their "official, but individual, capacities"—a non sequitur—it is clear the Commissioners were acting in their official capacities. *See* Dkt. No. 318 at 4; *see also* Dkt. No. 334 at 9 (arguing claims against individuals acting in official capacities are "redundant" if organization is also named as defendant).

[4] In fact, if credited, the CFTC's "four corners" argument would exclude its staff from compliance as well, rendering Paragraph 8 functionally useless to Defendants. *See, e.g.*, *All. to End Repression* v. *City of Chicago*, 742 F.2d 1007, 1013 (7th Cir. 1984) ("it is permissible to construe [even] unambiguous language where construction is necessary to determine the intended rather than the literal meaning of the decree") (quoting *White* v. *Roughton*, 689 F.2d 118, 120 (7th Cir. 1982)). The CFTC points to Section IV, Paragraph 10 ("Paragraph 10") to argue that if the parties intended Paragraph 8 to bind more than an entity, it would have used the language in Paragraph 10. Setting aside that Paragraph 10 concerns only Defendants and an unrelated injunction, applying it to Paragraph 8 would necessarily exempt the CFTC's staff and Defendants' officers, directors, and employees as well—all people the CFTC *concedes* must comply with Paragraph 8's restrictions.

own press release with impunity under the consent order?" CFTC Counsel: "I think not."). Yet the CFTC again points to no language in Paragraph 8, or other any other provision or authority, that supports applying Paragraph 8 differently to the CFTC than to Defendants.

In addition to being logically inconsistent, the CFTC's argument ignores how courts enforce consent orders. Courts routinely hold the officers of a corporation to account for their roles in defying a judicial directive issued to the entity. For instance, in *Wilson* v. *United States*, which affirmed the coercive imprisonment of a corporation's president for the corporation's defiance of a subpoena, the Supreme Court explained: "[a] command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs." 221 U.S. 361, 376 (1911). Based on this general rule, numerous courts have used contempt remedies against individuals based upon an organization's defiance of a court order. *See, e.g.*, *Carpenters Health & Welfare Fund of Philadelphia* v. *Special Servs. for Bus. & Educ., Inc.*, 2011 WL 2162902, at *3 (E.D. Pa. Jun. 1, 2011); *E.E.O.C.* v. *Local 28 of the Sheet Metal Workers' Int'l Ass'n (SMW)*, 1983 WL 493, at *1-2 (S.D.N.Y. Mar. 21, 1983).

Paragraph 8 is clear. It applies to the CFTC and to Defendants, neither of which may thwart the Court's Order by having Commissioners, officers, directors, or employees make the prohibited statements instead.[5]

[5] Although the Commissioners need not be named parties to be bound, Defendants note that the case law the CFTC offers supports finding that the Commissioners are, in fact, parties to the case and the settlement. In *Sterling Drug Inc.* v. *F.T.C.*, the D.C. Circuit stated that FTC "Commissioners were *obviously parties* to the . . . decision" that occurred as part of a merger enforcement action. 450 F.2d 698, 707 (D.C. Cir. 1971) (emphasis added); *see also* Dkt. No. 318 at 5 (relying on *Sterling Drug*). The authority the CFTC offers in its supplemental filing fares no better. In *Spallone* v. *United States*, the Supreme Court refused to allow sanctions against elected officials to compel them to vote in a certain way, because the Court did not *first* try to secure compliance by sanctioning only the City. 493 U.S. 265, 280 (1990). The legislative immunity concerns in *Spallone* are not present here because the Commissioners are not elected legislators, nor is the Court compelling them to vote for anything—they already voted unanimously to approve the settlement. Moreover, limiting contempt to the CFTC

C. The CFTC and its Commissioners admitted the Commissioners are constrained by Paragraph 8

As noted in Defendants' opening motion, in the days leading up to the parties' submission of the agreed Consent Order, the Commissioners made multiple requests to Defendants through enforcement counsel to remove Paragraph 8, because the Commissioners did not want to be bound by it. *See* Dkt. No. 315 at 2-3, 5-6. Those requests are admissions that the Commissioners *would* be subject to Paragraph 8 if they chose to approve the Consent Order as written, which the Commissioners did via unanimous vote. The CFTC's new interpretation is nothing more than an attempt to manufacture an excuse and blur what was unambiguously clear to all sides when the parties' agreed to the Consent Order and the Court entered it.

As set forth in more detail in the Declaration of J. Kevin McCall, submitted as Exhibit 1 to this brief, on July 26, 2019, CFTC Chief Trial Counsel Robert Howell called Kevin McCall, counsel for Defendants. Mr. Howell stated that he had been directed to ask if Defendants would agree to delete Paragraph 8 because certain Commissioners, and possibly others, did not like being limited by a court as to what they could say about the case. Ex. 1, McCall Decl. ¶¶ 5-6. Mr. Howell stated that he had explained to "them" (presumably the Commissioners and/or the senior attorneys communicating the Commissioners' request) that Paragraph 8 reflected the agreement the Division of Enforcement and Defendants had negotiated. *Id.* ¶ 6. Notwithstanding that explanation, Mr. Howell said he was told to request that Defendants agree to delete Paragraph 8. *Id.* Mr. McCall reiterated to Mr. Howell the importance of Paragraph 8 to Defendants. *Id.* ¶ 7. Mr. Howell further stated that if Defendants did not agree to remove the provision, the Commissioners would vote on the settlement as-is, and may or may not approve it.

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in the first instance would not be effective because the CFTC's position is that it cannot compel the Commissioners to comply with Paragraph 8.

Id. ¶ 5. Defendants later informed Mr. Howell they would not agree to remove Paragraph 8. *Id.* ¶ 8.

On July 29, counsel of record for the CFTC expressed a desire for representatives of the CFTC to speak directly with Defendants' client representatives to communicate the request to remove Paragraph 8. CFTC counsel described this call as a "principals call." *Id.* ¶ 9. Before that call could be arranged, CFTC counsel informed Defendants the CFTC no longer needed the "principals call." *Id.* ¶ 11. In all of their substantive communications, Defendants' counsel advised CFTC enforcement counsel that Paragraph 8 must remain in the agreement as negotiated. *Id.* ¶¶ 7, 12.

On July 30, after the morning status hearing before this Court, Mr. Howell informed Defendants that Director of Enforcement James McDonald again desired to have the "principals call" with Defendants' client representatives to discuss removing Paragraph 8. *Id.* ¶ 16. Defendants agreed to have that call and, on July 31, participated in a call with Defendants' client representatives, Defendants' counsel, Mr. McDonald, and other lawyers from the CFTC. *Id.* ¶ 17. During the call, Mr. McDonald stated that certain (unnamed) CFTC Commissioners wanted to remove Paragraph 8 from the Consent Order. *Id.* ¶ 18. He stated that no Commissioner planned to make a statement. *Id.* Instead, the Commissioners desired to remove the provision to vindicate the principle that Commissioners should not be limited in what they can say about a case, and to avoid setting a precedent for future settlements. *Id.* At no time did Mr. McDonald state or otherwise imply that the Commissioners, or anyone else at the CFTC, believed the Commissioners to be exempt from the prohibitions in Paragraph 8. *Id.* ¶ 19. Defendants again

rejected the Commissioners' request, notwithstanding McDonald's caution that the Commissioners may not approve the agreement if it included Paragraph 8.[6] *Id.* ¶¶ 20-21.

On August 8, Mr. Howell informed Defendants that the Commissioners had approved the settlement, which included Paragraph 8, and that he was authorized to execute the Consent Order and submit it to the Court. *Id.* ¶ 22. Defendants later learned from the CFTC's press release that Commissioners voted unanimously to approve the agreement.

Paragraph 8 is unambiguous: it plainly applies to the Commissioners. But even if it were not, the CFTC cannot credibly claim its Commissioners did not understand the "unequivocal command" that they refrain from making statements beyond those allowed by Paragraph 8. *See* Dkt. No. 334 at 6-7. As reflected by the representations made on their behalf by the enforcement attorneys, the Commissioners had no doubt about "who" was subject to the Order, or "what behavior" it proscribed. *Id.* at 7. There would be no need for them to direct enforcement counsel to request the removal of Paragraph 8 if the Commissioners did not believe it restricted their statements. Based on the above conduct, the CFTC and its Commissioners are clearly precluded from arguing for the exact opposite interpretation of Paragraph 8.

D. Even if the Commissioners are legally distinct non-parties, they cannot circumvent the prohibitions in Paragraph 8

Even if the Court credits the CFTC's novel and tortured reading to carve the Commissioners out of the Consent Order, the Commissioners still had to comply with Paragraph 8 because Paragraph 8 is tantamount to an injunction. That means it binds "the parties' officers, agents, servants, employees, and attorneys," and "other persons who are in active

[6] At the October 2 hearing, Defendants will be prepared to present the testimony of multiple witnesses, including the "principals" from Kraft and Mondelēz, to confirm McDonald's statements to them.

concert or participation with" the parties' officers, agents, servants, employees, or attorneys, as long as those people have actual notice of the Order. Fed. R. Civ. P. 65(d)(2).

A consent order is a contract "[f]rom the standpoint of interpretation," but "from the standpoint of remedy it is an equitable decree," meaning Rule 65 applies when determining who is bound. *Cook* v. *City of Chicago*, 192 F.3d 693, 695 (7th Cir. 1999); *see also State Indus. Prod. Corp.* v. *Beta Tech. Inc.*, 575 F.3d 450, 457 (5th Cir. 2009) (determining consent order subject to Rule 65 because it required parties to abide by terms and prohibited them from taking certain actions, and because "the district court retained jurisdiction to enforce it, further indicating the consent judgment's injunctive nature"). The CFTC's argument that its Commissioners are not officers or agents is accordingly irrelevant. The Commissioners obviously work in "active concert" with the staff who the CFTC admits are bound by the Order.[7] Nor can there be any question that the Commissioners had "actual notice" of the Order—the overriding purpose of the Commissioners' statement was to undermine Paragraph 8. *See* Dkt. No. 315 Ex. 3 at 1 (stating purpose of statement was to explain to "the public the basis for the sanctions obtained"). The Commissioners' statement therefore represents a violation of the Order or, at the very least, a basis to find them in contempt for causing the CFTC to publish statements that violated the Order.[8]

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[7] If the CFTC claims they do not, that presents a factual issue for which the Court may determine it needs a hearing to resolve.

[8] Courts will also find conduct by a nonparty to be contemptuous when the nonparty participated in a "conscious and continuous scheme to thwart the court's decree." *United States* v. *Schine*, 260 F.2d 552, 556 (2d Cir. 1958). As discussed above, the extent of coordination between the Commissioners and the staff, and whether that coordination rises to the level of a scheme to thwart the Court's Order, present factual issues for which the Court may order a hearing to resolve.

II. The CFTC Violated The Consent Order By Publishing The Commissioners' Statement On Its Website And By Linking To It In A Press Release

Regardless whether Paragraph 8 restricts the Commissioners' statements, the CTFC does not dispute that statements by the "entity" must comply with the Order. The CFTC "the entity" violated Paragraph 8 when it published its own prohibited statements (as addressed in Section IV below), when it published the Commissioners' statement to its website, and again when it provided links to the Commissioners' statement within its own press release.

First, the CFTC admits that it published the Commissioners' statement on its website, in the section of the website containing information about the case and the Consent Order. The CFTC's publication of the statement constitutes a violation of Paragraph 8 by the CFTC.

Second, the CFTC's linking to that statement in its "official" entity press release represents an independent violation of Paragraph 8 separate from posting the statement to its website. The obvious purpose of the links was to direct readers to a statement on the CFTC's website, which the CFTC knew violated the Consent Order, but could not publish in its own name. The CFTC's response on this point, offered without authority, is that "common sense" says sharing a link is not an endorsement. Dkt. No. 334 at 10. To the contrary, when a government agency issues an official press release directing readers to statements issued by its commissioners, and published on the agency website, endorsement is the only logical conclusion. For example, in *Sutliffe* v. *Epping School District*, the First Circuit held that a town's decision to establish a website, and include certain hyperlinks but not others, constituted government speech because the town's selection of links "conveyed a message about itself." 584 F.3d 314, 329-32 (1st Cir. 2009). The same logic applies here. The CFTC controlled the content of its press release and chose which links to include in that release. By linking to the Commissioners' statement and publishing it on its website, the CFTC incorporated the

Commissioners' statement into its official entity statement, and violated Paragraph 8 of the Court's Order.[9]

III. The CFTC Had No Obligation To Make, Post, or Publish Any Statement In Connection With The Settlement

The CFTC maintains it cannot be held in contempt for publishing the Commissioners' statement because it was legally obligated to do so and any order that encroaches on that obligation is invalid.[10] Not true. Neither the CEA provision on which the CFTC relies, nor the provision that actually applies to such statements, requires the CFTC to publish *anything* related to the settlement. And even if the CFTC were obligated to publish the Commissioners' statement, which it is not, it manufactured that obligation by electing to issue a press release it was not legally required to issue.

A. The CEA provision on which the CFTC relies does not apply to public statements concerning enforcement actions

The statutory section the CFTC identifies, 7 U.S.C. § 2(a)(10)(C), is irrelevant to the statements at issue and provides no support for the CFTC's argument. That provision, according to its title, applies to the "[t]ransmittal of *budget requests* and *legislative recommendations* to congressional committees." *Id.* (emphasis added); *cf. I.N.S.* v. *Nat'l Ctr. For Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text"). Nor is there anything in the legislative history of Section 2(a)(10)(C) that would support applying it to statements concerning settlements of enforcement actions or

[9] It is not the CFTC's practice to publish or link to statements with which it disagrees. For example, in addition to the links to the Commissioners' statement, the press release recited the unproven allegations in the CFTC's complaint. Absent from the release was any mention of Defendants' publicly filed statements denying those allegations.

[10] The CFTC appears to limit its excuse to the publication of the Commissioners' statement. It identifies no legal obligation to link to the statement in the CFTC's official entity press release.

court orders. *See* 137 Cong. Rec. S4599-01, 1991 WL 60789, at *7. Thus, the provision on which the CFTC relies says nothing about whether the CFTC was required to issue a statement or publish a Commissioner's statement in the context of a court's consent order terminating an enforcement action.

Significantly, the CFTC fails to identify the CEA provision that governs what the CFTC "may" disclose in connection with investigations, enforcement actions, and subpoenas. *See* 7 U.S.C. § 12 (titled "Public disclosure"). Under Section 12, "[t]he Commission *may publish* from time to time the results of any such investigation [regarding the operations of boards of trade and other persons subject to the CEA]," *id*. § 12(a)(1) (emphasis added), and "*may make* or issue such reports . . . relative to the conduct of any registered entity or to the transactions of any person *found guilty* of violating the provisions of this chapter or the rules," *id*. § 12(c) (emphasis added).

Three aspects of Section 12 are relevant here. First, the statute is permissive as to the CFTC's publication of information related to an investigation or enforcement action; the agency has no *obligation* to publish anything, including a press release. Second, the statute imposes no obligation on the CFTC to publish any statement by individual Commissioners. Third, Section 12 expressly forbids the CFTC from disclosing "the business transactions or market positions of any person," *id.* § 12(a)(1), except when the person has been "found guilty of violating the provisions" of the CEA, *id.* § 12(c). There has been no finding of guilt in this case, yet the CFTC's press release and the Commissioners' statement both disclosed Defendants' market positions and the facts as to the transactions they claim violated the CEA.

Accordingly, the statute that actually applies makes clear the CFTC had no obligation to publish anything in connection with the settlement, from the CFTC or its Commissioners.

Moreover, having already settled the matter without any finding of guilt, the CFTC press release and the Commissioners' statement not only violated the Court's Consent Order, but possibly violated the CEA's prohibition on disclosing details concerning Defendants' transactions and market activity as well.

B. The CEA provision on which the CFTC relies imposes no obligation to issue any statement

The CEA provision the CFTC identifies, although inapplicable, likewise does not impose a legal obligation on the CFTC to publish "any dissenting, concurring, or separate opinion" on any matter. Dkt. No. 334 at 3-4, 10-11 (citing 7 U.S.C. § 2(a)(10)(C)). The CFTC's obligation to publish an individual Commissioner's statement about budgeting or a legislative recommendation attaches *only* if the CFTC first issues its own official statement. *See* 7 U.S.C. § 2(a)(10)(C) ("Whenever the Commission issues for official publication . . .). As with Section 12, there is no requirement in Section 2(a)(10)(C) that the CFTC make any statement in the first place.

Put simply, the CFTC orchestrated (with its Commissioners) an attempted end run around the Consent Order by issuing a press release it had no obligation to issue. By the same token, the Commissioners, having just approved the settlement on behalf of the agency, chose to issue a statement they knew would cause the CFTC to violate the Court's Order. Both the CFTC's and the Commissioners' actions warrant a finding of contempt.

C. The correct interpretation of Paragraph 8 does not render it invalid

As a further and final alternative to holding the CFTC and its Commissioners responsible for their actions, the CFTC suggests that the Court strike Paragraph 8 from the Consent Order because the "the CFTC could not and did not bargain away the individual Commissioners' rights under" Section 2(a)(10)(C). The CFTC's argument is irrelevant given the discussion above. The

Commissioners do not enjoy an unfettered statutory right to force the CFTC to publish any statement they make. *See supra* §§ III.A-B. It is also factually inaccurate. The "legal entity" of the CFTC did not "bargain away" anything; the Commissioners did when they unanimously approved the settlement.[11] Nor can the CFTC demand the Court simply strike a provision of the Consent Order and deprive Defendants of the benefit of their bargain. As all sides are aware, Paragraph 8 was a critical term of the settlement on which Defendants insisted—despite the CFTC's false public statement that the parties included Paragraph 8 at the *Court's* request.[12] *See* Dkt. No. 315 at 6-7. If the CFTC or the Commissioners believed Paragraph 8 to be invalid, their remedy was to vote against the settlement and inform the Court before it entered the Order. The nature of the Commissioners' statement makes obvious they decided not to abide by Paragraph 8 before submitting the Order to the Court, and either the Commissioners, or certain CFTC staff members, made a conscious decision not to advise Defendants or the Court. Given the circumstances of the Commissioners' request to remove Paragraph 8, their statement is obviously an attempt to circumvent the Court's Order.

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[11] The CFTC identifies no authority holding Commissioners cannot bargain away a right to make official public statements (which does not exist anyway). The sole case the CFTC cites, *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C.* v. *City of Cleveland*, states only that parties cannot agree on remedial relief, such as race-conscious hiring, that would itself violate Title VII or the Fourteenth Amendment. 478 U.S. 501, 526 (1986). By contrast, there is myriad case law in which the federal government agrees to forego some permissive action by virtue of a settlement. *See, e.g.*, *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 558 (2d. Cir. 2005); *Nault* v. *United States*, 517 F.3d 2, at *3 (1st Cir. 2008); *Fergus* v. *U.S. Virgin Islands Dep't of Health*, 2011 WL 6300339, at *1 (D.V.I. Dec. 16, 2011); *In re ASARCO L.L.C.*, 2009 WL 8176641, at *7 (Bankr. S.D. Tex. Jun. 5, 2009).

[12] It is the height of hypocrisy for the CFTC to request that the Court apply the plain language of Paragraph 8 if the Court agrees with the CFTC's view, but strike Paragraph 8 from the agreement if the Court agrees with Defendants. Yet that is exactly what the CFTC seeks, effectively asking the Court to grant the CFTC what it expressly sought but failed to achieve in settlement negotiations—an agreement that permits the CFTC to say whatever it wants about the case, or that carves out Commissioners' statements. The CFTC did not achieve that in settlement negotiations; the Court should not impose such a result on the parties now.

IV. All Three Of The Statements The CFTC Published Violate Paragraph 8 In Whole Or In Part

In their opening motion, Defendants identified many of the statements at issue and explained why they violate Paragraph 8. Dkt. No. 315 at 5-9. Defendants have also attached as Exhibits 2-4 to this supplemental filing charts cataloging the key provisions of each statement that violate Paragraph 8, and identifying how those prohibited provisions violated Paragraph 8, the false impressions they created, and the misrepresentations within those prohibited provisions.

While the CFTC makes almost no effort to defend the Commissioners' statement as complying with Paragraph 8, it excuses many of its own statements, including its inclusion of the quote from the Chairman, as "trivial," "generic," or harmless. *See* Dkt. No. 334 at 11-13. None of the statements were trivial or harmless, as shown in Exhibits 2 and 3. Nor were they "generic." All of the statements appear in publications the CFTC issued concerning the settlement, identifying Defendants by name, and accusing them of manipulation. The only logical reading of every statement included in the publications is that the CFTC and its Commissioners intended them to relate to the Consent Order, and to characterize the settlement in a light favorable to the CFTC. Indeed, that is how the CFTC's and Commissioners' statements were covered in the press—in a manner favorable to the CFTC and as if the CFTC had established manipulation. *See* Ex. 7 (collecting and highlighting a limited selection of articles).

V. The Court Has The Power To Order Relief Against the CFTC And Its Commissioners

As set forth in Defendants' revised prayer for relief at the end of this brief, Defendants are requesting that the Court issue an order that provides limited relief to minimize and prevent further ongoing harm. In broad strokes, the details of which are set forth in the revised prayer for relief, Defendants request an order that: (1) finds the CFTC and its Commissioners violated the Consent Order, that Paragraph 8 is unambiguous, and that the CFTC's and Commissioners'

statements contained numerous inaccuracies; (2) orders the CFTC and its Commissioners to permanently remove the statements and refrain from further statements; (3) suspends Defendants' obligation to pay the settlement amount until the CFTC has demonstrated compliance; and (4) orders the CFTC to pay Defendants' attorney's fees in connection with the post-judgment contempt proceedings. The Court has ample authority to order such relief.[13]

A. The Court has authority to order the non-monetary coercive sanctions Defendants seek

Federal courts are empowered to order coercive contempt sanctions against a federal agency and its commissioners to compel compliance with court orders. *See* 5 U.S.C. § 702 (waiving sovereign immunity for non-monetary damages). Those sanctions may take the form of court orders or, in some instances, monetary sanctions payable to the court. *See Armstrong* v. *Exec. Office of President*, 821 F. Supp. 761, 773 (D.D.C. 1993), *rev'd on other grounds by* 1 F.3d 1274 (D.C. Cir. 1993) (holding doctrine of sovereign immunity does not prevent the imposition of coercive monetary sanctions against a federal agency because fines payable to the court are not recoverable monetary damages). In fact, courts often rely on public reprimands, public apologies, or other relief when sovereign immunity precludes monetary compensation. *See United States* v. *Horn*, 29 F.3d 754, 766-67 (1st Cir. 1994) (reprimand); *cf. Windham* v. *Graham*, 2008 WL 3833789, at *6 (D.S.C. Aug. 14, 2008) (suggesting claim for money damages against state was barred by sovereign immunity, but request for apology was not); *cf. Birnbaum* v. *United States*, 588 F.2d 319, 335 (2d Cir. 1978) (determining letter of apology was not "money damages").

[13] All of the sanctions Defendants seek are available through civil contempt or the Court's inherent power. Defendants have never sought a finding of criminal contempt against the CFTC or its Commissioners nor do they intend to pursue one.

Here, despite the CFTC's insistence that the harm it caused cannot be undone, the order Defendants seek is obviously necessary to prevent further violations and to minimize the ongoing harm the CFTC has caused. The Court has not ordered the CFTC to do anything yet; the agency removed its statements by agreement and there is nothing to prevent the CFTC from reposting them or making future statements. Nor is there anything to prevent the Commissioners from continuing to make statements, since they apparently do not believe they are bound by the Court's Order. A statement from the Court identifying and correcting the inaccuracies and misrepresentations in the CFTC's and Commissioners' statements, and ordering future compliance by them, will clarify for the CFTC and Commissioners what they cannot do, and help minimize the harm the prohibited statements continue to cause.

B. Defendants may seek attorney's fees incurred in connection with the contempt proceeding

If the Court sees fit, it may also order the payment of Defendants' attorney's fees in connection with the contempt proceeding, particularly if it finds the CFTC and the Commissioners acted in bad faith.

Controlling Seventh Circuit authority makes clear that sovereign immunity does not bar the Court from ordering contemnors to pay Defendants' attorney's fees. In *Nelson* v. *Steiner*, the Seventh Circuit affirmed the entry of a contempt fine against an IRS district office director and the chief of the DOJ Tax Division Claims Section. 279 F.2d 944, 948 (7th Cir. 1960). The court explained that "[t]he executive branch of government has no right to treat with impunity the valid orders of the judicial branch. An order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until reversed by orderly and proper proceedings. And the 'greater the power that defies law the less tolerant can this Court be of defiance.'" *Id.* (*quoting United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 293

(1947)); *see also Giancana* v. *Johnson*, 335 F.2d 372, 372-73 (7th Cir. 1964) (affirming fine as sanction for criminal contempt of FBI agent, notwithstanding that misconduct came at instruction of agency head).[14]

The Supreme Court has similarly held that state sovereign immunity does not preclude the entry of federal contempt fines, particularly when the official in question has acted in bad faith. In *Hutto* v. *Finney*, the Supreme Court upheld an award of attorney's fees which would be paid out of state funds and were awarded for state officials' bad faith. 437 U.S. 678, 680, 685, 700 (1978). The Court explained, "federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties." *Id.* at 690. *See also, e.g.*, *Fish* v. *Kobach*, 294 F. Supp. 3d 1154, 1169 (D. Kan. 2018) (awarding attorney's fees for contempt motion against Kansas Secretary of State); *Asociacion de Suscripcion Conjunta del Seguro de Responsabilidad Obligatoria* v. *Sec. of the Treasury of the Commonwealth of P.R.*, 2016 WL 7165891, at *6 (D.P.R. Dec. 8, 2016) (finding Eleventh Amendment did not preclude contempt fine against Treasurer of Puerto Rico); *Palmigiano* v. *DiPrete*, 737 F. Supp. 1257, 1258 (D.R.I. 1990) (referencing an earlier fine of $50 per day, per prisoner against governor and state corrections director).

[14] *See also Norman Bridge Drug Co.* v. *Banner*, 529 F.2d 822, 825 (5th Cir. 1976) (affirming civil contempt fine of $500 against DEA agent who defied temporary restraining order "on the advice of the U.S. Attorney and of … [the] Chief of Compliance of the Regional Drug Enforcement Administration"); *cf. Califano* v. *Yamasaki*, 442 U.S. 682, 705 (1979) (noting "the grant of injunctive relief makes the Secretary's duty to comply enforceable by contempt order"); *Chilcutt* v. *United States*, 4 F.3d 1313, 1325–27, 1327 n.37 (5th Cir. 1993) (holding court can direct the government not to indemnify, obviating any sovereign immunity issue arising from government indemnification of individual).

VI. The Court May Hold An Evidentiary Hearing And Order The Chairman, The Commissioners, And McDonald To Appear

After agreeing to the evidentiary hearing and agreeing to produce the individuals who issued statements or were involved in the settlement, the CFTC now argues that the Court cannot hold a hearing because it can yield no relevant evidence, and because it cannot compel the appearance of the Commissioners or McDonald. Both arguments are incorrect. To be clear, with this submission, Defendants believe they have satisfied the civil contempt standard. There is an adequate basis for the Court to order the relief Defendants seek. But if the CFTC plans to contest the admissions described in this brief, rely on a good faith defense, rely on the advice of counsel, or if the Court determines it needs to receive evidence and make factual findings to make a determination on contempt or the appropriate sanction, it may do so.

A. The Court is entitled to receive evidence on matters the CFTC has put in issue

The plain language of Paragraph 8 prohibits statements by Commissioners. But there are at least two questions, both of which the CFTC has put in issue, on which the Court may need to receive evidence if the CFTC adheres to its positions.

The first is good faith, which the CFTC previously asserted as a defense to contempt. Dkt. No. 318 at 7-8. Although the CFTC is wrong that its supposed good faith is a defense to contempt, the Supreme Court has held that determinations of subjective intent to assess bad faith or good faith may help determine the appropriate sanction. *See Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1802 (2019) (evidence of bad faith or good faith may support contempt finding and help the court determine the appropriate sanction).

Second, even if the Court credits the CFTC's incorrect interpretation of the Order as it applies to Commissioners, the Commissioners may still be held in contempt for violating Paragraph 8 if they acted in concert with the CFTC staff to violate the Order, or otherwise

attempted to thwart the Court's Order. *See* Fed. R. Civ. P. 65(d)(2); *see also Schine*, 260 F.2d at 556 (nonparty may be found in contempt where it participates in a "conscious and continuous scheme to thwart the court's decree"). Because the CFTC has argued the Commissioners are not "parties" whose statements are constrained by Paragraph 8, it has put into issue whether and the extent to which the CFTC staff and its Commissioners coordinated with each other, and whether the purpose or effect of that coordination was to thwart the Court's Order.

In their initial motion and this brief, Defendants have asserted facts relevant to determining whether the CFTC Commissioners acted in bad faith and whether the Commissioners coordinated with the staff to violate Paragraph 8. For example, Defendants have asserted facts demonstrating that the CFTC and its Commissioners admitted they were bound by Paragraph 8 and that the CFTC and its Commissioners represented (or misrepresented) the same to Defendants. Ex. 1, McCall Decl. ¶¶ 5-6, 18-21. Defendants have asserted facts showing enforcement counsel told Defendants the Commissioners did not plan to make a statement, in an obvious attempt to mislead Defendants to convince them to remove Paragraph 8. *Id.* ¶ 18. Defendants have also asserted facts supporting a finding that the CFTC and its Commissioners worked in concert to thwart the Court's Consent Order, by manufacturing a supposed legal obligation to publish statements in violation of the Order, and orchestrating a coordinated roll out of those statements as soon as the Order issued. *See also* Dkt. No. 315 Ex. 3 (admitting the overriding purpose of the Commissioners' statement was to provide the public with an explanation for the "sanctions," which the CFTC "the entity" would have published had it not agreed to Paragraph 8).

If the CFTC does not dispute any of the facts set out in the McCall Declaration, Defendants agree that the Court has sufficient evidence of violations of Paragraph 8 to hold the

CFTC and its Commissioners in contempt. But the CFTC has repeatedly denied Defendants' factual assertions as inaccurate, and most recently described them as a "fictional account of a sweeping conspiracy to violate the order," (although the CFTC offered no evidence to support that assertion). Dkt. No. 334 at 9; *see also* Case No. 19-2769 (7th Cir.) (Dkt. No 2-1) (describing Defendants' "inflammatory factual accusations" as "false[]" and "unsupported by any declaration or affidavit"). The Court is entitled to receive evidence to resolve the disputes.

B. The Court has jurisdiction over every individual the CFTC agreed to produce at the hearing

The CFTC argues that the Court lacks jurisdiction over the individuals at issue solely because they have not been served in accordance with Rule 4 and Local Rule 37.1. Dkt. No. 324 at 18. As a threshold matter, this is not true. CFTC Deputy General Counsel Martin White appeared on behalf of the CFTC and the Commissioners at the August 19 hearing. Dkt. No. 328 at 2:9-15. He agreed on their behalf to appear at the evidentiary hearing, which the Court delayed to accommodate one Commissioner's vacation schedule. *Id.* at 29:1-4; 37:1-12. And Mr. White asserted the Fifth Amendment and other privileges on behalf of the Commissioners after the Court twice allowed him to discuss the issue with the five other CFTC lawyers present at the hearing. *Id.* at 22:22-24:1 (asserting privileges on behalf of "the commissioners I represent"). Mr. White's appearance, which he has not withdrawn, waives any personal service requirement under Local Rule 37.1.[15]

[15] To moot the issue, Defendants have also attempted to contact the Commissioners' and McDonald's counsel to find out whether they would agree to accept service, and avoid a situation where Defendants would have to serve the high ranking individuals via process servers. On September 7, CFTC Deputy General Counsel Robert Schwartz informed Defendants he could not accept service and directed them to the Department of Justice. The DOJ contact, Siegmund Fuchs, could not accept service but promised to inform Defendants of the individuals' private attorneys once they had been retained. After multiple inquiries, on September 23 (the filing deadline), Mr. Fuchs told Defendants the Commissioners and McDonald would be represented by Zach Fardon at King and Spaulding.

Setting aside Mr. White's appearance on their behalf and the service (non)-issue, the Court still has jurisdiction over McDonald and the Commissioners and may order them to appear—even if they are nonparties. As the Seventh Circuit has explained,

> Nonparties who reside outside the territorial jurisdiction of a district court may be subject to that court's jurisdiction if, with actual notice of the court's order, they actively aid and abet a party in violating that order. This is so despite the absence of other contacts with the forum. Jurisdiction over persons who knowingly violate a court's injunctive order, even those without any other contact with the forum, is 'necessary to the proper enforcement and supervision of a court's injunctive authority and offends no precept of due process.

S.E.C. v. *Homa*, 514 F.3d 661, 674–75 (7th Cir. 2008) (cleaned up); *see also id.* at 674 (court may find nonparty in contempt if person has actual knowledge of the court order and either abets the party named in the court order or is legally identified with him).

C. The Commissioners' status as "high ranking" officials cannot excuse their appearance if the Court determines it requires their testimony

If the CFTC continues to dispute facts, and if the Court determines it needs testimony from the Commissioners, it may compel their appearance because that testimony would relate to the Commissioners' direct personal knowledge of the facts at issue and may be otherwise unavailable—indeed, the CFTC has not identified any adequate substitute for the Commissioners. Courts will compel the testimony of high-ranking officials when "extraordinary circumstances" are present. *In re United States*, 108 F.3d 1391 (Table), 1997 WL 76161, at *4 (Fed. Cir. 1997) (unpublished). Courts often consider the "extraordinary circumstances" requirement to be met where the official has "direct personal knowledge" of the matter and the information is unavailable from another source. *See Estate of Richardson* v. *Kanouse*, 2013 WL 12113222, at *2 (C.D. Cal. Mar. 18, 2013); *Sherrod* v. *Breitbart*, 304 F.R.D. 73, 75-76 (D.D.C.

Defendants have spoken with Mr. Fardon, who has committed to confer with his clients and provide an answer to Defendants as soon as possible.

2014); *see also Pension Benefit Guar. Corp.* v. *LTV Steel Corp.*, 119 F.R.D. 339, 344 (S.D.N.Y. 1988) (suggesting bad faith would be a reason to compel government official's testimony). Here, there is ample reason to believe the Commissioners are the only source of evidence on the factual questions the CFTC has put into issue: their belief that Paragraph 8 constrained their statements, which goes to bad faith, and the extent to which they acted in concert with the CFTC staff to thwart the Order, which goes to their liability for contempt.

Although the CFTC identifies a number of cases in which courts refused to compel testimony from high ranking officials, none of those cases involved an action or question that was personal to the official at issue. *See* Dkt. No. 324 at 14-15. Nor did they involve a situation like the instant one, where the CFTC has expressly disavowed that the Commissioners were acting as a part of the CFTC when they issued their statement. By contrast, there are a number of cases supporting a court's ability to receive evidence from high ranking officials when those individuals have direct knowledge of the issues or provide the best (or only) source of evidence. *See, e.g.*, *In re United States*, 1997 WL 76161, at *3 (finding extraordinary circumstances warranting deposition of Department of Commerce officials because deposition inquiry was narrowly limited and because deposition was the most efficient way to resolve factual issues); *Kanouse*, 2013 WL 12113222, at *3 (allowing deposition of county undersheriff because evidence suggested undersheriff had taken personal role in actions at issue, and no other witness had been identified who could testify to matters within undersheriff's personal knowledge); *Bagley* v. *Blagojevich*, 486 F. Supp. 2d 786, 789 (C.D. Ill. 2007) (allowing deposition of governor when there was evidence that "the Governor was either the ultimate decision maker or at least personally involved in" the alleged unlawful conduct); *Breitbart*, 304 F.R.D. at 76 (allowing deposition of Secretary of Agriculture when Secretary had "personal knowledge that

[was] directly relevant to the claims and defenses here" and the information was not available elsewhere: "The Secretary alone has precise knowledge of what factors he considered and how they influenced his ultimate decision, so that information must come from him, not from third parties."); *Gaicia* v. *Trump*, No. 24973/2015E (N.Y. Sup. Ct. Sept. 20, 2019) (attached as Exhibit 8) (ordering sitting President to sit for deposition where his testimony is indispensable).

VII. The CFTC Has Waived Privilege By Disclosing Certain Communications to Defendants, Disclosing Legal Advice As A Defense, And Putting The Commissioners' Good Faith Into Issue

The CFTC's supplemental filing states that the deliberative process privilege and the attorney-client privilege "either severely or entirely limit additional discovery into the agency's deliberations that led to the Commission's vote on the Consent Order." Dkt. No. 334 at 15. But the deliberations concerning the vote are not the issue; the issue is the Commissioners' direction to ask for the removal of Paragraph 8 because they did not want to be so restricted. The CFTC fails to articulate how any of those privileges apply to that issue or why the CFTC has not waived them—reserving that question for yet another filing the CFTC intends to make before the October 2 hearing. *Id.* at 15 n.15. It is therefore difficult for Defendants to respond without knowing the bases for the privileges the CFTC bears the burden of establishing.

Nevertheless, the CFTC has waived any privilege over internal discussions about removing Paragraph 8 from the Consent Order, or whether Paragraph 8 binds the Commissioners, because the CFTC disclosed those communications to Defendants. As set forth above and in Defendants' opening motion, on multiple occasions, the CFTC's enforcement counsel disclosed to Defendants the Commissioners' internal deliberations concerning the removal of Paragraph 8, including the fact that the Commissioners may agree to approve the settlement notwithstanding the inclusion of Paragraph 8. Ex. 1, McCall Decl. ¶¶ 5-6, 13, 18, 21. In those same conversations, enforcement counsel communicated the Commissioners'

understanding that they would be restricted by Paragraph 8, and that they wanted Paragraph 8 removed to avoid being limited by a court as to what they could say. *Id.* ¶¶ 6, 18. Those disclosures waived any deliberative process or attorney-client privilege that applied to the CFTC's internal discussions about the effect of Paragraph 8 and whether to remove it.[16] *See Shell Oil Co.* v. *I.R.S.*, 772 F. Supp. 202, 209 (D. Del. 1991) (where authorized disclosure is voluntarily made to a non-federal party, the government waives any claim of deliberative process privilege); *E.E.O.C.* v. *Int'l Profit Assocs., Inc.*, 206 F.R.D. 215, 219 (N.D. Ill. 2002) ("[A]ny voluntary disclosure by the holder of the attorney-client privilege is inconsistent with the attorney-client confidential relationship and thus waives the privilege.").

Moreover, the CFTC and the Commissioners waived privilege over communications or work product addressing whether Paragraph 8 applies to Commissioners' statements because the CFTC publicly disclosed the supposed legal analysis on which the Commissioners relied to vindicate their alleged ability to issue a statement in violation of Paragraph 8. *See* Dkt. No. 315 Ex. 3 ("As the Commission observes . . . the consent order only limits the statements of the Commission as a collective body"). That is textbook waiver. *See Breuder* v. *Bd. Of Trustees of Cmt. Coll. Dist. No. 502, DuPage Cty, Ill.*, 2019 WL 3386966, at *6 (N.D. Ill. July 26, 2019) (holding reliance upon advice of counsel results in a waiver); *Panter* v. *Marshall Field & Co.*, 80 F.R.D. 718, 721 (N.D. Ill. 1978) (reliance on opinion letter results in a waiver).

Relatedly, the CFTC waived privilege as to the same communications when it argued against contempt based on the Commissioners' good faith belief that they were not bound by

[16] The Commissioners' statement itself also waives any deliberative process privilege that may apply. The very purpose of the statement, according to the Commissioners, was to explain the reasons for their decision and why Paragraph 8 does not apply to individual Commissioners. *See E.E.O.C.* v. *Cont'l Airlines, Inc.*, 395 F. Supp. 2d 738, 743 (N.D. Ill. 2005) (noting where agency selectively disseminates all or part of the substantive information contained in a predecisional report in an attempt to advance its case, a waiver has occurred).

Paragraph 8. *See* Dkt. No. 318 at 7-8; *see also, e.g.*, *Pyramid Controls, Inc.* v. *Siemens Indus. Automations, Inc.*, 176 F.R.D. 269, 272 (N.D. Ill. 1997) ("The great weigh of authority holds that the attorney-client privilege is waived when a litigant places information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party") (internal citation omitted).

Although the argument above demonstrates at a high level why the CFTC should not be able to assert privilege over communications concerning Paragraph 8, Defendants cannot know the CFTC's specific privilege assertions and the bases for them until the CFTC makes the more substantive filing it has promised in advance of the October 2 hearing. *See* Dkt. No. 334 at 15 n.15. Accordingly, if necessary, Defendants anticipate seeking the Court's permission to file a short response to CFTC's filing asserting any additional privileges, or asserting the deliberative process and attorney-client privileges with more specificity, shortly after the CFTC makes its filing.

REVISED PRAYER FOR RELIEF

Defendants respectfully request that the Court enter an Order:

Finding:

1. The CFTC, through Chairman Tarbert and others, and Commissioners Berkovitz and Behnam violated Section I, Paragraph 8, of the Consent Order ("Paragraph 8");
2. The terms of Paragraph 8 unambiguously apply to the CFTC and Commissioners. Further, the CFTC has admitted that Paragraph 8 applies to it, and the CFTC and certain Commissioners, through their statements and conduct, have admitted that Paragraph 8 applies to Commissioners;

3. The statements of the CFTC and Commissioners Berkovitz and Behnam, posted on the CFTC's website and related to the settlement of this case, violate Paragraph 8 and contain material inaccuracies as described below in paragraphs 4 to 6;
4. Contrary to the statements on the CFTC's website, the settlement between the CFTC and Defendants reflects neither an acknowledgment of any violation of the CEA by Defendants, nor any factual finding or legal determination by the Court (implicit or explicit) that Defendants violated any provision of the CEA. In approving the Consent Order, the Court did not determine that the CFTC had presented sufficient evidence of a violation of the CEA. Defendants have at all times denied any violation of the CEA, including the alleged manipulation;
5. Contrary to the statements on the CFTC's website, no implication of a violation of any provision of the CEA should be drawn from Defendants' agreement to pay an amount to resolve the litigation;
6. Contrary to the statements on the CFTC's website, the injunction in the Consent Order was not premised on any factual finding or legal determination (implicit or explicit) by the Court that Defendants violated any provision of the CEA.

The Court Further Orders:

7. The CFTC and its Commissioners shall permanently remove all previous statements concerning the settlement of this action from the CFTC's website and any other areas of publication. The Consent Order may be posted;
8. The CFTC, its staff and Commissioners, including Commissioners Berkovitz and Behnam, are prohibited from making any further public statements about the case or the settlement in any forum, except to refer to the terms of the Consent Order or to public documents filed in this case. Any such reference is strictly limited to the express terms of

the Consent Order or public document cited, and will not contain additional description, characterization, analysis, opinion, or other commentary, all of which is prohibited by Paragraph 8.

9. The CFTC, within a number of days to be determined by the Court, shall submit a declaration attesting to the Court its compliance with this Order;
10. Defendants' obligation to pay the settlement amount is suspended until the Court has determined the CFTC has complied with this Order.
11. The CFTC shall pay the Defendants' attorney's fees incurred in connection with Defendants' Contempt Motion and all related motions and proceedings.
12. Defendants shall submit a petition for fees within a number of days to be determined by the Court following the entry of this Order.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court grant its motion for contempt, sanctions, and other relief, deny the CFTC's motion to vacate the scheduled evidentiary hearing, and enter the relief requested in Defendants' revised prayer relief.

Dated: September 23, 2019

Respectfully submitted,

KRAFT FOODS GROUP, INC. and
MONDELĒZ GLOBAL LLC

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Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

U.S. COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. KRAFT FOODS GROUP, INC. and MONDELĒZ GLOBAL LLC, Defendants.	)	Case No. 15 C 2881 Judge John Robert Blakey

DECLARATION OF J. KEVIN MCCALL IN SUPPORT OF DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR CONTEMPT, SANCTIONS, AND OTHER RELIEF AND IN OPPOSITION TO THE CFTC'S MOTION TO VACATE THE OCTOBER 2, 2019 HEARING

FILED UNDER SEAL

I, James Kevin McCall, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am a partner at the law firm of Jenner & Block LLP and am counsel of record representing the Defendants, Kraft Foods Group, Inc. and Mondelēz Global LLC, in the above captioned matter.

2. In my role as Defendants' counsel, I participated in the March 22, 2019 settlement conference with the Plaintiff U.S. Commodity Futures Trading Commission ("CFTC") and the Court, and thereafter had numerous conversations and correspondence with the CFTC's counsel regarding the settlement agreement, including those described below.

Wednesday, July 24, 2019

3. On Wednesday, July 24, 2019, Robert Howell, Chief Trial Attorney, Division of Enforcement, CFTC, and counsel of record in this case, emailed me an unexecuted copy of the Consent Order reflecting the final terms agreed to by the CFTC and Defendants, but which had

not yet been approved by the CFTC. The Consent Order included the same provision in Section I, Paragraph 8, (hereinafter "Paragraph 8") that appears in the final Consent Order entered by the Court. I understood from Mr. Howell that the CFTC's Division of Enforcement would present the Consent Order to the Commission, which is composed of the five CFTC Commissioners, who would vote to either accept or decline the Consent Order on behalf of the CFTC.

Friday, July 26, 2019

4. On Friday, July 26, 2019, at approximately 11:59 a.m., I received an email from Mr. Howell in which he stated he did not think he would "have Commission sign off today," but remained hopeful he would have sign off on Monday. The same day, at approximately 3:37 p.m., Mr. Howell emailed again, asking if we could talk because he had an issue to discuss with me.

5. I spoke to Mr. Howell via telephone in the late afternoon of July 26, at approximately 4:30 p.m. In that call, Mr. Howell told me he had been directed to ask if Defendants would agree to delete Paragraph 8 from the Consent Order. Mr. Howell stated he was not certain that the Commission would approve the Consent Order with Paragraph 8 included. Mr. Howell also made it clear the Commission may approve the Consent Order with Paragraph 8, but he was directed to request that Defendants delete Paragraph 8. Mr. Howell stated that if Defendants did not agree to delete Paragraph 8, the Commission would vote on the Consent Order as negotiated.

6. I asked Mr. Howell why the Commission wanted Paragraph 8 deleted from the Consent Order. Mr. Howell stated in response that certain Commissioners, and possibly others, did not like being limited by a court as to what they could say about the case. Mr. Howell stated he told them that Paragraph 8 was what the CFTC Division of Enforcement and Defendants had negotiated, but he was nonetheless told to request Defendants delete Paragraph 8.

7. I told Mr. Howell that Paragraph 8 was a very important provision that was a critical part of the negotiation and that related directly to Defendants' concern that the Consent Order reflect that Defendants were not accepting a manipulation charge, because Paragraph 8 ensures that the CFTC cannot make public statements that create the impression that Defendants agreed to a manipulation charge. Mr. Howell stated he understood. I told Mr. Howell I would relay the request to Defendants and get back to him but it was unlikely he would hear from me before Monday. Mr. Howell said he understood and said "this is on us."

Monday, July 29, 2019

8. On Monday, July 29, 2019, shortly before 10:00 a.m., I had a telephone call with Mr. Howell in which I told him Defendants would not agree to remove Paragraph 8. Mr. Howell said he understood and he would see if the Commission would vote on the Consent Order without him needing to request additional time from the Court at the status hearing scheduled for July 30.

9. Later that day, sometime prior to 3:27 p.m., Dean Panos and I had a telephone call with Mr. Howell and Susan Gradman, Trial Attorney, Division of Enforcement, CFTC, and counsel of record in this case, in which Mr. Howell and Ms. Gradman expressed a desire for representatives of the CFTC to speak directly with representatives of Kraft Foods Group Inc. and Mondelēz Global LLC about the CFTC's and Commissioners' request to remove Paragraph 8 from the Consent Order. Mr. Howell and Ms. Gradman described this as a "principals call."

10. Following the call with Mr. Howell and Ms. Gradman, Mr. Panos and I reached out to Defendants' corporate representatives and scheduled a 4:30 p.m. call with them to discuss the CFTC's request.

11. At some point, I believe before the 4:30 p.m. call with Defendants' representatives occurred, Mr. Howell contacted me and advised that the CFTC no longer needed a call between principals.

12. Mr. Panos and I spoke with Defendants' representatives in the afternoon of July 29 regarding the request to remove Paragraph 8, and at approximately 5:16 p.m. that day, I emailed Mr. Howell and Ms. Gradman stating that Defendants' "answer remains the same" and "Paragraph 8 remains part of the agreement." I also asked Mr. Howell and Ms. Gradman to let me know the result of any vote by the Commission, or if the Commission needed more time to arrange a vote.

13. In at least one of my conversations with Mr. Howell concerning Commissioners' desire to remove Paragraph 8, Mr. Howell noted that Commissioners may not approve the settlement if it included Paragraph 8, or certain Commissioners may vote against the settlement and it was possible Commissioners voting against the settlement would dissent. I stated in substance that Defendants understood the settlement might be rejected, and that Commissioners might vote against the settlement, but that if the settlement was approved, and if any Commissioner dissented, there could be no public statements that violated Paragraph 8. Mr. Howell did not respond.

Tuesday, July 30, 2019

14. On Tuesday, July 30, 2019, Mr. Howell and I attended a status hearing with the Court. After the hearing, Mr. Howell told me he expected the Commission to vote on the Consent Order that day, and expected they would approve the Consent Order. Also after the hearing, the Court issued a minute entry denying all pending motions as moot and setting a status hearing for August 13, 2019. Dkt. No. 307.

15. Mr. Howell then emailed me at approximately 4:45 p.m. on July 30, asking if he could give me a call and at what telephone number.

16. I spoke to Mr. Howell via telephone that evening shortly before 5:00 p.m. During the call, Mr. Howell stated that a Commissioner wanted Jamie McDonald, the CFTC's Director of Enforcement, to have the "principals call" with Defendants' representatives so that Mr. McDonald could tell Defendants' representative directly what Mr. Howell had already told us about Commissioner(s) wanting to remove Paragraph 8 from the Consent Order. Mr. Howell described the request as "checking the box."

Wednesday, July 31, 2019

17. On Wednesday, July 31, 2019, at approximately 3:30 p.m., Defendants' representatives and their counsel had a telephone call with CFTC Division of Enforcement attorneys. Present on the call for Defendant Mondelēz Global LLC was Kevin Brennan. Present on the call for Defendant Kraft Foods Group Inc., was Stephen Mahieu. Present on the call as Defendants' counsel was Mr. Panos, myself, and Gregory Kaufman. Present on the call from the CFTC was Mr. McDonald, Mr. Howell, Ms. Gradman, and possibly others.

18. In the July 31 telephone call, Mr. McDonald stated that certain CFTC Commissioners wanted to remove Paragraph 8 from the Consent Order because they did not want to be limited in what they could say about the settlement. Mr. McDonald said this would be better for everyone because neither party would be restricted in what they could say. Mr. McDonald also stated the reason Commissioners wanted Paragraph 8 removed was not because any Commissioner planned to make a statement, but that the Commissioners were uncomfortable with the provision, wanted to vindicate the principle that the Commission would not agree to be

limited in what they could say about settlement agreements, and so they did not set a precedent of agreeing to these types of provisions in future settlements.

19. At no time did Mr. McDonald state, or indicate in any way, that he, anyone else in the Division of Enforcement, or any CFTC Commissioner, did not believe the Commissioners would be bound by Paragraph 8, if the Court approved the settlement.

20. Mr. Brennan responded to Mr. McDonald on Defendants' behalf, stating that he understood and appreciated the position Mr. McDonald was being placed in by the Commissioners, but that Defendants did not agree to remove Paragraph 8 from the Consent Order and that Paragraph 8 was important to the Defendants and their decision to settle.

21. Mr. McDonald stated it was possible the Commission would not approve the settlement if it included Paragraph 8. Mr. McDonald also stated the enforcement staff would continue to recommend that the Commission approve the settlement agreement as negotiated. Mr. Brennan said Defendants understood Mr. McDonald's position, and stated that the Commissioners should understand that if Paragraph 8 were removed, or if the settlement was voted down because of Paragraph 8, that the parties would have to restart their settlement negotiations from scratch, including renegotiating the monetary component of the settlement. The call ended at approximately 3:39 p.m.

Thursday, August 8, 2019

22. On Thursday, August 8, Mr. Howell emailed me advising that the Commission had approved the settlement and he was authorized to execute the Consent Order and submit it to the Court.

Monday, August 12, 2019

23. The parties submitted the executed Consent Order to the Court via email on Monday, August 12, 2019.

Thursday, August 15, 2019

24. On August 15, 2019, at 8:43 a.m., after incorporating modifications requested by the Court unrelated to Paragraph 8, the Court entered the final Consent Order on the public docket. Based on the Consent Order and public filings, it appears the Court signed the Consent Order on August 14, but the Consent Order, related minute entry, and judgment dismissing the case with prejudice were not entered on the public docket until August 15.

25. Less than two hours later, at approximately 10:21 a.m. on August 15, I became aware that the CFTC had issued a Press Release (Release No. 7996-19), titled "Kraft and Mondelēz Global to Pay $16 Million in Wheat Manipulation Case Penalty Valued at Three Times the Alleged Gain," and which was posted on the CFTC's website at https://cftc.gov/PressRoom/PressReleases/7996-19. A copy of the Press Release is included as Exhibit 1 to Defendants' opening motion. *See* Dkt. No. 315 Ex. 1.

26. The CFTC Press Release contained hyperlinks to two additional statements, both of which were also posted on the CFTC's website: (a) the "Statement of the Commission," posted to the Speeches & Testimony page of the CFTC's website at: https://www.cftc.gov/PressRoom/SpeechesTestimony/commissionstatement081519, and a copy of which is included as Exhibit 2 to Defendants' opening motion, Dkt. No. 315 Ex. 2; and (b) the "Statement of Commissioners Dan M. Berkovitz and Rostin Behnam Regarding the Commission's Settlement with Kraft Foods Group, Inc. and Mondelēz Global LLC," also posted to the Speeches &

Testimony page of the CFTC's website at: https://www.cftc.gov/PressRoom/SpeechesTestimony/jointstatementsberkovitzbehnam081519, and a copy of which is included as Exhibit 3 to Defendants' opening motion, Dkt. No 315 at Ex. 3.

27. After becoming aware of the above-identified statements, I left Mr. Howell a voicemail telling him Defendants planned to seek immediate relief from the Court based on the statements.

28. I followed-up on my voicemail with an email to Mr. Howell and Ms. Gradman at approximately 11:45 a.m., in which I advised them Defendants would be filing a motion seeking immediate relief based on violations of Paragraph 8 of the Consent Order.

29. Later on August 15, Ms. Gradman left me a voicemail asking me to call her. Ms. Gradman indicated in her voicemail that Stephanie Reinhart, Trial Attorney, Division of Enforcement, CFTC, and counsel of record in this case, was also present.

30. Ms. Gradman emailed me at approximately 1:14 p.m. asking when I would be available to speak with her.

31. Later that day, I had a telephone call with Ms. Gradman and Ms. Reinhart during which we discussed scheduling for Defendants' motion. During that call, I explained that Defendants believed the statements of the CFTC and the Commissioners violated Paragraph 8 of the Consent Order. Ms. Gradman said "we" were not aware. I understood her to be referring to the statements of the Commissioners. I said I was glad to hear that, but the statements of the Commission, including statements made by Chairman Tarbert, also violated Paragraph 8. Ms. Gradman asked what Commission statements I believed were prohibited by Paragraph 8. I identified certain provisions of those statements that violated Paragraph 8. Ms. Gradman

expressed her disagreement that the Commission statements I identified violated Paragraph 8. We then discussed the scheduling of the motion.

I declare under penalty of perjury that the forgoing is true and correct.

Dated: September 23, 2019

/s/ *J. Kevin McCall*
James Kevin McCall

Exhibit 2

EXHIBIT 2

Summary of Key Violations Contained in CFTC Press Release No. 7996-19, Published on the CFTC's Website on August 15, 2019[1]

Key Public Statements Contained in CFTC Press Release that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Press Release	Why Statement Violates Paragraph 8
"Kraft and Mondelēz Global to Pay $16 Million in Wheat Manipulation Case Penalty Valued at Three Times the Alleged Gain"	Title	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that Defendants either admitted to manipulating the wheat market, or that there was a determination that Defendants manipulated the wheat market, neither of which is correct. • This statement creates the false impression that Defendants agreed to pay a $16 million penalty because they manipulated the wheat market. • This statement creates the false impression that the settlement amount was three times greater than the

[1] This Exhibit identifies the key statements in CFTC Press Release No. 7996-19 that violate Section I, Paragraph 8, of the Consent Order; it does not identify every statement in the Release that may violate Section I, Paragraph 8. Because Section I, Paragraph 8, prohibits the CFTC and Commissioners from making "any public statement about this case other than to refer to the terms of [the Consent Order] or public documents filed in this case," with limited exceptions not relevant here, any statement contained in the Release that does not expressly refer to, or appear in, the Consent Order or another publically filed document in this case violates the Consent Order.

EXHIBIT 2

Key Public Statements Contained in CFTC Press Release that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Press Release	Why Statement Violates Paragraph 8
		amount of damages the CFTC was pursuing in the litigation.
"The U.S. Commodity Futures Trading Commission today announced that it obtained a $16 million penalty and injunction pursuant to a federal court's entry of a consent order against defendants **Kraft Foods Group, Inc.** and **Mondelēz Global LLC**."	Paragraph 1, Sentence 1	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that the CFTC obtained a $16 million penalty and injunction based on some determination that Defendants violated the law.
"The $16 million penalty is approximately three times defendants' alleged gain."	Paragraph 2, Sentence 1	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that Defendants either admitted to manipulating the wheat market, or that there was a determination that Defendants manipulated the wheat market, neither of which is correct. • This statement creates the false impression that Defendants agreed to pay a $16 million penalty because they manipulated the wheat market. • This statement creates the false impression that the settlement amount was three times greater than the

EXHIBIT 2

Key Public Statements Contained in CFTC Press Release that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Press Release	Why Statement Violates Paragraph 8
		amount of damages the CFTC was pursuing in the litigation.
"The order also enjoins Kraft and Mondelēz from engaging in future violations of the manipulation, wash trade, and position limit provisions of the Commodity Exchange Act and CFTC regulations charged in the complaint."	Paragraph 2, Sentence 2	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that Defendants either admitted, or there was a determination, that Defendants committed past violations of the manipulation, wash trade, and position limit provisions of the Commodity Exchange Act and CFTC regulations charged in the complaint.
"America is the breadbasket of the world; wheat markets are its heart. Market manipulation inflicts real pain on farmers by denying them the fair value of their hard work and crops, said Chairman Heath P. Tarbert. It also hurts American families by raising the costs of putting food on the table. Instances of market manipulation are precisely the kinds of cases the CFTC was founded to pursue."	Paragraph 3, Sentences 1-4	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that Defendants either admitted to manipulating the wheat market, or that there was a determination that Defendants manipulated the wheat market, neither of which is correct. • This statement creates the false impression that the CFTC alleged, or there was a determination, in this case that Defendants engaged in conduct that: (1) "inflict[ed] real pain on farmers by denying them the fair value of their hard work and crops";

EXHIBIT 2

Key Public Statements Contained in CFTC Press Release that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Press Release	Why Statement Violates Paragraph 8
		and/or (2) "hurt[ ] American families by raising the costs of putting food on the table." • This statement creates the false impression that Defendants engaged in misconduct, in the form of market manipulation, that the CFTC was founded to pursue.
"The complaint alleged that, in fact, Kraft and Mondelēz had no intention of sourcing wheat from the futures market …."	Paragraph 4, Sentence 2	• This statement does not appear in the Consent Order, or in any other public document filed in this case, including the complaint.
"A statement from the Commission can be found here. A further concurring statement by Commissioners Berkovitz and Behnam can be found here."	Paragraph 7, Sentences 1-2	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • The statement from the Commission, and concurring statement by Commissioners, both of which are hyperlinked to the Press Release, do not appear in the Consent Order or in any other public documents filed in the case, and thus violate Paragraph 8. • By providing hyperlinks to the Commissioners' statement in its Press Release, and posting the Commissioners' statement on its website, the CFTC made those statements its own and thus is liable for all statements contained in the Commissioners' statement that violate Paragraph

EXHIBIT 2

Key Public Statements Contained in CFTC Press Release that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Press Release	Why Statement Violates Paragraph 8
		8, including those identified in Defendants' Exhibit 3B.

Exhibit 3

EXHIBIT 3

Summary of Key Violations Contained in the Statement of the Commission, Published on the CFTC's Website on August 15, 2019[1]

Public Statements Contained in Statement of Commission that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commission	Why Statement Violates Paragraph 8
"We are pleased to bring this matter to a successful resolution, which terminates more than four years of litigation."	Paragraph 1, Sentence 2	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that the CFTC was "successful" in the litigation, which implies that Defendants were unsuccessful.
"The Consent Order results in a $16 million civil monetary penalty—nearly three times the unlawful profit the Commission alleged the Defendants obtained—and a permanent injunction prohibiting the Defendants from engaging in future violations of several anti-manipulation provisions of the Commodity Exchange Act and Commission Regulations."	Paragraph 1, Sentence 3	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that Defendants either admitted to manipulating the wheat market, or there was a determination that Defendants manipulated the wheat market, neither of which is correct.

[1] This Exhibit identifies the key statements in the Statement of the Commission that violate Section I, Paragraph 8, of the Consent Order; it does not identify every statement in the Statement of the Commission that may violate Section I, Paragraph 8. Because Section I, Paragraph 8, prohibits the CFTC and Commissioners from making "any public statement about this case other than to refer to the terms of [the Consent Order] or public documents filed in this case," with limited exceptions not relevant here, any statement contained in the Statement of the Commission that does not expressly refer to, or appear in, the Consent Order or another publically filed document in this case violates the Consent Order.

EXHIBIT 3

Public Statements Contained in Statement of Commission that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commission	Why Statement Violates Paragraph 8
		• This statement creates the false impression that Defendants agreed to pay a $16 million penalty because they manipulated the wheat market. • This statement creates the false impression that the settlement amount was three times greater than the amount of damages the CFTC was pursuing in the litigation.
"The Commission believes that the Consent Order advances our mission of fostering open, transparent, and competitive markets."	Paragraph 2, Sentence 1	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that Defendants engaged in conduct that made the futures market less open, transparent, and competitive.
"In unanimously approving the settlement, our Commission considered carefully Paragraph 8 of Section I of the Consent Order, which was included at the Court's request:"	Paragraph 2, Sentence 2	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • The statement that Paragraph 8 "was included at the Court's request" is factually inaccurate, and creates the false impression that the Court required the parties to accept Paragraph 8, when, in fact, the CFTC agreed to Paragraph 8 as part of the negotiation process.

EXHIBIT 3

Public Statements Contained in Statement of Commission that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commission	Why Statement Violates Paragraph 8
"Our decision to approve the Consent Order was based on the fact that while this provision (hereinafter, 'Paragraph 8') limits what *the Commission* (*i.e.*, the 'party' referenced in Paragraph 8) can say about the *Kraft* litigation, it does not restrict individual Commissioners when speaking in their personal capacities. [1] The text of Paragraph 8 could not be clearer: it binds the acts of a 'party,' namely the Commission as plaintiff, and Kraft Foods Group, Inc. and Mondelēz Global LLC as defendants. While other provisions—such as Section IV, Paragraph 10—do apply beyond the parties, specific language in the Consent Order makes it so." "[1] To be sure, in binding the Commission, Paragraph 8 includes any member of our agency's staff when they act on our behalf or speak for the CFTC."	Paragraph 3, Sentences 1-3 & n.1	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement is factually inaccurate, and to the extent it suggests that the CFTC believes Paragraph 8 does not apply to Commissioners, it creates a false impression. The notion that Paragraph 8 does not apply to Commissioners is inconsistent with several statements made by members of the CFTC's Division of Enforcement—in which they acknowledged Paragraph 8 applied to Commissioners—to Defendants' representatives and counsel prior to entry of the Consent Order.
"We do not expect the Commission to agree to similar language in the future, except in limited situations where our statutory enforcement mission of preventing market manipulation is substantially advanced by the settlement terms and the public's right to	Paragraph 4, Sentence 1	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that Defendants either admitted to manipulating the wheat market, or there was a determination that

EXHIBIT 3

Public Statements Contained in Statement of Commission that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commission	Why Statement Violates Paragraph 8
know about Commission actions is not impaired."		Defendants manipulated the wheat market, neither of which is correct. • By stating its "statutory enforcement mission of preventing market manipulation is substantially advanced by the settlement terms," the statement creates the false impression that Defendants either admitted to manipulating the wheat market, or there was a determination that Defendants manipulated the wheat market, neither of which is correct. It also creates the false impression that the CFTC was successful in the litigation, and Defendants were unsuccessful. • This statement creates the false impression that Paragraph 8 impairs some right of the public.

Exhibit 4

EXHIBIT 4

Summary of Key Violations Contained in the Statement of Commissioners Dan M. Berkovitz and Rostin Behnam Regarding the Commission's Settlement with Kraft Foods Group, Inc. and Mondelēz Global LLC ("Statement of Commissioners"), Published on the CFTC's Website on August 15, 2019[1]

Public Statements Contained in Statement of Commissioners that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commissioners	Why Statement Violates Paragraph 8
"We are voting for this settlement because we believe that Kraft Foods Group, Inc. (Kraft) manipulated the wheat market."	Paragraph 1, Sentence 1	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that Kraft Foods Group, Inc. manipulated the wheat market.
"The $16 million penalty and injunctive relief that the Commission has obtained in this consent order is as much as the Commission could reasonably expect to obtain if it were to prevail at trial."	Paragraph 1, Sentence 2	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that the settlement amount was three times greater than the amount of damages the CFTC was pursuing in the litigation.

[1] This Exhibit identifies the key statements in the Statement of Commissioners that violate Section I, Paragraph 8, of the Consent Order; it does not identify every statement in the Statement of Commissioners that may violate Section I, Paragraph 8. Because Section I, Paragraph 8, prohibits the CFTC and Commissioners from making "any public statement about this case other than to refer to the terms of [the Consent Order] or public documents filed in this case," with limited exceptions not relevant here, any statement contained in the Statement of Commissioners that does not expressly refer to, or appear in, the Consent Order or another publically filed document in this case violates the Consent Order.

EXHIBIT 4

Public Statements Contained in Statement of Commissioners that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commissioners	Why Statement Violates Paragraph 8
"This action demonstrates the CFTC's resolve to aggressively prosecute and punish those who manipulate or attempt to manipulate our nation's commodity markets."	Paragraph 1, Sentence 3	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that Defendants either admitted to manipulating or attempting to manipulate the wheat market, or there was a determination that Defendants manipulated or attempted to manipulate the wheat market, neither of which is correct. • This statement creates the false impression that the settlement is a punishment for Defendants, as opposed to an agreement that was heavily negotiated between the parties and to which all parties voluntarily agreed. • The use of the word "prosecute" mischaracterizes the nature of the proceedings and creates the false impression this was a criminal proceeding prosecuting criminal conduct, when in fact this was a civil enforcement action.
"The settlement agreement in this case has two unusual features that merit further explanation and comment."	Paragraph 2, Sentence 1	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • Paragraph 8 unambiguously prohibits "explanation and comment" about the case.

EXHIBIT 4

Public Statements Contained in Statement of Commissioners that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commissioners	Why Statement Violates Paragraph 8
As the Commission observes, however, the consent order only limits the statements of the Commission as a collective body.	Paragraph 2, Sentence 4	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • Paragraph 8 unambiguously applies to the CFTC, including Commissioners, staff, and all other members.
"Individual Commissioners, speaking in their own capacities, retain their right and ability to speak fully and truthfully about this matter."	Paragraph 2, Sentence 5	• This statement does not appear in the Consent Order, or in any other public document filed in this case.
"Commissioners, as public officials, must be able to explain to Congress and the public the basis for the sanctions obtained, as well as the rationale for entering into a settlement agreement rather than pursuing litigation."	Paragraph 3, Sentence 1	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement mischaracterizes Defendants' agreement to enter into the settlement—including Defendants' agreement to pay an amount to resolve the litigation—as a "sanction obtained" by the CFTC. This creates the false impression that the settlement, including the settlement amount, was intended to, and did, punish Defendants for their conduct, which is not accurate. • Paragraph 8 unambiguously prohibits the CFTC Commissioners from explaining to the public "the basis for the sanctions obtained, as well as the rationale for entering into a settlement agreement

EXHIBIT 4

Public Statements Contained in Statement of Commissioners that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commissioners	Why Statement Violates Paragraph 8
		rather than pursuing litigation." The Statement of Commissioners is a public statement that has nothing to do with any right the Commissioners may claim they have to transmit information to Congress.
"Although we disagree with any provision restricting the five-member Commission's capacity to make public statements, this provision does not impede our ability to provide information about this case to the public in light of each Commissioner's right to discuss this case freely."	Paragraph 3, Sentence 2	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • Stating they "disagree with any provision restricting the five-member Commission's capacity to make public statements" creates the false impression that Commissioners Berkovitz and Behnam voted against the Consent Order. In fact, Commissioners Berkovitz and Behnam voted to approve the Consent Order, including Paragraph 8. • This statement creates the false impression that Paragraph 8 does not apply to Commissioners, or that Commissioners are somehow carved-out of Paragraph 8, when, in fact, Paragraph 8 unambiguously applies to Commissioners and prohibits them from making public statements about the case in a manner inconsistent with the terms of Paragraph 8.
"CFTC enforcement actions not only punish violations of the law and deter future misconduct by the party to the action, but also provide guidance to the public about the	Paragraph 4, Sentence 2 & n.4	• This statement does not appear in the Consent Order, or in any other public document filed in this case.

EXHIBIT 4

Public Statements Contained in Statement of Commissioners that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commissioners	Why Statement Violates Paragraph 8
agency's interpretation of its laws, thereby deterring similar conduct by others. [4]" "[4] *See, e.g.*, *Reddy v. CFTC*, 191 F.3d 109, 123 (2d Cir. 1999) (holding CFTC enforcement should be 'to further the [CEA]'s remedial policies and to deter others in the industry from committing similar violations'); *In re First Fin. Trading, Inc.*, CFTC No. 00-35, 2002 WL 1453795, at *2, *14, *20 (July 8, 2002) (stating that CFTC has 'important and delicate government function of punishing illegal conduct' and that CFTC civil penalties should serve as both specific and general deterrents) (quoting *Miller v. CFTC*, 197 F.3d 1227, 1236 (9th Cir. 1999)); *cf. SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 306, 308 (S.D.N.Y. 2011) (noting that enforcement actions brought by the Securities and Exchange Commission ("SEC") serve the public interest and deter future misconduct)."		• This statement creates the false impression that Defendants either admitted to violations of the law, or there was a determination that Defendants violated the law, neither of which is correct. • This statement creates the false impression that the settlement is a punishment for Defendants. • Footnote 4 does not appear in the Consent Order, or in any other public document filed in this case, and contains the same false impressions as the statement itself.
"Explaining to the public the factual basis for imposing a penalty not only serves to deter similar conduct in the future, but also is essential to avoid chilling legitimate market activity."	Paragraph 4, Sentence 3	• This statement does not appear in the Consent Order, or in any other public document filed in this case.

EXHIBIT 4

Public Statements Contained in Statement of Commissioners that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commissioners	Why Statement Violates Paragraph 8
		• This statement creates the false impression that the amount Defendants agreed to pay to resolve the case without further litigation was a punitive sanction imposed on Defendants for misconduct, which is incorrect. • This statement creates the false impression that Defendants admitted they engaged in misconduct, or there was a determination that Defendants engaged in misconduct, neither of which is correct. • This statement creates the false impression that the CFTC alleged, or the Court determined, that Defendants' conduct could have, or did, chill legitimate market activity, when no such allegation or determination was made.
"General deterrence is an exercise in communication. That is, for a sanctions regime to deter, the potential wrongdoer must be able to apprehend what conduct might give rise to a particular level of pain, in the form of a sanction. [5]" "[5] David M. Becker, *What More Can Be Done to Deter Violations of the Federal Securities Laws?*, 90 Tex. L. Rev. 1849, 1850 (2012) (citing Raymond Paternoster,	Paragraph 4, Sentences 4-5 & n.5	• This statement, including footnote 5, does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that Defendants admitted they engaged in wrongdoing, or there was a determination that Defendants engaged in wrongdoing, neither of which is correct.

EXHIBIT 4

Public Statements Contained in Statement of Commissioners that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commissioners	Why Statement Violates Paragraph 8
How Much Do We Really Know About Criminal Deterrence?, 100 J. Crim. L. & Criminology 765, 785-86 (2010)). David Becker was General Counsel of the SEC from 2000-2002 and 2009-2011."		• This statement creates the false impression that Defendants were the subject of a sanction meant to inflict pain on them, which is not correct. • The reference in footnote 5 to criminal deterrence and violations of the federal securities laws gives the false impression that there was an admission or determination that Defendants engaged in criminal conduct or other violations of law, which is not correct.
"Federal agencies often decide to settle enforcement matters without further litigation for pragmatic reasons, including the avoidance of the costs and risks associated with a trial. [6]" "[6] *See, e.g., SEC v. Citigroup Glob. Mkts. Inc.*, 752 F.3d 285, 295 (2d Cir. 2014) ('Even if the Commission's case against [defendants] is strong, proceeding to trial would still be costly. The S.E.C.'s resources are limited, and that is why it often uses consent decrees as a means of enforcement.')."	Paragraph 5, Sentence 1 & n.6	• This statement, including footnote 6, does not appear in the Consent Order, or in any other public document filed in this case. • This statement, including footnote 6, mischaracterizes the nature of the settlement, creating the false impression that the CFTC's case against Defendants was strong and the only reason the CFTC decided not to further pursue litigation was due to cost.
"The Commission, like other federal agencies, may determine that resolving a case without evidentiary findings is appropriate, where the Commission believes that the settlement agreement, viewed in its	Paragraph 5, Sentence 2 & n.7	• This statement, including footnote 7, does not appear in the Consent Order, or in any other public document filed in this case.

EXHIBIT 4

Public Statements Contained in Statement of Commissioners that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commissioners	Why Statement Violates Paragraph 8
entirety under the circumstances, is in the public interest. [7]" "[7] *See id.* (noting that the determination of whether a consent judgment best serves the public interest is one that 'rests squarely' with the federal agency and merits 'significant deference')."		• This statement creates the false impression that the CFTC had the authority or discretion to determine whether evidentiary findings would be included as part of the settlement, which is inaccurate. • Moreover, statements about the "public interest" create the false impression that the settlement is more favorable to the CFTC than to Defendants, or that a determination was made that Defendants engaged in conduct detrimental to the public interest, none of which is correct.
"We support entering into the consent order with Kraft, despite the absence of findings of fact, because the penalty and injunctive relief imposed reflect, in our view, the gravity of Kraft's conduct."	Paragraph 5, Sentence 3	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that the settlement imposed punitive sanctions on Defendants as a result of Defendants engaging in misconduct, which is incorrect. • Indeed, this statement creates the false impression that Defendants admitted they engaged in misconduct, or it was determined that Defendants engaged in misconduct, neither of which is correct.
"However, particularly in settlements where there are no evidentiary findings, it is critical that a Commissioner be able to speak publicly about his or her reasons for	Paragraph 6, Sentence 1	• This statement does not appear in the Consent Order, or in any other public document filed in this case.

EXHIBIT 4

Public Statements Contained in Statement of Commissioners that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commissioners	Why Statement Violates Paragraph 8
determining that the law has been violated, why the agreed penalties are appropriate, and why the agency did not obtain findings of fact or proceed to trial."		• This statement creates the false impression that it was determined that Defendants violated the law, when no such determination was made in connection with the settlement. • This statement creates the false impression that the CFTC had the authority or discretion to determine whether evidentiary findings would be included as part of the settlement, which is inaccurate.
"The public has a right to know whether federal agencies are obtaining appropriate remedies when the law is violated. [8]" "[8] *See, e.g., EEOC v. Erection Co.*, 900 F.2d 168, 172 (9th Cir. 1990) (Reinhardt, J. concurring in part and dissenting in part)."	Paragraph 6, Sentence 2 & n.8	• This statement, including footnote 8, does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that Defendants either admitted to violations of the law, or there was a determination that Defendants violated the law, neither of which is correct. • This statement creates the false impression that the amount Defendants agreed to pay to resolve the case without further litigation was a sanction imposed on Defendants for misconduct, which is incorrect.
"More generally, CFTC Commissioners must be able to freely and openly express their views on public matters. Congress has recognized the importance of such unrestrained communications by providing Commissioners with a statutory right to	Paragraphs 7-8; n.10	• This statement, including footnote 10, does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that Paragraph 8 does not apply to Commissioners,

EXHIBIT 4

Public Statements Contained in Statement of Commissioners that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commissioners	Why Statement Violates Paragraph 8
publically state their views on matters before the Commission. . . . The Commission cannot bargain this right away in settlement negotiations. The courts are obligated to recognize it when crafting consent orders. [10]"		which is incorrect, or that the CEA prohibits the CFTC from entering into settlements with provisions such as Paragraph 8, for which Commissioners Berkovitz and Behnam offer no relevant authority or support. • This statement creates the false impression that Commissioners Berkovitz and Behnam voted against the Consent Order, when, in fact, Commissioners Berkovitz and Behnam voted to approve the Consent Order, including Paragraph 8.
"Other federal agencies expressly prohibit consent or settlement agreements that restrict the agency's ability to speak about settlements or the underlying action. For example, the Department of Justice has adopted a regulation that prohibits it from entering into settlement agreements or consent decrees that are subject to a confidentiality provision in any civil matter in which the Department is representing the interests of the United States or its agencies. [11] The Department of Justice regulation is based upon 'the public's strong interest in knowing about the conduct of its Government.' [12]"	Paragraph 9; nn.11-12	• This statement, including footnotes 11-12, does not appear in the Consent Order, or in any other public document filed in this case.

EXHIBIT 4

Public Statements Contained in Statement of Commissioners that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commissioners	Why Statement Violates Paragraph 8
"In our view, in future situations, the Commission should not accept any confidentiality provisions or restrictions on the Commission's ability to make public statements."	Paragraph 10	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that Paragraph 8 does not apply to Commissioners, or that Commissioners are somehow carved-out of Paragraph 8, when, in fact, Paragraph 8 unambiguously applies to Commissioners and prohibits them from making public statements about the case in a manner inconsistent with the terms of Paragraph 8. • This statement creates the false impression that Commissioners Berkovitz and Behnam voted against the Consent Order, when, in fact, Commissioners Berkovitz and Behnam voted to approve the Consent Order, including Paragraph 8.
"Even where a court does not make any evidentiary findings or conclusions of law, the fact that a U.S. district court, through a consent order, imposes a civil monetary penalty demonstrates that the Commission has provided sufficient evidence to find that the defendants violated the law."	Paragraph 11, Sentence 1	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that the Court, in approving the settlement and entering the Consent Order, determined that the CFTC had presented sufficient evidence to find that Defendants violated the law. The Court made no such determination and the Consent Order—which was approved by the Commission and which

EXHIBIT 4

Public Statements Contained in Statement of Commissioners that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commissioners	Why Statement Violates Paragraph 8
		Commissioners Berkovitz and Behnam voted to approve—expressly states, "[n]othing in this Order reflects an agreement or a legal determination that Defendants have or have not violated any provision of the CEA."
"Section 6c(d)(1) of the Act provides courts with 'jurisdiction to impose [a civil monetary penalty], on a proper showing, *on any person found in the action to have committed any violation* ….' [13] Because the court can only impose civil monetary penalties in instances where the government has made a 'proper showing,' it must be presumed that the Commission has provided sufficient evidence to find a violation—even where the order itself does not explicitly say so. 'As part of its review, the district court will necessarily establish that a factual basis exists for the proposed decree.' [14]" "[13] 7 U.S.C. § 13a-1(d)(1) (emphasis added). CEA Section 6c(b) provides courts with jurisdiction to impose a permanent injunction 'upon a proper showing.' 7 U.S.C. § 13a-1(b). [14] *Citigroup*, 752 F.3d at 295."	Paragraph 11, Sentences 2-4 & nn.13-14	• This statement, including footnotes 13-14, does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that the Court, in approving the settlement and entering the Consent Order, determined that the CFTC had presented sufficient evidence to find that Defendants violated the law. The Court made no such determination, and the Consent Order—which was approved by the Commission and which Commissioners Berkovitz and Behnam voted to approve—expressly states, "[n]othing in this Order reflects an agreement or a legal determination that Defendants have or have not violated any provision of the CEA."

EXHIBIT 4

Public Statements Contained in Statement of Commissioners that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commissioners	Why Statement Violates Paragraph 8
"Judge Rakoff has put it more bluntly. In approving a settlement agreement where the defendant neither admitted nor denied the allegations, yet paid the penalty for the violation, Judge Rakoff cogently noted: 'No reasonable observer of these events could doubt that the company has effectively admitted the allegations of the complaint in the way that, for a company, is particularly appropriate: by letting its money do the talking.' [15]" "[15] *Vitesse*, 771 F. Supp. 2d at 310."	Paragraph 12, Sentences 1-2 & n.15	• This statement, including footnote 15, does not appear in the Consent Order, or in any other public document filed in this case. • This statement falsely describes the Consent Order as indicating Defendants neither admitted, nor denied, the CFTC's allegations, when Defendants expressly denied in the Consent Order any violation of the CEA. • This statement creates the false impression that the amount Defendants agreed to pay to resolve the case without further litigation was a "penalty for [a] violation," which is not correct. • Moreover, equating the settlement amount paid by Defendants to resolve the litigation as a "penalty for [a] violation" creates the false impression that Defendants either admitted to violations of the law, or there was a determination that Defendants violated the law, neither of which is correct.
"In this case, it is not only Kraft's $16 million payment that is doing the talking. The Commission is speaking loudly and clearly as well: those who manipulate or attempt to manipulate our commodity markets will be prosecuted and punished."	Paragraph 13, Sentences 1-2	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that Defendants either admitted to manipulating or attempting to manipulate the commodity markets, or

EXHIBIT 4

Public Statements Contained in Statement of Commissioners that Violate Section I, Paragraph 8, of the Consent Order	Contained Where in Statement of Commissioners	Why Statement Violates Paragraph 8
		there was a determination that Defendants manipulated or attempted to manipulate the commodity markets, neither of which is correct. • This statement creates the false impression that the litigation was a criminal proceeding prosecuting criminal conduct, when in fact this was a civil enforcement action. • This statement creates the false impression that the settlement is a punishment for Defendants, as opposed to an agreement that was heavily negotiated between the parties and to which all parties voluntarily agreed.
"We thank the Division of Enforcement staff for their diligent prosecution of this matter."	Paragraph 14, Sentence 1	• This statement does not appear in the Consent Order, or in any other public document filed in this case. • This statement creates the false impression that this was a criminal proceeding prosecuting criminal conduct, when in fact this was a civil enforcement action.

Exhibit 5

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Chicago, Illinois 60661
Telephone: (312) 596-0700
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Division of
Enforcement

Robert Howell
Chief Trial Attorney
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rhowell@cftc.gov

March 6, 2019

Via U.S. Mail
Honorable John Robert Blakey
U.S. District Court for the Northern District of Illinois
Everett McKinley Dirksen United States Courthouse
219 South Dearborn Street
Chicago, IL 60604

Re: U.S. Commodity Futures Commission v. Kraft Foods Group, Inc. et al., Civil Action: No: 15-cv-02881

Dear Judge Blakey:

On February 26, 2019, your honor issued an order setting a settlement conference for March 22, 2019 at 11:00 a.m. One provision of the order poses logistical problems for the Plaintiff Commodity Futures Trading Commission ("CFTC"), namely, the order requires that "[p]arties with full and complete settlement authority must attend the conference personally."

The CFTC is an independent federal regulatory agency charged with the responsibility for administering and enforcing the provisions of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 1 et seq. and the Regulations promulgated thereunder, 17 C.F .R. § § 1 et seq. It is composed of and governed by five Commissioners appointed by the President, by and with the advice of the Senate. 7 U.S.C. § 4a(a)(2). Although the Commission prosecutes actions through its Division of Enforcement ("Division"), the Division does not possess independent settlement authority. Rather, the Division presents executed offers of settlement to the Commission with specific recommendations that any such offer be accepted or declined, and in the case of federal litigation, to grant the Division authority to enter into the proposed settlement.

Recognizing this administrative framework, the CFTC intends to participate in the settlement conference through a Division attorney possessing authority to negotiate the terms of a settlement that the Division will affirmatively recommend the Commission accept. Prompt action by the Commission concerning any resulting settlement recommendation is anticipated.

If your honor has any questions I can be reached at (312) 596-0590.

Sincerely,

Robert Howell

Robert Howell
Chief Trial Attorney

cc: Dean Panos and Kevin McCall, *Counsel for Defendants*
Susan Gradman, Michael Frisch, and Stephanie Reinhart, *Counsel for CFTC*

Exhibit 6

The CFTC Organization

08/19/2019

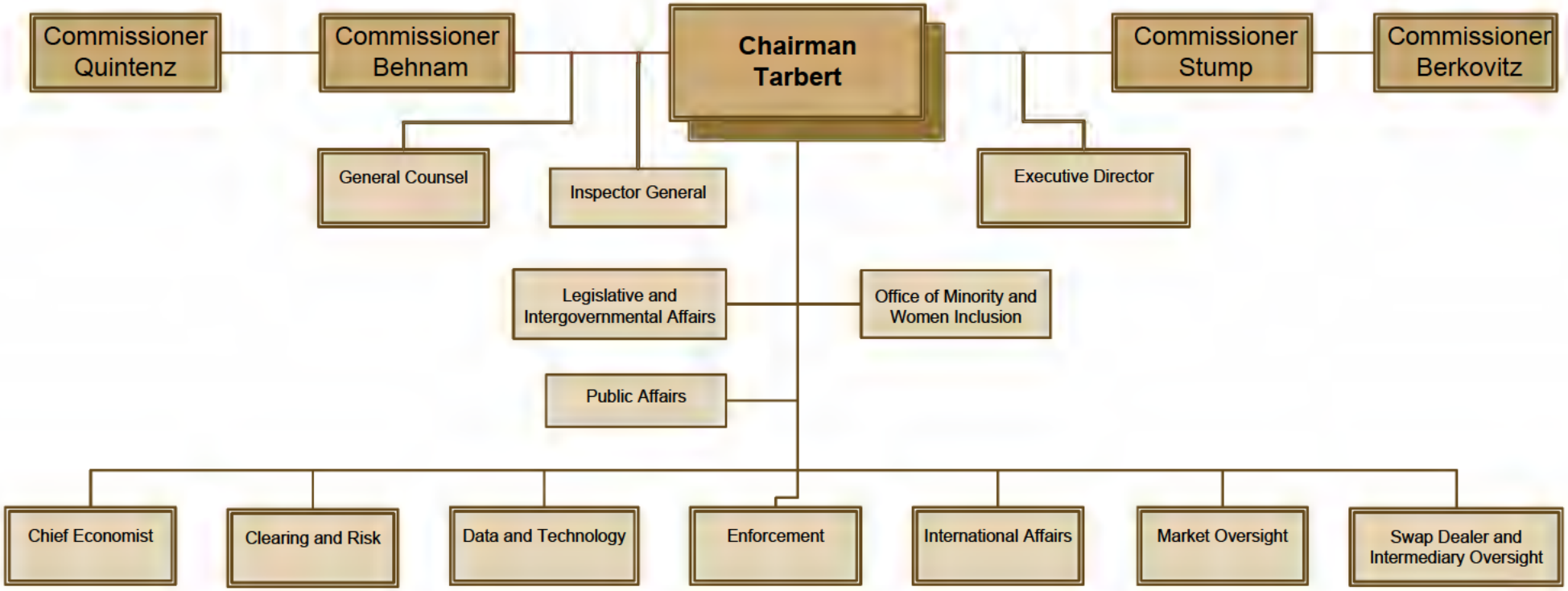

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Exhibit 7

Published on *The National Law Review* (http://www.natlawreview.com)

Long-Awaited CFTC v. Kraft Settlement Resolves Manipulation Allegations

Article By:
Michael W Brooks
Robert E. Pease
Joshua Robichaud

Today the legal battle between the **Commodity Futures Trading Commission** (CFTC) and **Kraft Foods Group, Inc.** (Kraft) over whether Kraft manipulated the wheat market in 2011 officially ended with the entering of a Consent Order in the U.S. District Court for the Northern District of Illinois. It was disclosed on March 25, 2019 that the parties reached a binding agreement, but the details have remained non-public until today. The settlement includes a civil penalty of $16 million dollars to be paid by Mondelez Global, LLC (an affiliate of and co-defendant with Kraft Foods Group, Inc.). While the settlement resolves the dispute between the parties, it leaves open issues of first impression and removes an opportunity to clarify the scope of the CFTC's anti-manipulation rule. One thing this should not signal to market participants is a surrender by the CFTC.

As we have discussed previously, Kraft allegedly changed from behaving as a captive customer in the wheat cash market (and using futures only to hedge) to acquiring large quantities of wheat futures contracts and signaling to the market that it intended to take the contracts to delivery with the expectation that this would encourage convergence of futures prices and cash prices (which were at a premium to futures), allowing Kraft to liquidate its futures position at a profit and purchase in the cash market at a savings. These factual allegations were neither proven nor stipulated by the parties, but the CFTC's characterization of the activity as manipulation presented the question whether exercising market power short of cornering or squeezing a market constitutes market manipulation.

Practical Takeaways: What is Market Manipulation?

Many market observers previously had hoped to get more clarity through a decision on the merits in this case. The Consent Order certainly will not satisfy that desire. Instead, we are left with a Commission declaring victory and a respondent paying a substantial penalty What does this mean for market participants? They must behave as though the Commission won or risk being a defendant in the next attempt to better define the scope of the Commission's anti manipulation authority

As such, rather than considering what the law is, might be, or should be, market participants should consider what the CFTC alleged violated the law In this regard, the following highlights can be taken as words of caution for future conduct:

- Kraft, a physical end user, allegedly carried a futures position substantially larger than its expected physical needs.
- It allegedly carried that large position into the delivery period with a plan to take delivery and redeliver some portion of the delivered product back into the futures market.
- This practice allegedly was a departure from its historic practice
- Its goal allegedly was to influence market prices (in the futures and cash markets).

- It did not matter to the CFTC that the anticipated effect would be to encourage convergence of the futures and cash markets consistent with the fundamental purpose of futures contracts.

While any one of these factors alone might not have resulted in allegations of market manipulation, and all combined might not have led to a finding on the merits in favor of the CFTC, any one factor is sufficient to warrant vetting by legal and compliance

Message from the CFTC: (1) We Won and (2) Don't Expect Similar Concessions in the Future

In a brief statement issued by the CFTC, the Commission expressed pleasure in bringing the matter to "a successful resolution" and touted the settlement amount as equaling "nearly three times the unlawful profit the Commission alleged the Defendants obtained" (which is one way of calculating the maximum penalty allowed). The CFTC had alleged that Kraft yielded "more than $5.4 million in futures trading profits and savings from its strategy" and was seeking the maximum penalty allowable, which would equal the greater of $1 million for each violation of the anti-manipulation provisions of the statute and "$140,000 for each additional violation" or "triple the monetary gain to Kraft for each violation."[1]

This sentiment was echoed in a statement issued by the two Democratic commissioners, Commissioners Berkovitz and Behnam: "In this case, it is not only Kraft's $16 million payment that is doing the talking. The Commission is speaking loudly and clearly as well: those who manipulate or attempt to manipulate our commodity markets will be prosecuted and punished."

Both the Commission as a whole, and the Democratic commissioners, highlighted a portion of the Consent Order that restricts the parties' ability to speak publicly about the case. The Commission specifically noted that it "considered carefully Paragraph 8 of Section I of the Consent Order, which *was included at the Court's request*" (*emphasis added)*, which provides: "Neither party shall make any public statement about this case other than to refer to the terms of this settlement agreement or public documents filed in this case, except any party may take any lawful position in any legal proceedings, testimony or by court order." This language is similar to boilerplate language typically included in CFTC settlements that unilaterally limits the respondent's ability to make public statements but here applies to the Commission's statements as well.

The Commission cautioned that such mutually binding language should not be expected in future settlements "except in limited situations where our statutory enforcement mission of preventing market manipulation is substantially advanced by the settlement terms and the public's right to know about Commission actions is not impaired." As highlighted by the Democratic commissioners, the Commission interprets the provision to only govern official statements by the Commission as a whole or by agency staff when acting on the Commission's behalf or speaking for the CFTC and not to cover statements by individual commissioners speaking in their personal capacities. In fact, the limitation only applies to the parties and not to individuals, which also likely means employees and agents of Kraft are not prevented by the Consent Order from speaking freely about the case in their own personal capacities. It will be interesting to see whether any exercise this freedom.

Finally, query whether the Commission's statement today about Paragraph 8 of Section I itself violates Paragraph 8 of Section I. It would seem to be a "public statement [by the Commission, a party,] about [the] case other than to refer to the terms of [the] settlement agreement or public documents filed in [the] case," and it is not taking any position in a legal proceeding, testimony, or by court order.

With this settlement, the CFTC's litigation record for fiscal year 2018 with respect to market manipulation comes to 1-1-1, including its recent win in CFTC v. Monex, its loss in *CFTC v. Wilson*, and the tie in this case. One thing clear from the Commission's and commissioners' statements is that it doesn't intend to quit while even.

---

[1] *See* Complaint, *CFTC v. Kraft Foods Group, Inc., et al.*, No. 15-cv-2881 (N.D. Ill. Apr. 1, 2015). As for the potential penalties for additional violations, the CFTC had alleged violations related to *non-bona fide* exchange-for-physical (EFP) transactions at least five times per year from 2009 to 2014 ($4,200,000 in potential penalties, assuming within statute of limitations) and position limit violations on five days ($700,000 in potential penalties)

Source URL: https://www.natlawreview.com/article/long-awaited-cftc-v-kraft-settlement-resolves-manipulation-allegations

CADWALADER

United States: Two Companies Settle CFTC Charges Of Wheat Futures Price Manipulation

Last Updated: August 20 2019
Article by **Robert Zwirb**
Cadwalader, Wickersham & Taft LLP

Most Read Contributor in United States, August 2019

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Two companies agreed to pay $16 million to settle CFTC charges of wheat futures price manipulation. Pursuant to the settlement, the CFTC agreed not to make "any public statement about this case." The Consent Order does not contain either factual findings or conclusions of law.

In its Complaint filed in the U.S. District Court for the Northern District of Illinois Eastern Division, the CFTC alleged that Kraft Foods Group, Inc. and Mondelēz Global LLC devised and executed a scheme designed to manipulate the prices of the December 2011 wheat futures contract traded on the Chicago Board of Trade. The CFTC alleged that the Defendants had no intention of sourcing wheat from the futures market but sought to create a false demand for more than 3,000 futures contracts (estimated $90 million) of Soft Red Winter Wheat. The CFTC found that the Defendants made over $5 million through their improper conduct.

In a public statement, the Commission emphasized that it likely will not agree to a gag order again, with certain exceptions. The Commission further clarified that, although it cannot speak on the litigation, individual Commissioners may speak on the matter in their personal capacity.

Although they expressed support for settlement, CFTC Commissioners Dan M. Berkovitz and Rostin Behnam urged the Commission not to "bargain this right away in settlement negotiations." Specifically, the Commissioners stated that it is crucial that they retain the ability to speak to Congress and the public in order to explain the logic behind entering into settlement agreements. Going forward, they urged the Commission not to accept any confidentiality provisions or restrictions on public statements.

Commentary

Bob Zwirb

Gag orders imposed in settlements typically create an asymmetry for litigating parties in their ability to comment on such matters, with the government usually remaining free to say whatever it wants about the respondent's alleged wrongdoing, while the latter enjoying no similar privilege. Here the Court took the unusual step of imposing a gag order on *both* parties to prevent them from "mak[ing] any public statement about this case." Commissioners Berkovitz and Behnam nevertheless get around this restraint by taking advantage of the fact that it applies only to the Commission "as a collective body," but not to them as individual Commissioners. And while they lament the Commission's (but not the defendants') inability to talk about this case, they nevertheless feel free to "explain to . . . the public the basis for the sanctions obtained, as well as the rationale for entering into a settlement agreement rather than pursuing litigation."

By taking this path, the two Commissioners not only are able to preserve the fiction that the Court's Order here was meant to prevent, but at the same time to impute guilt on the part of Kraft and Mondelēz, notwithstanding the fact that the latter neither admitted nor denied the CFTC's allegations. They do so by citing the judge's unfair statement that by settling rather than fully litigating, Kraft "has effectively admitted the allegations of the complaint."

"Federal agencies," as Messrs. Berkovitz and Behnam correctly observe, "often decide to settle enforcement matters without further litigation for pragmatic reasons, including the avoidance of the costs and risks associated with a trial." The same can be said for defendants like Kraft and Mondelēz, but they enjoy no similar right to express that sentiment. Such a clever workaround, as was done here, allows Washington regulators to continue to talk their side while compelling defendants to shut up about cases that are settled. Perhaps this is why such gag orders are currently subject to legal challenge. *See Shut Up the SEC Explained* and *How the SEC Silences-Criticism.*

Contributor
Robert Zwirb

Cadwalader, Wickersham & Taft LLP

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Robert Zwirb

BUSINESS

Feds reap $16 million settlement with Kraft, Mondelez but sow confusion

CFTC comments about case violate agreement, Kraft Heinz alleges.

By David Roeder | @RoederDavid | Aug 15, 2019, 6:10pm CDT

A trio of wheat harvest combines wrap up work Aug. 5 east of Walla Walla, Wash., at the base of the Blue Mountains. | Greg Lehman/Walla Walla Union-Bulletin via AP

The federal regulator of futures trading said Thursday it has obtained a consent order requiring Kraft Heinz and Mondelez International to pay $16 million to settle charges that they manipulated wheat prices in 2011, but the issue may not be resolved.

The Commodity Futures Trading Commission, which first accused the companies of wrongdoing four years ago, said the penalty is about three times their alleged profit from their trades. In 2011, Kraft, which has headquarters in Pittsburgh and Chicago, and Deerfield-based Mondelez were one company under the Kraft name.

But there were several unusual aspects about the consent order, entered Wednesday by U.S. District Judge John Robert Blakey. It contains no factual findings to support the penalty and, despite a provision forbidding the defendants and the CFTC from commenting on the case, two of the five agency commissioners issued a statement about it.

In addition, the consent order specifies that the $16 million must be paid only by Mondelez in 90 days. But then it adds a sentence that says both defendants are liable.

Kraft Heinz spokeswoman Lynne Galia said, “We strongly disagree with the CFTC’s statements, which blatantly violate and misrepresent the terms and spirit of the consent order, and will be seeking immediate relief from the court.” She declined further comment and a Mondelez spokesman could not be reached.

The CFTC alleged the companies devised a strategy in the late summer 2011 to counteract high prices for cash wheat. It said the food companies purchased 3,000 futures contracts expiring in December 2011, costing about $90 million, sending the market a false signal that they would use the wheat when in fact it was far more than they needed.

The CFTC said the real aim was to profit from trading in futures expiring later than December 2011 and to drive down the price of cash wheat to meet their real needs. It also said they exceeded speculative position limits established by the Chicago Board of Trade. The trading resulted in a profit of $5.4 million, the CFTC said.

In a joint statement, CFTC Commissioners Dan Berkovitz and Rostin Behnam said that despite the order banning additional comments from the agency, they are still free to speak as individuals. Doing so is important in a case settled without published facts, they said.

“Commissioners, as public officials, must be able to explain to Congress and the public the basis for the sanctions obtained, as well as the rationale for entering into a settlement agreement rather than pursuing litigation,” they said.

It also said, making no mention of Mondelez, “We support entering into the consent order with Kraft, despite the absence of findings of fact, because the penalty and injunctive relief imposed reflect, in our view, the gravity of Kraft’s conduct.”

The CFTC itself also issued a statement supporting the right of its individual members to speak.

A spokesman for the agency said, ““The Commission’s statement is fully compliant with the terms of the consent order.”

Bakery andsnacks.com

CFTC fine update: Kraft and Mondelēz sue US trade commission just days post-deal

By Kristine Sherred

23-Aug-2019 - Last updated on 23-Aug-2019 at 10:10 GMT

RELATED TAGS: Mondelez, Kraft, Kraft heinz, Futures contract, Trading standards, rade Commodity future trading commi ion Regulation Wheat upply and demand

The two food giants cried foul against statements in the agency's public documents confirming the $16m fine for alleged wheat futures manipulation.

n fact, the US Commodity Futures Trading Commission (CFTC) has removed the **two related** statements from ts website. Only **the original charge,** filed on April 1, 2015, remains.

That decision was voluntary, according to reports.

either Kraft nor Mondelēz would comment further to BakeryandSnacks.

On August 20, **they told us,** *"We strongly disagree with the CFTC's statements, which blatantly misrepresent the terms and spirit of the consent order, and will be seeking immediate relief from the court."*

Two days later, they filed suit and a federal judge ordered four officials, including the CFTC chairman and enforcement director, to testify at a hearing to be held next month.

How'd we get here?

CFTC handed down the penalty on August 19, ending a four year battle In official statements, the CFTC explained the deleterious effects of market manipulation, calling out Kraft specifically.

t also detailed the peculiar arrangement of this no-guilt-admitted deal, which required that CFTC refrain from further commented on the case – outside of the existing public record. Individual commissioners could speak freely 'in their own capacities,' and they did, publishing a separate joint statement

Though neither party admitted blame, the commissioners said, their capitulation to the fine 'is doing the talking.'

RELATED TOPICS: Industry Voices, Manufacturers, Markets, Regulation & Safety

Bakery andsnacks.com

Mondelēz and Kraft ordered to pay $16m penalty for alleged wheat futures manipulation

By Kristine Sherred

20-Aug-2019 - Last updated on 20-Aug-2019 at 14:38 GMT

RELATED TAGS: Wheat, Wheat prices, Commodity futures trading commission, ommodity market Kraft food group Kraft heinz Mondelez Chicago board of trade, Competition law, Futures contract

The civil decision wraps four years of litigation, after the US Commodity Futures Trading Commission (CFTC) charged the two CPG companies with noncompetitive trading and inflating wheat futures.

n addition to the $16m fine, the CFTC ruling **prohibits Mondelēz and Kraft from 'engaging in future violations of several anti-manipulation provisions,'** as per the Commodity Exchange Act and agency regulations.

n an adjunct statement, two of the CFTC commissioners, Dan M. Berkovitz and Rostin Behnam, said Kraft oods Group 'manipulated the wheat market,' and the penalty **amounts to the maximum the agency 'could reasonably expect to obtain' in court.**

The order contains two unusual provisions, according to the statement: the findings do not hold 'factual findings or conclusions of law,' and the CFTC cannot comment further on the case – apart from what is already on public record Individual commissioners, however, can speak freely about the matter 'in their own capacities.'

Kraft Heinz told BakeryandSnacks it *"strongly [disagrees] with the CFTC's statements, which blatantly violate and misrepresent the terms and spirit of the consent order, and will be seeking immediate relief from the court."*

Mondelēz echoed the sentiment, adding, *"We can't comment on the settlement per se "*

The CFTC typically requires facts and lawful conclusions because they deter others from erring into similar territory and offer insight to the agency's interpretation of its laws. Ultimately, the commissioners concluded

In this case, it is fitting that Kraft's $16 million payment is during the tariff. The Commission is speaking loudly and clearly as well: those who manipulate or attempt to manipulate our commodity markets will be prosecuted and punished."

Kraft initially contended in 2015 that **Mondelēz would bear the brunt of any monetary penalties** because it did not make products with the wheat in question.

Alleged $90m in manipulation

The 2015 complaint alleged that, in December 2011, Kraft and Mondelēz **developed, approved and executed a strategy to buy a six month supply of wheat futures for $90m** which they 'never intended' to accept, according to the CFTC.

Kraft's conundrum

This week's news lands just days after Kraft Heinz devalued its brands by another $1.2bn, sending its stock tumbling 9% to about $28 a share. The stock has dropped more than 30% in 2019.

The Chicago-based manufacturer had delayed the release of its 2018 results in June, due to a Securities and Exchange Commission investigation for accounting mishaps It also revealed **a $15bn devaluation** in February.

CEO Miguel Patricio, **who joined Kraft Heinz in April**, said the company would not offer short-term forecasts as it deals with recent setbacks. Net sales were down 5% in the first quarter this year compared to 2018

"[They] instead executed this strategy expecting that the market would react to their enormous long position by owering cash wheat prices and strengthening the spread between December 2011 wheat and March 2012 wheat futures."

Because the market indeed lowered cash wheat prices, the food giants raked in $5.4m in profits, the CFTC omplaint alleged

n a statement on August 15, CFTC chairman Heath P. Tarbert described America as the 'breadbasket of the orld' with wheat as 'its heart.'

Market manipulation inflicts real pain on farmers by denying them the fair value of their hard work and crops," he said

It also hurts American families by raising the costs of putting food on the table. Instances of market manipulation are precisely the kinds of cases the CFTC was founded to pursue."

A third prong contended that for more than a decade between 2003 and 2014, Kraft and Mondelēz ran 'off-exchange futures transactions between two separate corporate trading accounts that did not comply with exchange rules for noncompetitive trading '

RELATED TOPIC Kraft Food Commoditie Milling & Grain Manufacturer Market Regulation & afety

Exhibit 8

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART STP

----------X

EFRAIN GALICIA

Index №. 024973/2015

-against-

Hon. DORIS M. GONZALEZ

DONALD J. TRUMP

Justice Supreme Court

----------X

The following papers numbered 1 to 4 were read on this motion (Seq. No. 012) for **QUASH SUBPOENA** noticed on _____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1, 2
Answering Affidavit and Exhibits	No(s). 3, 4
Replying Affidavit and Exhibits	No(s).

Motion is Respectfully Referred to Justice: _____
Dated: _____

Upon the foregoing papers defendants' motion to quash and plaintiffs' cross-motion to compel are decided in accordance with the annexed memorandum opinion.

This constitutes the decision and order of the court.

Dated: 9-20-19

Hon. _____
DORIS M. GONZALEZ, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY X CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART X OTHER - cross-mot granted
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART STP

----------x

EFRAIN GAICIA, FLORENCIA TEJEDA PEREZ, GONZALO CRUZ FRANCO, MIGUEL VILLALOBOS and NORBERTO GARCIA, as Administrator of the Estate of JOHNNY HOSVALDO GARCIA ROJAS,

DECISION AND ORDER
Index No. 24973/2015E

Plaintiffs,

-against-

DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT, INC., THE TRUMP ORGANIZATION LLC, KEITH SCHILLER, GURY UHER, EDWARD JON DECK JR AND JOHN DOES 3-4

Defendants.

----------x

HON. DORIS M. GONZALEZ:

Upon the foregoing papers defendants Donald J. Trump and Trump Organization LLC move to quash a subpoena directed at Donald J. Trump, the current sitting president of the United States (hereinafter "President Trump"). In turn, plaintiffs cross-move to compel President Trump to testify at trial via videotaped testimony at a location, date and time of his own choosing. Upon review of the papers, together with the opposition submitted thereto; and after due deliberation, the motions are decided as follows.

FACTS AND PROCEDURAL HISTORY

Plaintiffs commenced this action on or about September 9, 2015, asserting claims for, *inter alia*, assault and battery, stemming from an alleged physical altercation at a protest rally outside of Trump Tower in Manhattan between the defendants' employees and plaintiffs.

As relevant to the instant motion, defendants moved for a protective order early in the litigation to preclude plaintiffs from deposing defendant, then-candidate, Donald J. Trump. Plaintiffs cross-moved to compel the candidate's examination before trial and for the production

of documents. By decision and order dated June 1, 2016, the Honorable Laura G. Douglas granted defendants' motion, issued a protective order, and denied plaintiffs' cross-motion as premature, holding that "this is an ordinary personal injury action," and plaintiffs had not "demonstrated a sufficient basis . . . to compel the examination before trial." Plaintiffs did not seek to reargue that decision, nor did they move again to compel the examination before trial prior to the close of discovery. Plaintiffs filed their note of issue on February 14, 2017, certifying that this matter is ready for trial and all discovery known to be necessary had been completed.

Defendants moved for summary judgment pursuant to CPLR 3212. By decision and order dated August 20, 2018, the Honorable Fernando Tapia granted the motion, in part, dismissing plaintiffs' claims for negligent hiring, retention, and supervision, but permitted plaintiffs' claims for assault, battery and conversion to proceed as against all defendants, including President Trump, under a theory of *respondeat superior*. Justice Tapia held:

> "Defendants motion to disassociate the actions of [Keith] Schiller, [Gary] Uher, and [Edward Jon] Deck from Trump, his namesake company, and his campaign as a matter of law is unavailing. To the contrary, plaintiffs raise ample issues of fact that contrary to moving defendants' claims, tends to exhibit Trump's dominion and control over Schiller, Uher, and Deck."

On December 18, 2018, plaintiffs served a subpoena ad testificandum on the now-President Trump to compel his testimony at trial. Thereafter, this matter was temporarily stayed due to the death of plaintiff Johnny Garcia. Upon substitution, the stay in this matter was lifted on June 21, 2019, and the trial is scheduled for September 26, 2019. The instant order to show cause to quash the subpoena that plaintiffs directed to President Trump, pursuant to CPLR 2304, and plaintiffs' cross-motion to compel, were argued before this Court on September 9, 2019.

DISCUSSION

More than 200 years ago our founders sought to escape an oppressive, tyrannical governance in which absolute power vested with a monarch. A fear of the recurrence of tyranny birthed our three-branch government adorned with checks and balances. Chief Justice John Marshall famously stated "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right" (*Marbury v. Madison*, 1 Cranch 137 [1803]). Put more plainly, no government official, including the Executive, is above the law.

However, the relevant inquiry here is not whether the President is absolved from responsibility for unofficial conduct, as the United States Supreme Court resolved that question unequivocally in *Clinton v Jones* (520 US 681 [1997]). Nor is the inquiry whether this Court may exercise jurisdiction over the President, as that question was recently settled in *Zervos v Trump* (171 AD3d 110 [1st Dept. 2010]). That Court held in no uncertain terms that "the presidency and the President are indeed separable" for civil liability purposes (*id* at 124). The only issue presented by these motions is whether the President's testimony is necessary at trial.

In moving to quash the subpoena defendants contend that the taking of the President's deposition was waived when plaintiffs failed to conduct the examination before trial during the discovery phase of this action. According to defendants, the *Clinton* Court provided a road map for the taking of a sitting President's deposition that requires the testimony to be taken during discovery, at the White House, for use at trial. Further, defendants contend, relying on precedent from the United States Court of Appeals for the Second Circuit, that in order to compel a high-ranking government official to testify at trial, there must be some showing of "exceptional circumstances" and the witness must possess "unique[,] first-hand knowledge related to the

litigated claims" (*see Lederman v New York City Dept. of Parks and Recreation*, 731 F3d 199, 203 [2d Cir 2013]), and President Trump possesses no such knowledge. Finally, defendants posit that Justice Douglas' order is "law of the case" and may not be disturbed.

In opposition to the motion to quash plaintiffs contend there was no waiver; that *Clinton v Jones* did not announce a rigid prescription for how a president may be deposed; and *Lederman* is inapposite. Plaintiffs contend in furtherance of their cross-motion that President Trump's testimony is highly probative as to his personal liability in this matter in light of Justice Tapia's ruling that there are triable issues of fact that must be resolved by a jury.

Plaintiffs' arguments must prevail. Foremost, by failing to appeal or renew their motion to compel before Justice Douglas, plaintiffs affirmatively waived their right to an examination before trial of President Trump. They did not, however, *waive the President's testimony at trial*. Defendants' reliance on *Clinton v Jones* for the proposition that the testimony of a sitting president must be taken at the White House during the discovery phase of litigation is misguided. There, writing for the majority, Justice Stevens observed:

> "We assume that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person, though he could elect to do so"

(*Clinton*, 520 US at 691-92). Respectfully, this remark upon which defendants rely, given that it was prefaced with "we *assume*" (emphasis added) must be interpreted as dicta and not a rigid procedural requirement for the taking of a president's deposition, *de bene esse*. Further, the First Department, which this Court must follow, recently contemplated both the President's involvement during discovery *and* a trial judge deeming the President's participation at trial necessary (*Zervos*, 171 AD3d at 127). In light of the First Department's decision in *Zervos*, this

Court has no choice but to reject defendants' waiver argument, as there is no lawful basis to conclude that the President's testimony may only be taken during discovery.

Second, in *Lederman*, the United States Court of Appeals for the Second Circuit held that "to depose a high-ranking government official, a party must demonstrate exceptional circumstances justifying the deposition . . ." (*Lederman*, 731 F3d at 203). However, the *Lederman* court was clear that the rule announced therein was born from the principle that "that a high-ranking government official should not—absent exceptional circumstances—be deposed or called to testify regarding the reasons for taking *official action*" (*id.* at 203 [citing *United States v Morgan*, 313 US 409, 414 [1941] [emphasis added]). Whereas President Trump is being called upon to answer for unofficial conduct, the "exception circumstances" doctrine is inapplicable.

Finally, defendants' contention that the decision and order of Justice Douglas is "law of the case" misinterprets that doctrine. "[L]aw of the case doctrine is designed to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case" (*People v Evans*, 94 NY2d 499, 504 [2000]). To be clear, nothing herein shall be construed as disturbing or contradicting that order. Justice Douglas deemed plaintiffs' motion to compel an examination before trial – made when discovery was in its infancy – "premature." The instant cross-motion seeks to compel *trial testimony* and circumstances have clearly changed considering Justice Tapia's ruling that questions of fact exist regarding President Trump's exercise of dominion and control over his employee defendants. As the record appears before this Court, President Trump's relationship with the other defendants is now central to plaintiffs' prosecution of their claims under the theory of *respondeat superior*. As such, his testimony is indispensable.

ACCORDINGLY, it is hereby

ORDERED, that the motion (012) by defendant President Donald J. Trump, for an order pursuant to CPLR 2304, quashing a subpoena ad testificandum is DENIED in its entirety; and it is further

ORDERED, that plaintiffs' cross-motion is GRANTED in its entirety; and it is further

ORDERED, that defendant President Donald J. Trump shall appear for a videotaped deposition prior to the trial of this matter and provide testimony for the use at trial.

This constitutes the decision and order of the Court

DATED: 9/20/19

ENTER:

HON. DORIS M. GONZALEZ, J.S.C

FAX: 212-964-2707

At the Special Trial Part of the Supreme Court of the State of New York, held in and for the County of Bronx, at the Courthouse located at 851 Grand Concourse, Bronx, New York on the 23 day of August, 2019.

PRESENT:

DORIS M. GONZALEZ

_____, Justice.

IA-STP appearance 9/26/19 QS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

EFRAIN GALICIA, FLORENCIA TEJEDA PEREZ, GONZALO CRUZ FRANCO, MIGUEL VILLALOBOS, and NORBERTO GARCIA, as Administrator of the Estate of JOHNNY HOSVALDO GARCIA ROJAS,

Plaintiffs,

- against -

DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT, INC., THE TRUMP ORGANIZATION LLC, KEITH SCHILLER, GARY UHER, EDWARD JON DECK JR and JOHN DOES 3–4,

Defendants.

----------X

Index No. 24973/2015E

ORDER TO SHOW CAUSE

Oral Argument Requested

Upon the Affirmation of Lawrence S. Rosen, dated August 22, 2019, and the attached exhibits, supported by the points and authorities set forth in the accompanying memorandum of law, dated August 22, 2019, and upon all the papers and proceedings had herein,

LET, plaintiffs or their attorneys appear and show cause before The Special Trial Part Room 607, a Justice of this Court, at the Supreme Court Courthouse, located at 851 Grand Concourse, Bronx County, State of New York, on the 9th day of September 2019, at 9:30 a.m., or as soon thereafter as counsel can be heard,

WHY, an Order should not be entered:

(i) Quashing the subpoena that plaintiffs directed to President Donald J. Trump, pursuant to CPLR 2304; and

(ii) Granting defendants any such other relief as the Court deems just and proper.

ORDERED, that answering papers, if any, shall be served ~~via e-mail~~ so as to be received by LaRocca Hornik Rosen & Greenberg LLP (attorneys for defendants Donald J. Trump, Trump Organization LLC (s/h/a The Trump Organization LLC), and Keith Schiller), attention Lawrence S. Rosen, Esq., ~~at LROSEN@LHRGB.COM, no later than __ o'clock __ m. on~~ ON OR BEFORE the 3rd day of September, 2019, and ~~electronically filed via NYSCEF so as to be received by the Court by such time~~; and it is further

JSC

ORDERED that reply papers, if any, shall be served ~~via e-mail~~ so as to be received by the attorneys for the plaintiffs, ~~to the attention of Nathaniel K. Charny at NCHARNY@CHARNYWHEELER.COM; to the attention of Benjamin Dictor at BEN@EISNERDICTOR.COM; and to the attention of Roger Bernstein at RBERNSTEIN@RJBLAW.COM, no later than __ o'clock __ m. on~~ ON OR BEFORE the day of September 6, 2019, ~~and electronically filed via NYSCEF so as to be received by the Court by such time;~~ and it is further

JSC

ORDERED that sufficient cause therefor being alleged, let service of a copy of this Order and the papers upon which it is granted, be made on or before August 26, 2019, ~~in the manner provided below~~, with proof of service thereof to be filed on the return date of this motion ~~be deemed good and sufficient service~~, and

TO: Plaintiffs Efrain Galicia, Florencia Tejeda Perez, Miguel Villalobos, and Norbert Garcia, as Administrator of the Estate of Johnny Hosvaldo Garcia Rojas, by overnight delivery service ~~delivery via e-mail~~ of all papers described above to Charny & Wheeler, Eisner & Dictor, P.C., and Roger J. Bernstein, and shall be deemed good and sufficient service thereof.

JSC

Enter

DORIS M. GONZALEZ

Exhibit 4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S. COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. KRAFT FOODS GROUP, INC. and MONDELĒZ GLOBAL LLC, Defendants,	Civil Action No: 15-2881 Hon. John Robert Blakey

SEALED MOTION BY NON-PARTIES
COMMISSIONERS BERKOVITZ AND BEHNAM AND CHAIRMAN TARBERT FOR A STATUS CONFERENCE

The Court has directed Commissioners Berkovitz and Behnam and Chairman Tarbert of the U.S. Commodity Futures Trading Commission ("CFTC") to appear at the hearing set for October 2, 2019, and has indicated that it is willing to consider the possibility of imposing sanctions against individuals. Commissioners Berkovitz and Behnam and Chairman Tarbert have thus retained separate counsel, who along with this motion are filing notices of appearance. The Commissioners and Chairman hereby respectfully request that the Court hold a status conference at its earliest convenience.

Following this Court's hearing on August 19, 2019, the CFTC began working with the Department of Justice to obtain counsel for the individuals ordered to testify. In September 2019, the Department of Justice contacted undersigned counsel regarding that representation. Undersigned counsel was then retained on September 18, 2019, and promptly began its efforts to become acquainted with the factual and legal issues, having not previously been involved in this case. There is a tremendous amount of work that counsel must conduct to be adequately prepared

for an evidentiary hearing on the pending motion for contempt. A status conference held in advance of the October 2 motion hearing would aid that process by ensuring that counsel have a full and proper appreciation of the Court's expectations.

By this motion, the Commissioners and Chairman also respectfully offer very preliminary suggestions for a framework to address the motion for contempt filed by Kraft Food Groups Inc. and Mondelēz Global LLC (collectively "Kraft") in a manner that reflects the complex legal issues at stake. After there is a better understanding of the Court's expectations, the Commissioners and Chairman would appreciate an opportunity to present their position on the merits.

ANALYSIS

The parties' briefing to date has not drawn clear lines between the myriad issues implicated by Kraft's motion. The result has been confusion that can only complicate the Court's task. The CFTC's briefing indicates a concern that Kraft is pressing for an open-ended perquisition that will impose unnecessary burdens and potentially become mired by privilege assertions. At the same time, the Commissioners and Chairman are concerned that the CFTC's briefing risks leaving a misimpression that the Commissioners and Chairman are resisting an appropriate inquiry into the circumstances surrounding the alleged consent-order violation. All of this has placed the Court in a difficult position of addressing Kraft's complaint while navigating the significant separation-of-powers and related concerns that arise when a party seeks extraordinary sanctions against executive branch officials.

The Commissioners and Chairman respectfully suggest that the Court's resolution of Kraft's motion could be simplified by distinguishing between three different sets of issues. If the Court were willing to sequence its consideration and resolution of these issues, it may be easier to reach an appropriate overall resolution that would be satisfactory to both the Court and the parties. Conducting the proceedings in this manner should not prejudice Kraft, as the CFTC has removed

the statements at issue from its website pending resolution of the matter. The Commissioners and Chairman more fully address each of these three sets of issues below.

1. Clarifying Which Parties Are Properly Subject to Sanctions Would Simplify the Issues Before the Court.

Kraft's motion for contempt initially sought sanctions not only against the CFTC itself, but also against the Commissioners. *See* ECF No. 316 at 9-11. That request for sanctions against individuals resulted in unnecessary confusion over the proper scope of the Court's upcoming hearing. Kraft has now revised its prayer for relief and no longer seeks such sanctions. *See* ECF No. 339 at 27-28. The Commissioners and Chairman Tarbert nevertheless believe that before an evidentiary hearing, clarification of which parties are properly subject to relief here would simplify the issues before the Court.

The only parties to this case, and the only parties bound by the Court's consent order, are Kraft and the CFTC. The individual Commissioners are not parties to this action. And, as a result, they should not face a threat of sanctions.

That does not mean, of course, that the CFTC cannot be held responsible for actions by a Commissioner if the Court ultimately determines that a violation of the consent order has occurred. Whether the CFTC has violated the consent order depends, in part, on whether the Commissioners' separate statements are properly imputed to the Commission and deemed within the scope of paragraph 8 (an issue discussed below). But however the Court might resolve that issue, it would not be justified in sanctioning the Commissioners themselves. Even if the Commissioners' separate statements could be a basis for contempt, sanctions could only be imposed on the CFTC.

In limited circumstances, a court has authority to impose contempt sanctions on a non-party when clear and convincing evidence shows that the non-party has aided and abetted an unequivocal violation of a court order by the party itself. *See Stotler & Co. v. Able*, 870 F.3d 1158,

1164 (7th Cir. 1989); *see also Select Creations, Inc. v. Paliafito Am., Inc.*, 906 F. Supp. 1251, 1273 (E.D. Wisc. 1995) (determining whether a nonparty "has actively aided a party in violating the Court's order necessarily requires some inquiry into a non-party respondent's state of mind"). But even assuming a violation could be proven, that authority does not apply where, as here, there is no showing that sanctions against the party alone would be insufficient to ensure compliance with the Court's order and deter future violations.

The Supreme Court's decision in *Spallone v. United States* is on point. 493 U.S. 265 (1990). There, the district court entered a consent order requiring the named party, the City of Yonkers, to enact legislation remedying racial segregation. *See id.* at 268-69. When Yonkers failed to enact an appropriate legislative package, the court held the city in contempt and imposed sanctions on individual city council members. *See id.* at 271. The Supreme Court reversed.

Noting that a court when selecting contempt sanctions must use "the least possible power adequate to the end proposed," *id*. at 276 (citations omitted), the Supreme Court held that the lower court abused its discretion by sanctioning the individual council members. The Supreme Court began its analysis by observing that the city "was a party to the action from the beginning," while the individual councilmembers "were not parties to the action." *Id.* The Court then explained that the district court was required to proceed with "contempt sanctions first against the city alone in order to secure compliance with" its remedial order and "[o]nly if that approach failed to produce compliance within a reasonable time should the question of imposing contempt sanctions" against the non-party city council members "even have been considered." *Id*. at 280; *see also Commwth. of Pa. v. Cromwell Twnshp*, 32 A.3d 639 (Pa. 2011) (holding that township supervisors could not be held in contempt when township failed to comply with order).

The Seventh Circuit has likewise recognized that "[t]he fundamental principle in contempt cases is that the court must exercise the least possible power to the end proposed." *FTC v. Trudeau*, 606 F.3d 382, 386 (7th Cir. 2010). That principle means that the Court should not consider sanctions against the individual Commissioners.

2. Whether the Consent Order Has Been Violated Raises an Important, Threshold Question of Law.

The next set of issues raised by Kraft's motion relates to whether the CFTC has violated the consent order's paragraph 8. To resolve that question and the issues it raises, the Court will first need to determine the lawful scope of paragraph 8 and then determine whether any of the three categories of statements identified by Kraft run afoul of paragraph 8's requirements. The three categories are: (1) the CFTC's press release, (2) the CFTC's statement, and (3) the separate statement of Commissioners Berkovitz and Behnam. Although these different documents are related inasmuch as they were all published on the CFTC's website, they should not be lumped together. Instead, they should be considered separately in determining whether any of the documents violate the consent order.

As part of that determination, the Court will also need to assess—as a threshold matter—whether paragraph 8 clearly and unambiguously prohibits individual Commissioners from issuing public statements about the case. *See Trudeau*, 579 F.3d at 763 (requiring "clear and convincing evidence that the respondent has violated the express and unequivocal command of a court order"); *Ferrell v. Pierce*, 785 F.2d 1372, 1378 (7th Cir. 1986) (contempt may only be imposed if requirements are unambiguous and unequivocal); *see also Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir. 1991) ("civil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous"). Any "ambiguities" must be read in favor of the party charged with contempt. *See, e.g.*, *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir. 1993)

(contempt sanctions may be imposed only if conduct violated "four corners" of order or consent decree, without resort to extrinsic evidence); *Ford v. Kammerer*, 450 F.2d 279, 280 (3d Cir. 1971) ("ambiguities … in orders redound to the benefit of the person charged with contempt").

Determining the meaning and proper scope of paragraph 8 raises difficult and important legal questions that require consideration of the consent order's plain text, the CFTC's authority and statutory obligations, as well as the role and responsibilities of its Commissioners. The Court's questions at the August 19 hearing highlight the complexities involved. The Court asked whether a judge sitting by designation on the Seventh Circuit acts on behalf of the Seventh Circuit. *See* 2019-08-19 Hrg. Tr. 12:21-13:1. The answer is more complicated than it might initially seem: It is clear, for instance, that when a judge sitting by designation joins a majority opinion, the resulting judgment or order is an act attributable to the Seventh Circuit. But that conclusion does not necessarily hold when a judge chooses to issue a separate concurrence or dissent. In most circumstances, a separate opinion reflects only the views of the individual judge who authors (or joins) the opinion; it is not an act of the Seventh Circuit itself. Courts, like administrative agencies, speak only through their judgments and orders. *See, e.g.*, *Bell v. Thompson*, 545 U.S. 794, 805 (2005) (noting this principle). Separate opinions are often meaningful, but they are not ordinarily considered to be acts of the Court itself.

That is also true in the context of the CFTC. The CFTC speaks only through its opinions, orders, rules, and determinations. When the Commissioners vote, the resulting majority decision constitutes an act by the CFTC as a whole. But individual Commissioners retain authority, distinct from the CFTC itself, to issue separate opinions. *See* 7 U.S.C. § 2(a)(10)(C). The Commodity Exchange Act specifically directs that whenever the CFTC issues any official opinion, order, or determination, "the Commission shall provide that any dissenting, concurring, or separate opinion

by any Commissioner on the matter be published in full along with the Commission opinion …, order, … or determination." *Id.* That statutory authority reflects the fact that the Commission is an independent agency, with bipartisan members whose "demonstrated knowledge" with respect to the Commission's areas of authority must be "balanced." *Id.* § 2(a)(2)(A).

It is therefore understood that, while the CFTC is entitled to enter orders agreeing to settle cases, it cannot do so in a manner that would deprive individual Commissioners of their right and responsibility to issue separate opinions and to have those opinions published in full along with any CFTC order approving the settlement. The Commissioners have a strong interest in ensuring that their individual rights to issue separate opinions expressing their own views cannot be impinged merely because a majority of Commissioners vote in favor of settlement. That principle is essential to protecting the rights of Commissioners in the minority to be able to express their perspectives on decisions made by the majority which, by definition, become the acts of the CFTC.

3. If the Court Determines That the Consent Order Has Been Violated, The Court May Be Able to Avoid the More Difficult Remedy Issues.

If the Court determines, as a matter of law, that any of the statements identified by Kraft constitute a violation of a clear and unambiguous provision of the consent order, the Court may then need to decide on an appropriate remedy. But the remedy questions are complex. As the Court is aware, there are difficult issues of sovereign immunity that would need to be addressed. *See Coleman v. Espy*, 986 F.2d 1184, 1189-92 (8th Cir. 1993) (holding that sovereign immunity bars civil contempt fines against federal agencies). Similarly, a hearing to address the issue of remedy would likely give rise to significant privilege questions, including the attorney-client privilege, deliberative process privilege, and attorney work product doctrine.

The problem is that unless and until the Court determines as a legal matter whether a violation of the consent order has in fact occurred, the prospects for a negotiated resolution appear

slim and the possibility of impermissibly intruding on the CFTC's broader institutional interests during an evidentiary hearing are significant. There may be a way, however, to avoid many of these concerns. If the Court determines that a violation has actually occurred by the CFTC, it will likely be in both the CFTC's and Kraft's interests to reach a resolution that would address any harm to Kraft while also protecting the CFTC's broader institutional interests. Moreover, if a resolution could be reached, most of the issues before the Court would disappear and the only issue remaining to be resolved would be whether any additional sanction would be appropriate to vindicate the Court's authority.

It is for this reason that the Commissioners and Chairman respectfully suggest that further guidance from the Court—in the form of a ruling on the dispositive legal issues following more targeted briefing by the parties—would facilitate a fair and lawful resolution of the issues raised in Kraft's motion for sanctions. The Commissioners and Chairman further submit that engaging in this effort would not prejudice Kraft's interests in this matter and would not cause harm to Kraft. The CFTC has already removed the press release and two statements from its website during the pendency of these proceedings.

CONCLUSION

The Commissioners and Chairman respectfully request a status conference so their counsel may better appreciate and understand the Court's expectations for the upcoming hearing. A status conference would also allow counsel for the Chairman and Commissioners to present their proposal for the Court to address the legal issues articulated in this motion.

Dated: September 24, 2019

Respectfully Submitted:

By: */s/ Zachary T. Fardon*
Zachary T. Fardon

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Attorneys for Non-Party Commissioners Berkovitz and Behnam, and Chairman Tarbert

CERTIFICATE OF SERVICE

I hereby certify on September 24, 2019, the foregoing document was filed electronically through the Court's Electronic Case Filing (ECF) System. Service of this document will be made upon all counsel of record by through the Court's ECF system on this date.

/s/ Zachary T. Fardon
Zachary T. Fardon
Attorney for Non-Party Commissioners Berkovitz and Behnam, and Chairman Tarbert

Exhibit 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

U.S. COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. KRAFT FOODS GROUP, INC. and MONDELĒZ GLOBAL LLC, Defendants.	)	Case No. 15 C 2881 Judge John Robert Blakey

DEFENDANTS' RESPONSE TO COMMISSIONERS' MOTION FOR A STATUS CONFERENCE

FILED UNDER SEAL

Defendants Kraft Foods Group, Inc. and Mondelēz Global LLC ("Defendants") file this response to correct inaccuracies and respond to certain arguments raised in the Commissioners' motion for a status conference. *See* Dkt. No. 344.

I. Defendants Are Seeking Sanctions Against All Parties Who Violated The Consent Order, Which Includes The CFTC, As Well As The Individual Commissioners.

The Commissioners' statement that Defendants no longer seek sanctions against individual Commissioners is incorrect. *See* Dkt. No. 344 at 3. As stated more completely in Defendants' supplemental brief, Defendants seek relief against the CFTC and any individuals who violated the Consent Order, including the individual Commissioners, in the form of (1) a finding by the Court that the Commissioners (and possibly others) violated the Consent Order, (2) an order prohibiting the Commissioners, any other individuals who violated the Order, and the CFTC from republishing or making future violative statements, and (3) attorneys' fees.[1] *See*

[1] To be clear, Defendants' request for attorney's fees is not limited to the CFTC. Defendants assert they are entitled to an award of attorneys' fees against the CFTC and any individual(s) found to have violated the Consent Order. *See* Dkt. No. 339 at 18 ("If the Court sees fit, it may also order the

Dkt. No. 339 at 16-19, 27-29. The relief Defendants seek is well within the Court's authority to implement against the CFTC, and anyone else the Court finds to have violated the Consent Order or to have aided in such violations, including the Commissioners. *Id.* at 16-19.

The Commissioners' position that they are not subject to sanctions is simply a rehash of the argument the CFTC already made on their behalf: that the Commissioners are "non-parties" who are not restricted by Section I, Paragraph 8, of the Consent Order ("Paragraph 8") and thus cannot be sanctioned for violating it. Defendants addressed that argument in their supplemental filing. *See* Dkt. No. 339 at 3-10. And as Defendants explained, for a number of reasons, the notion that the very individuals who comprise and control an organization, and who caused the organization to violate a court order, are somehow not subject to sanctions for that violation, is legally and logically unsupportable. *Id.*

Notably, the Commissioners admit they may be sanctioned if they "aided" the CFTC in violating the Order. Dkt. No. 344 at 3-4. The Commissioners' assertion that such a determination would require "some inquiry into [their] state of mind," puts their state of mind squarely at issue and underscores why an evidentiary hearing is appropriate. *Id.* at 4 (citations omitted). However, the CFTC has stated its intent to thwart any such inquiry by asserting various privileges "on a blanket basis" with respect to the Commissioners' testimony. *See* Dkt. No. 337 at 2.[2]

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payment of Defendants' attorney's fees in connection with the contempt proceeding, particularly if it finds the CFTC *and the Commissioners* acted in bad faith" (emphasis added)); *id.* at 19; *cf. Cobell* v. *Norton*, 334 F.3d 1128, 11145-46 (D.C. Cir. 2003) (suggesting attorney's fees in connection with contempt do not implicate sovereign immunity concerns); *Am. Civil Liberties Union v. Dep't of Def.*, 827 F. Supp. 2d 217, 230 (S.D.N.Y. 2011) (awarding fees against CIA). To the extent this is unclear from Defendants' supplemental brief and revised prayer for relief, *see* Dkt. No. 339 at 29, Defendants will, at the Court's request, submit a "corrected" brief clarifying their position.

[2] The CFTC also put the Commissioners' "good faith" at issue in its Response to Defendants' Motion for Contempt, Sanctions, and Other Relief, Dkt. No. 318 at 7, but now intends to block any inquiry into that claimed "good faith" on the basis of privilege. Dkt. No. 337 at 2.

The Commissioners argument that the Court should postpone any inquiry into their intent until it has first attempted to secure compliance by sanctioning only the CFTC also fails. Dkt. No. 344 at 4 (citing *Spallone* v. *United States*, 493 U.S. 265 (1990)). As Defendants pointed out in their supplemental brief, the sanction sequence the Supreme Court envisioned in *Spallone* addressed a fundamentally different situation (the passage of an ordinance) than is at issue here. *See* Dkt. No. 339 at 6 n.7. In this case, unlike in *Spallone*, confining sanctions to the CFTC in the first instance will not provide adequate relief to the ongoing harm, because the Commissioners claim they are not bound by court orders directed at the CFTC. And as demonstrated by their initial violations of the Court's Order, and their subsequent briefing, neither the CFTC, nor the Commissioners, believe the CFTC has the ability to compel the Commissioners' future compliance.

II. The Court Can Determine If The CFTC And Commissioners Violated The Consent Order In An Efficient And Expeditious Manner.

The issues before the Court are straightforward and simple, and do not require the Court to adopt the Commissioners' complicated, bifurcated process to address Defendants' motion. *See* Dkt. No. 344 at 5-7. Of course the Court must determine if the Consent Order was violated, and by whom, but that is not a complex determination and the parties have provided the Court with extensive briefing on the issues. Defendants have also made a threshold evidentiary showing, while the CFTC and Commissioners have submitted nothing that suggests they will contest that evidence. Proceeding with the hearing as scheduled will give the parties further opportunity to submit evidence in support of their positions, which Defendants will do, and permit the Court to make its determination with the benefit of a complete record.

The Commissioners' proposed piecemeal approach is inefficient and would unnecessarily complicate the straight forward issues, which are whether the CFTC statements,

the Commissioners' statement, and the CFTC's publication of the Commissioners' statement, violated the Consent Order. The Commissioners raise no new argument the Court should consider on these matters, and instead restate what the CFTC has already argued on their behalf—*i.e.*, that Paragraph 8 was ambiguous or, alternatively, could not apply to the Commissioners in light of their (alleged) statutory right under the Commodity Exchange Act ("CEA") to make statements on enforcement actions. Dkt. No. 344 at 5-7 (relying on 7 U.S.C. § 2(a)(10)(C)). Defendants demonstrated why these arguments lack merit in their supplemental brief.

First, the plain and unambiguous language of Paragraph 8 makes clear it applies to the Commissioners. Dkt. No. 339 at 3-6. The Commissioners admitted as much when one or more of them directed CFTC staff to request that Defendants agree to remove Paragraph 8 so the Commissioners would not be bound by it. *Id.* at 7-9.

Second, the statutory provision the Commissioners attempt to rely on for their statements, Section 2(a)(10)(C), does not apply to statements concerning enforcement actions and, even if it did, the provision is triggered only if the CFTC first makes a statement on a matter, which the CFTC had no obligation to do here. *See id*. at 12-14.

Third, the Commissioners' suggestion that they "have a strong interest in ensuring that their individual rights to issue separate opinions expressing their own views cannot be impinged merely because a majority of Commissioners vote in favor of settlement," is a red herring. Dkt. No. 344 at 7. There is no majority versus minority issue here because Chairman Tarbert and Commissioners Berkovitz and Behnam voted in favor of the settlement, as did every other Commissioner. Nor did anyone else impose Paragraph 8 on any individual Commissioner, despite the CFTC's knowingly false public statement that the Court requested it. *See* Dkt. No.

315 Ex. 2. Rather, each Commissioner voted to approve the settlement agreement and authorized enforcement staff to submit it to the Court for entry as a final order.

Significantly, neither the CFTC, nor the Commissioners, cite a shred of authority standing for the proposition that federal agency commissioners cannot voluntarily agree to limit their public statements on a topic as part of a litigation settlement agreement. Defendants are aware of no such authority. This Court should reject any effort by the Commissioners and the CFTC to recast the very settlement agreement they negotiated, approved, and submitted to the Court, as somehow infringing on their supposed statutory rights.

III. The Court Can Determine And Impose The Appropriate Remedies Without Further Delay.

Contrary to the Commissioners' view, the remedies for their violations of Paragraph 8 of the Consent Order are straightforward. The Court is clearly able to find the CFTC, its Commissioners, and any other individual in contempt for violating the Order or assisting in such violations. The Court can identify the CFTC's and Commissioners' statements that violated Paragraph 8 and identify the misrepresentations within those statements, as set forth in Defendants' supplemental brief. *See* Dkt. No. 339 at 16 & Exs. 2-4. If the Court finds violations, it can enjoin the CFTC and the Commissioners from reposting their statements and making further public statements about the case, other than to refer to the Consent Order or publicly filed documents, without characterization or embellishment.[3] And, if the Court determines it is appropriate, the Court can order the CFTC and its officials or employees (including the

[3] If there were any doubt as to the necessity of a further injunction, the Court need only look to the CFTC's continued refusal to refrain from public comment, even while these contempt proceedings are pending. *See* US Regulator Files Sealed Appeal Challenging Judge's Sanctions Inquiry, National Law Journal (Sept. 24, 2019), *available at* https://www.law.com/nationallawjournal/2019/09/24/u-s-regulator-files-sealed-appeal-challenging-judges-sanctions-inquiry/ (quoting CFTC representative statement defending CFTC statement as "fully compliant" and the Commissioners as exempt from the Court's Order).

Commissioners) to pay Defendants' attorney's fees incurred in connection with these contempt proceedings. Defendants' positon on remedies is set forth more completely in its supplemental brief. Dkt. No. 339 at 18-19, 27-29. *See supra*, footnote 1.

Finally, to the extent the Commissioners intend to request at the status hearing a further postponement of the evidentiary hearing—to allow the Commissioners to gain "a better understanding of the Court's expectations," and then "to present their position on the merits"—there is no need for such an extension. Dkt. No. 344 at 1. The CFTC already secured the Commissioners an extension for that very purpose and they have had ample opportunity to present their position.[4]

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Respectfully submitted,

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[4] Since the Court granted the first extension, the CFTC has filed four briefs, substantial portions of which have been devoted to asserting the Commissioners' rights and making the same arguments the Commissioners identify in their motion.

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