

Securities Regulation Daily covers *CFTC v. Kraft* (2019-20)

By: Brad Rosen

It looked like the CFTC's high-profile and bitterly contested enforcement action against Kraft Foods Group, Inc. and Mondelez Global LLC, brought in 2015 under the Dodd-Frank Act's expanded anti-manipulation authority, had come to a peaceful conclusion when the parties told the court that they had [reached a binding agreement](#) in March 2019. That was not to be. Instead, immediately following the announcement of the final settlement in mid-August, an unprecedented series of events ensued leading the parties down a long, winding and twisted road of legal jostling and intrigue.

More than four years ago, the CFTC [charged the defendants](#) with manipulating the prices of red winter wheat, a key ingredient in Kraft's snack foods and thereby had violated sections 6(c)(1) and 9(a)(2) of the Commodity Exchange Act, as well as CFTC Regulations 180.1 and 180.2. Industry participants were eagerly awaiting the settlement in this matter and further clarification from the CFTC what the agency would (or would not) deem to be manipulation.

As it turned out, the settlement reached by the parties did not provide the guidance many were seeking. Instead, the CFTC found itself in the crosshairs as it faced charges that it had engaged in a deliberate effort to violate the court's consent order. Ultimately, the district court judge would set the settlement aside. Recently, the parties have again advised the court that they have reached settlement. *Securities Regulation Daily* has closely followed the controversies, developments, and the legal precedents that emerged in this from August 2019 onward. A look back on some of these highlights follow:

1) An "unusual" settlement. On August 14th, the parties [entered into a settlement agreement](#) that provided for the defendants to pay \$16 million to resolve claims that they manipulated wheat futures markets. Notably, Kraft, Mondelez, and the CFTC (as a full Commission) also agreed to a "gag" provision in the [consent order](#) that limited their ability to speak publicly about the case. Moreover, the consent order did not contain any factual findings or conclusions of law thereby denying Congress and the public with the basis of the sanctions obtained as well as the rationale for entering into the settlement. Commissioners Rostin Behnam and Dan Berkovitz described these two provisions as "unusual" in their [joint statement](#). The CFTC also issued a [press release](#) and [separate statement](#) in connection with the settlement.

2) CFTC leaders ordered to testify in Chicago courtroom on contempt charges. In an emergency motion, Kraft and Mondelez, charged the CFTC [with deliberately violating the consent order](#), contending that the statements of the CFTC and its commissioners following the settlement demonstrated that they never intended to comply with the agreement they had negotiated. In an August 19th hearing, Judge Robert Blakey ordered CFTC Chairman Heath Tarbert, Commissioners Dan Berkovitz and Rostin Behnam, and James McDonald, the agency's director of enforcement, to appear in his Chicago

courtroom at a future hearing to testify in connection with the agency's potentially contemptuous conduct.

3) Commission leadership lawyers up. In advance of the court hearing on contempt and sanctions, then scheduled for October 2nd, CFTC leadership [retained legal heavy weight Zach Fardon](#), the former U.S. attorney for the Northern District of Illinois, to represent their personal interests. Fardon had recently launched the Chicago office for the law firm King and Spalding.

4) 7th Circuit stays district court's contempt proceedings. The CFTC [scored a significant victory](#) as a three-judge panel from the Seventh Circuit Court of Appeals granted its motion for a stay of proceedings in a ruling dated September 26th. As a consequence, the district court struck its evidentiary hearing scheduled for October 2nd.

5) Let the sunshine in—7th Circuit releases a trove of previously sealed documents. The appellate court issued an order on September 26th [unsealing and releasing numerous documents in the case](#) which were previously kept out of the public eye. At the center of the document release was the CFTC's Petition for Writ of Mandamus filed two weeks earlier whereby the Commission sought to vacate the district court's contempt proceeding which it characterized as "unlawful judicial inquest hearing."

6) CFTC argues district court proceedings are premised on a pure mistake of law. In a reply memorandum urging the appellate court to grant its request for a writ of mandamus, the CFTC's Office of General Counsel argued that the lower court proceedings were [premised on a pure mistake of law](#) based on the judge's view that any finding of civil contempt required some showing of state of mind. The CFTC asserted that view was flat out wrong.

7) 7th Circuit issues writ of mandamus giving CFTC a major victory. The Seventh Circuit [issued a writ of mandamus](#) on October 22nd granting the Commission a majority of its requested relief, and which notably eliminated the requirement for the CFTC's high-level leadership to appear at the controversial contempt hearing. The district court was permitted to keep its contempt inquiry open, but only with respect to the CFTC, and not with respect to any of the agency's personnel.

8) District court vacates the settlement and reopens the underlying market manipulation case. Judge Blakey, on October 23rd, [vacated the consent order](#) previously agreed to by the CFTC, Kraft, and Mondelez, citing language in the Seventh Circuit's opinion that the consent order's gag rule was "ineffectual" at least regarding public statements made by individual CFTC commissioners. As a result, and in combination with his view that the gag rule was material to the prior settlement, the judge vacated the consent order and the associated settlement among the parties.

9) CFTC asks judge to set aside the pending contempt motion asserting the issue is now moot. The CFTC urged the court [to reject Kraft's continued bid for imposing sanctions](#) for civil contempt premised upon the CFTC's alleged violations of the court's consent order. In a filing dated November 8th, the agency argued that the court's subsequent order vacating the disputed consent order rendered Kraft's motion for civil contempt sanctions moot.

10) The underlying litigation resumes in earnest. [Housekeeping matters dominated](#) as the parties reconvened at a status hearing before Judge Blakey on December 18th. At issue were motions to compel the production of deposition transcripts, and the parameters surrounding Kraft's third time out deposing the Commission's expert witness. The judge also afforded the CFTC an opportunity to weigh in further regarding defendant's pending motion for contempt and sanctions.

11) Court cites CFTC's "egregious misconduct" after parties tell judge they have again agreed to settle. On February 14, 2020, Judge John Robert Blakey of the Northern District of Illinois on [granted in part](#) Kraft Foods and Mondelez Global's motions for contempt, sanctions and other relief arising out of the CFTC's violation of a gag order. At a hearing on the prior day, lawyers for the CFTC and the defendants advised the court that [they had reached a preliminary agreement to settle the litigation](#). The defendants had also told the judge that they had agreed to withdraw that motion eventually as part of the proposed settlement.

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