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

HARRY PLOSS, et al., Plaintiffs, *-against-* KRAFT FOODS GROUP, INC. and MONDELĒZ GLOBAL LLC, Defendants.	No. 15 C 2937 Honorable Edmond E. Chang

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO CERTIFY FOR APPEAL THE COURT'S MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants Kraft Foods Group, Inc. and Mondelēz Global LLC (collectively, "Kraft") ask this Court for exceptional relief: permission to immediately appeal this Court's June 27, 2016 Memorandum Opinion and Order. *See* ECF No. 113. Four days after Kraft made this request, Judge Blakey rejected Kraft's motion seeking the same relief in the parallel CFTC action. *See U.S. Commodity Futures Trading Comm'n v. Kraft Foods Grp., Inc.*, No. 15 C 2881, 2016 WL 3907027 (N.D. Ill. July 19, 2016) (the "*CFTC Action*").[1] Kraft's motion here should be rejected for the same rationale: Kraft's failure to present a single contestable, controlling question of law that will expedite this case.

I. Judge Blakey already considered and rejected Kraft's first and second Proposed Questions in the *CFTC Action*.

Kraft asked Judge Blakey to certify for immediate appeal the same first and second Proposed

[1] Following Judge Blakey's July 19 ruling, Plaintiffs requested that Kraft withdraw its pending motion. Kraft refused.

Questions it repeats here:

- "[W]hether a defendant's large futures position, coupled with an alleged intent to affect market prices but absent any other false communications to the market, constitutes 'false signaling' market manipulation under §§ 6(c)(1) or 9(a)(2) of the Commodity Exchange Act ("Act") and corresponding Regulations 180.1 and 180.2"; and

- "[W]hether, when a defendant's purchases in the futures market cause cash and futures market prices to converge, those converging prices are 'artificial' for purposes of those same statutory provisions and regulations."

CFTC Action, 2016 WL 3907027, at *1; *compare* ECF No. 117 at 1. Judge Blakey declined to certify either question. *CFTC Action*, 2016 WL 3907027, at *1-3, 6. The court based its opinion in large part on this Court's "well-reasoned" June 27 Order and an analysis of the facts of Kraft's primary authority, *Sullivan & Long, Inc. v. Scattered Corp.*, 47 F.3d 857 (7th Cir. 1995), which Judge Blakey distinguished as interpreting the federal securities laws, not the CEA. *Id.*

Judge Blakey considered Kraft's first Proposed Question unlikely to yield a reversal. *CFTC Action*, 2016 WL 3907027, at *5 (citation and internal quotation marks omitted). He rejected Kraft's invitation to hold that "some sort of false communication or other misrepresentation is required to state a claim for market manipulation under §§ 6(c)(1) or 9(a)(2)" of the CEA. *Id.* at *6. Judge Blakey instead reaffirmed the long-standing principle that "(1) the intentional exaction of a price determined by forces other than supply and demand, or (2) the creation of an artificial price by planned action . . ." is the *sine qua non* of market manipulation. *Id.* (citation and internal quotation marks omitted).

To hold—as Kraft suggests—that an explicit misrepresentation is required to state a CEA manipulation claim would undermine the congressional intent in enacting the CEA: to deter and redress all forms of market manipulation. *CFTC Action*, 2016 WL 3907027, at *6 (noting that manipulation "defies easy description" and "tend[s] to be characterized by fact specific, case-by-case analysis.") (citation and internal quotation marks omitted). Congress declined to define

"manipulation" out of fear that "clever manipulators would be able to evade any legislated list of proscribed actions or elements of such a claim." *CFTC Action*, 2016 WL 3907027, at *6 (citation and internal quotation marks omitted). Because the "methods and techniques of manipulation are limited only by the ingenuity of man," the test for manipulation is practical and aims to "discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand." *Id.* (citation and internal quotation marks omitted).[2] No judge has ever held that an explicit misrepresentation is required to state a CEA claim—hence, there is no reasonable ground for debate on Kraft's first Proposed Question.

Judge Blakey also rejected Kraft's second Proposed Question, because it is not "a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record." *CFTC Action*, 2016 WL 3907027, at *3 (citation omitted). Rather, he ruled that the question calls for a "complex" factual determination as to whether Kraft's manipulative conduct caused artificial prices in the wheat futures market. *Id.* at *4. Even so, Judge Blakey noted that "(1) there is nothing in the Complaint suggesting that Defendants' theory regarding convergence in the wheat market applies in this case; and (2) Defendants' own motion undercuts their position by suggesting that the wheat market is dysfunctional, not well-functioning, and that the failure of the price of wheat futures to converge with the price of cash wheat is a well-known phenomenon." *U.S. Commodity Futures Trading Comm'n v. Kraft Foods Grp., Inc.*, No. 15 C 2881, 2015 WL 9259885, at *18 (N.D. Ill. 2015) (internal citations and quotations omitted).

An appeal of Kraft's second Proposed Question could also not advance the *CFTC Action*, Judge Blakey held, because Kraft did not challenge the CFTC's attempted manipulation claims. *CFTC Action*, 2016 WL 3907027, at *8 (citation omitted). "[A] great deal" of discovery would occur

[2] *See also Leist v. Simplot*, 638 F.2d 283, 322 (2d Cir. 1980) (noting that the private right of action for manipulation under the CEA must be broadly construed).

regardless of the outcome. *Id.* at *8. The same is true of Plaintiffs' unjust enrichment claims here, which will move forward with or without Kraft's proposed appeal. *See* Part IID, *infra*.

Faced with Judge Blakey's well-reasoned rejection of each ground of their flawed motion, Kraft now attempts to fashion a third, no less infirm question—"whether a defendant can obtain monopoly power in a futures market through open market purchases at open market prices without executing a corner or a squeeze." ECF No. 117 at 1. This question, as demonstrated below (Part IIC, *infra*) fails, no less than its already-rejected predecessors, to satisfy the statutory requirements for certification under Section 1292(b).

II. Kraft's Proposed Questions are not appealable under 28 U.S.C. § 1292(b).

Courts "frown[] on" Section 1292(b) motions. *CFTC Action*, 2016 WL 3907027, at *1 (citation omitted). The movant "bears the heavy burden of persuading the Court that 'exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment.'" *Praxair v. Hinshaw & Culbertson*, No. 97 C 3079, 1997 WL 662530, at *1 (N.D. Ill. Oct. 15, 1997) (citation omitted). Section 1292(b) mandates (1) a question of law that is (2) controlling, (3) contestable, and (4) the resolution of which will expedite the case. *Ahrenholz v. Bd. of Trustees of the Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000). All three criteria must be satisfied. *Id.* at 676.

A. Kraft's first Proposed Question fails under 28 U.S.C. § 1292(b).

Kraft's first Proposed Question would ask the Seventh Circuit to determine if a large futures position coupled with an intent to manipulate states a CEA manipulation claim. ECF No. 117 at 1. Just last year the Seventh Circuit stated the elements of such a claim: "(1) the defendants possessed the ability to influence prices; (2) an artificial price existed; (3) the defendant caused the artificial price; and (4) the defendant specifically intended to cause the artificial price." *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 801 F.3d 758, 764-65 (7th Cir. 2015) (citation omitted). This Court

applied this test to the allegations here and concluded that the Complaint[3] adequately pleaded these elements. ECF No. 113 at 33.

Kraft's first question calls for "an essential factual predicate that must be determined by the appellate court . . . ." *CFTC Action*, 2016 WL 3907027, at *3. Kraft contorts the Complaint's factual allegations to make them appear like questions of law, claiming that Kraft's "large futures position" is what led to its CEA violations. But Plaintiffs allege much more than Kraft's "large futures position."

Plaintiffs allege that in late 2011, Kraft manipulated the wheat market by depressing the price of cash market wheat and artificially inflating the price of futures market wheat. ¶¶ 1, 48-49, 83. Kraft did so by radically changing what had been its normal behavior since 2002: it began to source its wheat from the futures market rather than the cash market. ¶¶ 3, 53, 55-56, 80. Kraft's strategy had no legitimate business purpose as Kraft never intended to take delivery of, load out, or store futures market wheat for commercial use. ¶ 87. Futures market wheat wasn't viable for Kraft's business because it was more expensive due to delivery, transportation, and storage costs, and Kraft could not legally use it because it did not comply with the FDA's maximum vomitoxin levels, unless Kraft purchased additional, higher quality cash market wheat to blend with the futures market wheat. *Id.* Kraft knew this was the case from its September 2011 "test run," when it accepted a small delivery of futures market wheat. ¶¶ 51, 80-81, 86.

Notwithstanding these factors that made sourcing futures market wheat commercially prohibitive, Kraft used its status as a commercial hedger to put on a front and purchase and stand for delivery of more than $93.5 million of December 2011 wheat futures contracts—representing over 15.75 million bushels and 87% of the total CBOT open interest. ¶¶ 84, 88. But Kraft never

[3] All paragraph references to "¶ _" and "¶¶ _" are to the Consolidated Class Action Complaint (hereafter, the "Complaint"), ECF No. 71.

intended to take delivery of this purchase—rather, Kraft wanted the market to react to the massive long position and lower the price of cash market wheat in the Toledo area, which it did. ¶¶ 56, 87.

Kraft did not even have the capacity to store the six-month supply of 15 million bushels because 80% of Kraft's storage facility was already occupied at the time. ¶ 86. Storing the additional 15 million bushels (not including the additional wheat Kraft would need to purchase to make the futures market wheat usable) would have meant paying for more space at five cents a bushel. *Id.* Kraft planned all along to sell back at least $40 million of the wheat futures within weeks of putting on the position, demonstrating that it had no *bona fide* commercial need for it. ¶¶ 84-85. And ultimately, Kraft took delivery of less than 5% of its original position (660,000 out of 15.75 million bushels); it resold or offset the rest, and never made cash purchases equivalent to the wheat futures it resold or offset. ¶¶ 91-92. Kraft's uneconomic conduct demonstrates that it never viewed futures market wheat as a viable alternative to cash market wheat. Its goal from day one was only to manipulate the wheat market in its favor, benefitting in at least two ways: (1) Kraft could obtain wheat in the now-depressed cash market on the cheap (¶¶ 56, 83, 87); and (2) Kraft obtained illegitimate profits by narrowing the spread between the long positions it held in December 2011 and the short positions it held in March 2012 futures contracts. ¶¶ 1, 49, 61, 64-70, 78, 87; *see also* ECF No. 113 at 28-30 ("In sum, Ploss alleges specific details about the scheme, suggesting that Kraft's high-volume futures acquisition was willfully combined with something more to create a false impression of how market participants value a security.") (internal quotations omitted).

Kraft's first Proposed Question fails for another reason—it is not contestable. Judge Blakey held that this question is not likely to be overturned on appeal because it relies upon an argument both this Court and Judge Blakey already rejected: "an unreasonable extrapolation of *Sullivan & Long*'s fact-specific finding." *CFTC Action*, 2016 WL 3907027, at *7; *see also Sullivan & Long*, 47 F.3d at 857. As it did before Judge Blakey, Kraft argues that this Court should have stretched *Sullivan &*

Long's analysis of the federal securities laws to find that a false communication or other explicit misrepresentation is required to state a market manipulation claim under §§ 6(c)(1) or 9(a)(2). Both this Court[4] and Judge Blakey[5] recognized that *Sullivan & Long* could not be interpreted to impose a "false communication" requirement under Section 6(c)(1). Judge Blakey correctly rejected Kraft's improper addition of this "fifth requirement" of misrepresentation under either Section 6(c)(1) or 9(a)(2). *CFTC Action*, 2016 WL 3907027, at *6.

Sullivan & Long could never directly apply here because of the very different purposes of the federal securities laws on the one hand and the CEA on the other. In the federal securities laws, Congress, the SEC, and the courts construe "manipulation" in such a formalistic manner that it is virtually a "term of art." *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476-77 (1977). CEA manipulation is different; it is "practical," "ad hoc," and "fact specific." *In re Soybean Futures Litig.*, 892 F. Supp. 1025, 1044-46 (N.D. Ill. 1995). Congress, the courts, and the CFTC have purposely refused to adopt safe harbors from the definition of manipulation under the CEA. *See In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 90 (S.D.N.Y. 1998) ("[I]n enacting the CEA, Congress did not define manipulation by statute; similarly, the CFTC and its many predecessor agencies which have had the authority to promulgate regulations under the CEA, have refrained from defining in an exclusive or other limiting fashion what constitutes manipulation."); Jerry W. Markham, *Manipulation of Commodity Futures Prices-The Unprosecutable Crime*, 8 YALE J. ON REG. 281, 360 n.526 (1991) (quoting a CFTC memorandum rejecting efforts to catalog manipulative practices because this would simply enable "crafty" traders to then "evade the prohibitions"). And the CEA, unlike the federal securities laws,

[4] ECF No. 113 at 20 ("*Sullivan*, however, did not hold that a market manipulation claim in the securities context always requires an explicit misrepresentation.").

[5] *CFTC Action*, 2016 WL 3907027, at *7 (noting that "Judge Chang persuasively explained" that *Sullivan & Long* does not require a "false communication" to state a claim, and that "[t]he statute and regulations themselves thus recognize a difference between two types of unlawful actions: manipulative acts and explicit misrepresentations").

prohibits all price manipulation. *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 28 (2d Cir. 1985) (any and all price manipulation of futures contracts is expressly prohibited under the CEA).

Accordingly, reliance on "the specific 'purposes' of the securities laws in *Sullivan & Long* [is not controlling], especially when the CEA does not share the exact same purposes." *CFTC Action*, 2016 WL 3907027, at *7 n. 2. The CFTC noted that "[t]o account for the differences between the securities markets and the derivatives markets, [enforcement of CEA Section 6(c)(1)] will be guided, *but not controlled*, by the substantial body of judicial precedent applying the comparable language of SEC Rule 10b-5." 76 Fed. Reg. at 41, 404 (emphasis added). *Sullivan & Long* is distinguishable insofar as it interprets the securities laws, not the CEA.

B. Kraft's second Proposed Question fails under 28 U.S.C. § 1292(b).

Kraft's second Proposed Question would ask the Seventh Circuit to determine whether the specific facts alleged gave rise to "artificial prices" in the wheat market. That is Plaintiffs' causation theory, and whether "artificial prices" existed is hardly "an abstract legal issue" pertaining to "the meaning of a statutory or constitutional provision, regulation, or common law doctrine," that can be "decide[d] quickly and cleanly without having to study the record." *Ahrenholz*, 219 F.3d at 676-77; *see also* ECF No. 113 at 38 ("In deciding whether there is an artificial price, courts must search for those factors which are extraneous to the pricing system, are not a legitimate part of the economic pricing of the commodity, or are extrinsic to that commodity market.") (internal quotation omitted). This question requires a "complex" fact determination because "it would need some factual predicate to know what th[e] 'true' prices were." *CFTC Action*, 2016 WL 3907027, at *4. This Court correctly found that the Complaint alleges facts that, if true, show "the prices of cash wheat in Toledo and of December 2011 wheat contracts were caused not by legitimate forces of supply and demand . . . ," but rather by Kraft's misconduct. ECF No. 113 at 38. That determination did not resolve any abstract legal issue.

The second Proposed Question is also uncontestable. Kraft wrongly claims that *Sullivan & Long* holds that there can be no artificial price based on conduct that causes convergence. But *Sullivan & Long*:

> found that there was no artificial price when a pre-determined 'objective' or 'true' value of a stock existed, and the actions of the defendant in that case moved the price of the stock in that direction, thus aiding the objectives of the securities laws to promote the convergence of economic and market value. Here, there is no objectively correct price for either the cash wheat or the futures wheat . . . .

CFTC Action, 2016 WL 3907027, at *7. Judge Blakey has already found that the fact-specific holding in *Sullivan & Long* does not preclude convergence between cash wheat and futures from creating artificial prices: "[t]o do so would be to improperly extend the reasoning in *Sullivan & Long*." *Id.* at *7; *see also* ECF No. 113 at 38. As Judge Blakey held, these findings were based on extensive factual analysis and are unlikely to be overturned. *Id.*

C. Kraft's third Proposed Question fails under 28 U.S.C. § 1292(b).

Kraft's third Proposed Question does not meet the statutory standards, either. While Kraft claims substantial grounds for differences of opinion concerning "whether a defendant's open market purchases at open market prices can support a monopolization claim" (*see* ECF No. 117 at 10), Kraft does not quarrel with the standard this Court applied. Rather, Kraft's challenge only trains on the Court's application of "open market purchases at open market prices" to that standard. *Id.* Again, this is not a legal issue, it is an amalgam of factual questions: whether Kraft's "open market purchases at open market prices" (facts) equals monopoly power (a fact). *Id.* The Seventh Circuit could not evaluate this question without a factual record.

Kraft's third Proposed Question is also not contestable because there is no "'substantial likelihood' . . . that the district court ruling will be reversed on appeal." *Padilla v. DISH Network L.L.C.*, No. 12 C 7350, 2014 WL 539746, at *5 (N.D. Ill. Feb. 11, 2014) (citation omitted); *see also*

CFTC Action, 2016 WL 3907027, at *5. Though this third Proposed Question was not before Judge Blakey, this Court's decision on this antitrust question is supported by Judge Hibbler's decision in *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 767 F. Supp. 2d 880, 901 (N.D. Ill. 2011). In *In re Dairy Farmers*, Judge Hibbler noted that monopolization could occur by open market purchases, namely by purchasing an enormous percentage of the long positions "of the open interest on milk futures contracts." *Id.* at 889. Contrary to Kraft's assertion, the defendants in *In re Dairy Farmers* "'[were] not accused of inflating the price of milk futures by gaining control of the underlying commodity' through a corner or a squeeze, and it was not a problem that the relevant market did not include the cash crop." ECF No. 113 at 54 (quoting *In re Dairy Farmers*, 767 F. Supp. 2d at 901).

Kraft's reliance on *Kohen* is odd. *See* ECF No. 117 at 11 (citing *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672 (7th Cir. 2009)). First, *Kohen* did not involve a monopoly claim. Second, Kraft argues that in *Kohen* Judge Posner said "no one can corner the U.S. money supply" and Kraft suggests that the same comment applies to the wheat market. ECF No. 117 at 11; *see also Kohen*, 571 F.3d at 675. But what the Seventh Circuit actually wrote in *Kohen* demonstrates the opposite: that *unlike* a cash-settled futures market (*e.g.* financial futures), a commodities-settled futures market (like wheat) can plausibly be cornered. *Kohen*, 571 F.3d at 675 ("while it is correct that most financial futures contracts are settled in cash . . . and that if a cash option exists there is no market to corner (no one can corner the U.S. money supply!), futures contracts traded on the Chicago Board of Trade for ten-year U.S. Treasury notes are an exception; they are not 'cash settled.'") (internal citations omitted). *Kohen* thus undermines Kraft's argument. And nowhere in *Kohen* will this Court find the suggestion that a corner or a squeeze are the only means available for a defendant to monopolize a futures market. This Court properly held that the Plaintiffs' allegations here, if true, demonstrate another, equally viable (and in this case successful), way:

> Kraft succeeded in excluding competitors from taking a meaningful position in the December 2011 wheat futures market. In particular,

> Kraft's 87% long position "constituted a dominant position" that "gave Kraft great influence or control over the prices . . . ." *Id.* ¶ 166. And it allegedly "used its position of control to force the spread between the December 2011 and March 2012 CBOT wheat futures contracts," to increase December 2011 prices, and to shift the pricing curve from contango to backwardation. *Id.* ¶ 168. Like *In re Dairy Farmers*, even though it may be true that other participants theoretically could have entered the market, Ploss alleges that in reality, competitors were priced out of any meaningful ability to do so.

ECF No. 113 at 59-60.

D. The Proposed Questions are not controlling and their resolution will not expedite the case.

A proposed question must be "controlling"—dispositive—to qualify for interlocutory review. *Ahrenholz*, 219 F.3d at 676. The immediate appeal must also "expedite rather than protract the resolution of the case." *CFTC Action*, 2016 WL 3907027, at *8. None of Kraft's proposed questions is dispositive. Nor will an interlocutory appeal accelerate this litigation. Should Kraft prevail on its three questions, the ruling would not, as Kraft claims, "effectively end both this case and the parallel enforcement action." ECF No. 117 at 3. The unjust enrichment claim would proceed apace. *See CFTC Action*, 2016 WL 3907027, at *8.[6] All certification would do is require the parties to wage two contemporaneous battles, one here and another in the Seventh Circuit. The final judgment rule was designed to avoid this proliferation of effort.

III. Conclusion

None of Kraft's three Proposed Questions satisfies the requirements for interlocutory appeal under § 1292(b). Kraft's motion should be denied.

[6] Over 47% of Seventh Circuit appeals remain pending for over seven months. *See* U.S. Court of Appeals for the Seventh Circuit, *The Judicial Business of the United States Courts of the Seventh Circuit*, (2010) at U.S.C.A. Table 4, *available at* http://www.ca7.uscourts.gov/annual-report/2010_report.pdf; *see also Ahrenholz*, 219 F.3d at 676 (noting that normally proceedings in the district court "grind[] to a halt as soon as the judge certifies an order in the case for an immediate appeal").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Vincent Briganti, certify that on August 5, 2016, I caused Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Certify for Appeal the Court's Memorandum Opinion and Order Denying Defendants' Motion to Dismiss Plaintiffs' Complaint to be served on counsel of record via the Court's CM/ECF system.

Dated: August 5, 2016 */s/ Vincent Briganti*