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' MEMORANDUM OF LAW IN SUPPORT OF
<u>THEIR MOTION FOR SUMMARY JUDGMENT</u>

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INTRODUCTION

Kraft is a huge end-user of wheat, using millions of bushels each year. Faced with high prices for wheat in the cash market in the fall of 2011, Kraft did precisely what the [redacted] testified would be reasonable for a buyer facing high prices to do: Kraft attempted to buy comparable wheat in the futures market, where it was cheaper. Specifically, Kraft bought 3,000 wheat futures contracts on the Chicago Board of Trade, deliverable in December 2011.[1]

According to the CFTC, Kraft did so despite never intending to take possession of the wheat. Instead, the CFTC alleges that Kraft was really trying to manipulate the wheat futures market. The CFTC claims that by placing such a large long futures position and maintaining that position into the delivery period (called "standing for delivery" in the industry), Kraft intentionally sent a false signal to the market that Kraft would take possession of ("load out") the futures wheat to grind at its Toledo mill. *See* Compl. ¶¶ 25, 34. The CFTC theorizes that this would cause other market participants to perceive excessive demand for wheat, driving up the price of the December 2011 futures contract and (somehow) driving down the price of wheat in the cash market. The CFTC alleges that by standing for delivery Kraft caused artificial prices for December 2011 futures. This strategy supposedly benefited Kraft because it: (1) allowed Kraft to buy cash wheat at deflated prices after it drove those prices down; and (2) by driving up the price of the December 2011 futures contract, Kraft profited from the narrowing of the "spread" between the December and March futures prices (in which Kraft had a short position).

[1] For purposes of this motion, "Kraft" refers to defendants Kraft Foods Group, Inc. and Mondelēz Global LLC collectively. "CFTC" means plaintiff Commodity Futures Trading Commission. Citations to "¶ __" are to Kraft's Rule 56.1 Statement of Undisputed Material Facts, filed concurrently. Citations to "Ex. __" are to the exhibits attached to the Declaration of Thomas E. Quinn in support of this motion, filed concurrently.

The CFTC's two principal claims are (1) that Kraft engaged in a deceptive or manipulative scheme in violation of Section 6(c)(1) of the Commodity Exchange Act ("CEA" or "Act"); and (2) that Kraft engaged in market manipulation in violation of Section 9(a)(2) of the Act by causing artificial prices in the December 2011 wheat futures contract. After extensive discovery, the CFTC has failed to muster the necessary factual basis for its claims, and the Court should grant Kraft summary judgment.

There is no genuine issue of material fact as to an essential element of the CFTC's Section 6(c)(1) claim, Count I of the Complaint. Specifically, the CFTC cannot prove that Kraft sent a false signal that deceived the market.

In ruling on Kraft's motion to dismiss, this Court held that to prove its false-signaling claim, the CFTC must prove through evidence its allegation that "Kraft, through its activities in the market," actually "*conveyed* a false sense of demand," and that "the resulting prices in the market … *were influenced* by Kraft's false signals of demand." Dkt. No. 87 ("MTD Op.") at 27 (emphases added). The CFTC has no evidence to support those requirements:

- No market participant testified that it was misled into believing Kraft would take physical delivery (or "load out" in industry parlance) significant quantities of wheat—that is, there was no deception.
- As acknowledged by [redacted], any market participant who stands for and receives a shipping certificate to take delivery of futures wheat has at least four options to use that certificate, only one of which is actually taking physical delivery of the wheat.
- The undisputed facts, including t[redacted], show that market participants perceive taking physical delivery of the futures wheat as the *least* likely of those options.

[2] Although the futures contracts in question are traded on the Chicago Board of Trade ("CBOT"), the Chicago Mercantile Exchange ("CME"), which now owns the CBOT, is the CFTC-authorized self-regulatory organization that oversees the CBOT and is responsible for monitoring the market to ensure it is free from manipulation. *See* § IV below.

- It is undisputed that other market participants have no way of knowing whether someone who stands for delivery and obtains shipping certificates will load out wheat or pursue one of the other alternatives.
- There is no evidence that any market participant traded in response to Kraft's standing for delivery—that is, there is no evidence that Kraft's conduct influenced prices.
- There is no evidence that Kraft traded in wheat futures and caused the December price to increase and the December-March futures spread to narrow.

In addition, and as Kraft explains in its concurrently filed *Daubert* motion ("Wilson *Daubert* Motion"), the [redacted] opinion of the CFTC's expert, Dr. William Wilson, is inadmissible because it is based on pure *ipse dixit* rather than a reliable, accepted economic methodology, and because it conflicts with the undisputed facts. Accordingly, the CFTC has no evidence from which a reasonable jury could conclude that Kraft's conduct sent a false signal or influenced prices to move in response to that signal. Because the CFTC cannot establish that essential element of its Section 6(c)(1) claim, Kraft is entitled to summary judgment.

There is also no genuine issue of material fact as to two elements of Count II of the CFTC's Complaint, its Section 9(a)(2) market manipulation claim: (1) that artificial prices existed; and (2) that Kraft caused them. As discussed above, there is no record evidence from which a reasonable jury could conclude that Kraft's conduct influenced prices. The only support the CFTC has for either element is the testimony of Wilson, the CFTC's proffered expert. But as Kraft explains in its *Daubert* motion, Wilson's [redacted] opinions are inadmissible because (1) he is not qualified to give them; (2) he did not follow a reliable methodology to reach them, (3) his opinions have no support in accepted economic principles; (4) he and the CFTC failed to develop available evidence from market participants as to what caused them to trade in ways that moved market prices; and (5) Wilson did not account for record evidence that fatally undermines his opinions. Both the lack of critical evidence and the

undisputed facts conclusively refute the CFTC's theory that Kraft caused artificial prices. Accordingly, Kraft is entitled to summary judgment on the CFTC's market manipulation claim.

The Court should also grant Kraft summary judgment on the CFTC's two remaining claims: (1) for exceeding the CME's position limit rules during the December 2011 futures contract delivery period; and (2) for engaging in impermissible non-competitive trading when Kraft asked its futures commission merchant ("FCM"), [redacted] to offset short and long positions that Kraft maintained in separate [redacted] accounts.

The position limit claim (Count III) fails for a simple reason: the CME, to which the CFTC has delegated regulatory authority, provided Kraft a valid exemption from those limits. Indeed, during the December 2011 delivery period, the CME repeatedly told Kraft that it had a valid exemption that covered that delivery period.

The non-competitive trading claim (Count IV) fails for multiple reasons. In essence, the CFTC seeks to hold Kraft liable for the decision of Kraft's FCM to offset Kraft's long and short positions via an Exchange for Physical ("EFP") transaction. The CFTC cannot establish that claim for four reasons: (1) the CFTC cannot establish that Kraft is liable for the supposedly illegal acts of its FCM; (2) the non-competitive trading statute and regulation only cover "purchases" and "sales" of futures contracts, and a party does not purchase or sell when it offsets its own positions through off-exchange position transfers; (3) offsetting Kraft's own positions was not a wash sale or fictitious sale because it negated no market risk to Kraft; and (4) the CFTC has not developed any evidence to show that Kraft caused a non-bona fide price to be "reported, registered, or recorded," as required by the statute.

BACKGROUND

I. Facts Relating to the CFTC's Section 6 and Section 9 Claims.

A. Kraft and the Soft Red Winter Wheat Market

Kraft is a large food and beverage company and uses flour to make snack brands such as Ritz Crackers and Chips Ahoy. ¶ 5. To make this flour, Kraft operates a mill in Toledo, Ohio, and needs a steady supply of wheat (mostly Soft Red Winter wheat ("SRW")) to keep the mill running. ¶¶ 5-6. Typically, Kraft acquires wheat in the cash market from farmers, cooperatives, grain elevators, and merchandisers. ¶ 7. Kraft typically uses the wheat futures market to hedge price risk inherent in its use of wheat. ¶ 8. But Kraft, like any miller, can and has used the futures market to procure physical wheat. ¶¶ 9-10.

B. The Delivery Process

It is essential to this case to understand the "delivery process" by which parties can obtain wheat via CBOT futures contracts. There are five CBOT wheat futures delivery months: March, May, July, September, and December. ¶ 11. The delivery process, which occurs as a futures contract approaches its expiration date, enables a "long" or "short" futures holder, if it chooses, to take possession or make delivery of wheat. ¶ 12. At expiration, if a futures holder is long, it must either close its possession or be prepared to take delivery of the wheat; if a futures holder is short, it must close its position or deliver the wheat. ¶ 14. Long and short positions can be closed at any point during the delivery process prior to a long being matched with a short for delivery. ¶ 17. For SRW wheat futures, the short makes delivery by tendering an instrument called a shipping certificate (or "cert"), which entitles the holder to obtain 5,000 bushels of physical wheat from the registering warehouse (equivalent to one futures contract). ¶ 15. Shipping certificates can only be issued by "regular for delivery" warehouses (sometimes called "elevators"). ¶ 16. A "regular" warehouse with an open short position may make delivery at any

time during the two-week delivery period, and in any location where the warehouse has an approved elevator. ¶ 18.[3] There were 75 total regular warehouses and six designated delivery regions in 2011: (1) Chicago and Burns Harbor; (2) St. Louis and East St. Louis; (3) Toledo; (4) Northwest Ohio; (5) Ohio River; and (6) Mississippi River. ¶¶ 18, 29.

The delivery process lasts for approximately the last two weeks each contract trades on the exchange. ¶ 12. As to the December 2011 SRW wheat futures contract, the delivery period commenced on November 29 and ended on December 14. ¶ 13. On any day during the delivery period, a short position holder who possesses a certificate or can issue a new certificate may notify the CME that it intends to make delivery. ¶ 17. The CME will then match the short with the open long who has the oldest open position. *Id.* Delivery is made when the short tenders its shipping certificate to the oldest open long through the CME. ¶¶ 15, 17.

After a long position holder receives shipping certificates, it has four principal alternatives recognized by the CME and CFTC ([redacted]). ¶ 19. First, a market participant may **hold** the shipping certificates and pay storage fees to the issuing elevator. *Id.* Second, a market participant may **redeliver** the shipping certificates in the futures market by establishing a short position and tendering the certificates to close its short position. *Id.* Third, a market participant can **trade** the shipping certificates in the secondary (cash) market, either to a third party or the warehouse that issued and delivered the certificates. *Id.* Fourth, when it is economic to do so, a market participant may **load out** the wheat underlying the shipping certificates and transport the wheat from the warehouse to another location, such as a mill. *Id.* The first option (holding the certificate) can be followed by either option three (trading) or four (loading out) at any time during or after the delivery period. ¶ 22. There is no typical amount of

[3] Shipping certificates may be purchased or sold after they are delivered.

time a market participant owns shipping certificates before pursuing the options described above (one of which is simply to hold the certificates). ¶ 23.

Under CME rules, a market participant should only load out wheat underlying shipping certificates when it is economic to do so, meaning the cost of the futures wheat plus the cost of loading out and transporting the wheat is less than the price at which the market participant can buy and transport wheat in the cash market. ¶ 26. If the cash market provides a cheaper alternative, even after a market participant has acquired shipping certificates, the market participant should not load out the wheat. *Id.* In that situation, CME expects the market participant to pursue one of the three alternative actions described above. *Id.* Although other market participants expect owners of shipping certificates to follow CME rules and not load out shipping certificates from locations that would obviously be uneconomic, market participants do not know which of the three alternative options the certificate owner will pursue if it is not economic to load out the wheat. ¶¶ 27-28.

Because deliveries in a given expiration period may occur at any time and in any of the six regions by 75 different regular warehouses, it is impossible for a long position holder to know in advance who will deliver wheat and where they will do so. ¶ 29. Deliveries can, and do, occur in a variety of locations. ¶ 29. Because of the uncertainty, it is common for market participants who stand for delivery to anticipate having to sell or redeliver certificates they cannot economically load out, keeping only certificates delivered for locations that are economic. ¶ 30. According to [redacted], market participants regularly take delivery and resell certificates, while keeping open a long position until they get deliveries at locations from which they can economically load out. ¶ 30. This process is commonly referred to as "sorting receipts"

or "sorting certificates." ¶ 30. Actual load out of wheat, although one of the four options available to a certificate holder, is not common. ¶ 31.

C. Kraft Developed a Strategy to Attempt to Acquire Cheaper Wheat from the Futures Market

[redacted] prevailing cash wheat prices in the Toledo region were significantly higher relative to futures prices in the second half of 2011 than they had been in recent years. ¶ 32. [redacted] witnesses agreed that an end user like Kraft could stand for delivery to attempt to acquire wheat in the futures market in the face of high prices in the cash market. ¶ 10. In fact, internal correspondence from June-September 2011 among terminal elevators—the parties demanding high prices in the cash market—demonstrates that those elevators *expected* millers (like Kraft) to stand for delivery in light of the prevailing cash market conditions. ¶ 33. In response to these market conditions, in September 2011 Kraft purchased a 3,000 contract long position in the December 2011 SRW wheat futures contract. ¶ 34. [redacted] if cash wheat prices were higher than futures prices, it would have been "perfectly reasonably" for Kraft to attempt to obtain comparable wheat through the futures market. ¶ 10.

D. The December 2011 Delivery Period

The December 2011 delivery period started on November 29, 2011. ¶ 13. At that time, Kraft "stood for delivery"—that is, Kraft did not liquidate its long position. ¶ 35. In the few days following the start of the delivery period, Kraft obtained shipping certificates from warehouses from which the CFTC [redacted] concede it was not economic to load out the wheat. ¶ 36. Accordingly, and as required by CME rules, Kraft did not load out the wheat from uneconomic locations. ¶ 37. Rather, Kraft resold the 1,320 shipping certificates it received to the issuers of those certs. *Id.* Kraft liquidated the remaining portion of its December futures position by

December 9. ¶ 39. Kraft resold all of its certs by December 12. ¶ 37. On December 1, 14, and 20, 2011, Kraft bought wheat in the cash market for [redacted]. ¶ 41. From the sellers' perspective, those three purchases were the highest prices Kraft paid for wheat in all of 2011. *Id.*

As explained below, *see* §§ I.A, II.A below, there is no evidence that any market participants were deceived by Kraft's decision to stand for delivery into believing Kraft would load out the futures wheat associated with its long position, much less traded on that belief.

II. Facts Relating To The CFTC's Position Limits Claim.

In 2011, existing CME rules set forth speculative position limits that specified the number of wheat futures contracts a market participant could hold, both in general and during the spot month (that is, the month in which futures contract deliveries occur, here December). Compl. ¶ 42. Prior to delivery month, the speculative position limit was 5,000 contracts; during the delivery period, the speculative limit was 600 contracts. ¶ 68. Commercial end users like Kraft, however, can apply for and obtain hedge exemptions from CME that entitle them to hold futures positions that exceed the CME position limits. Compl. ¶¶ 43-45; ¶ 69. Effective December 1, 2010, CME granted Kraft a speculative limit hedge exemption allowing it to hold 5,460 long wheat futures contracts and 6,660 short wheat futures contracts in any contract month. ¶ 71. The exemption did not impose any limit on the positions that could be held in any single expiration month, but rather applied to all expirations combined. ¶ 72. On November 18, 2011, however, the CFTC adopted new rules on position limits on wheat and other commodity futures that impacted CME's hedge exemption approval process, which CME decided to delay until May 2012. ¶ 73.

During the period leading up to and including December 2011, Kraft had [redacted] contact CME to advise that Kraft was going to stand for delivery as to the December 2011 futures contract and also confirm that Kraft had a valid hedge exemption. ¶¶ 64, 74. The CME contacted Kraft through [redacted] on November 29, 2011—the first day of the December 2011 futures contract delivery period. ¶ 75. CME emailed [redacted] confirming that "Kraft has an exemption in CBOT Wheat contracts." *Id.* CME also confirmed that "[redacted]s." *Id.* The only limitation mentioned by CME was that Kraft's [redacted]," and that the [redacted] *Id.* In other words, Kraft could not maintain an open long position in excess of the speculative position limit of 600 contracts during the last five trading days, beyond its unfilled anticipated requirements from December 2011 and January 2012.

CME *again* confirmed Kraft's hedge exemption on December 7, 2011, in the midst of the delivery period for December 2011 futures contracts. In an email that day, CME confirmed that Kraft's hedge exemption was still in force. ¶ 76. CME wrote: "[redacted]" *Id.* Finally, on December 20, 2011, CME informed Kraft that its *current hedge exemption* was extended until May 31, 2012 because the CFTC's adoption of new rules required CME to postpone the hedge exemption renewal process until later in 2012. ¶ 77. In

other words, on December 20 the CME acknowledged that the hedge exemption that originally was set to expire on December 1, 2011 in fact had been extended and would not expire until May 2012.

CME has market surveillance personnel who closely monitor the delivery process, for compliance with position limits, market disruption, and evidence of manipulation. ¶ 78. At no time before, during, or after the December delivery period did CME state that Kraft's position exceeded position limits or that Kraft did not have a hedge exemption. *Id.* CME did not consider Kraft's position a large position. ¶ 81. After the December delivery period, CME did not sanction or even investigate Kraft for pursuing a strategy inconsistent with the rules of the exchange or for violating CME position limits. ¶ 80.

III. Facts Relating To The CFTC's Non-Competitive Trading Claim.

Kraft maintained several accounts at [redacted] in which it held wheat futures for long and short hedging purposes. ¶ 82. Between 2009 and 2014, and prior to each of the five delivery months for the CBOT SRW wheat futures contract, Kraft asked [redacted]e to "offset" or "switch" its open long and short hedge positions in the same contract month that were held in separate [redacted] accounts. ¶ 83.[4] Kraft personnel also asked [redacted] to offset the positions in Kraft's [redacted] account at a particular price that Kraft provided. ¶ 84. Kraft did so because it had to close its consumptive hedge positions before expiration of the contract if it did not wish to stand for or make delivery in these traditional consumptive hedge accounts. ¶ 83. Kraft never instructed [redacted] to execute or record the transactions as exchange for physical ("EFP")

[4] These long positions were held in the accounts Kraft used for its traditional consumption hedges to protect Kraft against increases in prices. ¶ 82. The short positions were to hedge the value of Kraft's inventory (on hand and already purchased). *Id.* The wheat futures for the December 2011 delivery strategy relating to Counts I-III of the Complaint were held in a separate account. ¶¶ 82, 34.

transactions. ¶ 85. Nevertheless, [redacted] recorded the offsets as EFP transactions. *Id.* The CFTC claims that by telling [redacted] to offset its consumptive hedge long and short positions in separate accounts, Kraft engaged in unlawful non-competitive trades. (Compl. ¶¶ 52, 55.)

LEGAL STANDARD

"Summary judgment is appropriate when 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124, 1128 (7th Cir. 2012) (quoting Fed. R. Civ. P. 56(a)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Wells v. Coker*, 707 F.3d 756, 760 (7th Cir. 2013) (internal quotation marks and citation omitted). In determining whether a genuine issue of material fact exists, the court must construe all facts in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. *Bay v. Cassens Transp. Co.*, 212 F.3d 969, 972 (7th Cir. 2000). However, "[n]ot all disputes of fact preclude summary judgment. Such factual disputes must be both *material* and *genuine*." *Carroll v. Lynch*, 698 F.3d 561, 564 (7th Cir. 2012) (emphases added). And "[t]he underlying substantive law governs whether a factual dispute is material: 'irrelevant or unnecessary' factual disputes do not preclude summary judgment." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)); *see Hampton v. Ford Motor Co.*, 561 F.3d 709, 713 (7th Cir. 2009). Finally, "[w]here the nonmovant bears the ultimate burden of persuasion on a particular issue . . . . the movant's initial burden 'may be discharged by "showing"—that is, point[ing] out to the district court—that there is an absence of evidence to support the nonmoving party's case.'" *Modrowski v. Pigatto*, 712 F.3d 1166, 1168 (7th Cir. 2013) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). "Upon

such a showing, the nonmovant must then 'make a showing sufficient to establish the existence of an element essential to that party's case.'" *Id.* (quoting *Celotex*, 477 U.S. at 322).

ARGUMENT

I. The CFTC Has Failed To Produce Evidence From Which A Reasonable Jury Could Find That Kraft Violated Section 6(c)(1).

Count I alleges that Kraft violated Section 6(c)(1) of the Act, which makes it unlawful for "any person" to use any "manipulative or deceptive device or contrivance" in "contravention of" the CFTC's regulations.[5] The gravamen of the CFTC's claim is that, by standing for delivery on its 3,000-contract long position—that is, just by doing nothing to close out its position before the delivery period started—Kraft sent a false signal to the market that Kraft intended to load out the wheat and grind it at its Toledo mill, causing futures prices to rise and cash prices to fall. Compl. ¶¶ 25, 34.

This Court has held that Section 6(c)(1) was "intended to reach only fraudulent conduct." MTD Op. at 16. Accordingly, a manipulation claim under Section 6(c)(1) "must involve 'conduct designed to deceive or defraud investors by controlling or artificially affecting the price of'" commodities. *Id.* at 19 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)). In resolving the motion to dismiss, this Court ruled that the CFTC had adequately pled deception because it alleged the following elements: "(1) Kraft took a huge wheat futures position; (2) that it did not intend to use in production; (3) but instead intended that the position would signal Kraft's demand for wheat in the relevant time period; (4) in a way that would mislead others in the market into thinking that Kraft would take delivery of its futures position and not buy cash

[5] The CFTC alleges a violation of its Regulation 180.1. That regulation implements Section 6(c)(1) and states that it is unlawful to use "any manipulative device, scheme, or artifice" to defraud, or to "engage, or attempt to engage," in acts that operate "or would operate as a fraud or deceit upon any person." 17 C.F.R. 180.1(a)(1), (3).

wheat; (5) which was intended to, and in fact did, cause cash wheat prices to decrease and the price for futures to increase." *Id.* at 26-27.[6] This motion concerns only element four, false signaling.

As stated by this Court, to establish its claim the CFTC must prove its allegation that "Kraft, through its activities in the market," actually "*conveyed* a false sense of demand," and that "the resulting prices in the market … *were influenced* by Kraft's false signals of demand." *Id*. at 27 (emphases added). In short, the CFTC must prove that Kraft not only intended to send a false signal with its large long futures position, but that the market was in fact misled into thinking that "Kraft would take delivery [of its futures position], load out, and use that wheat in its Mill." *Id.* at 26-27 (quoting Compl. ¶ 25); *see also id.* at 28 (CFTC must demonstrate "market was misled by that [false] signal"). The Court specifically acknowledged that the CFTC's Section 6(c)(1) claim would fail if "further discovery" showed that the market was not necessarily misled because Kraft's "long position could have signaled many things" *other* than that Kraft was going to take physical delivery of wheat on its futures contracts. *Id.* at 28.

A. The Undisputed Facts Show That No Market Participants Were Deceived By Kraft's Delivery Strategy.

Discovery has squarely resolved any factual question on the false-signaling element of the CFTC's claim. The CFTC has no evidence that any market participant was misled by any false signal from Kraft, or that Kraft's activities during the delivery period even *could have* sent a false signal that it intended to load out wheat. Given that, there is no genuine issue of material

[6] Kraft moved to dismiss the Section 6(c)(1) claim on the ground that mere purchases and sales of a commodity are legally insufficient to send a false signal. *See, e.g.*, Dkt. No. 57 at 11-14; Dkt. No. 91 at 7-8. This Court rejected that argument, and rejected Kraft's request to certify that issue for interlocutory appeal. In this motion, Kraft demonstrates that the CFTC cannot establish the elements of a Section 6(c)(1) claim even if mere purchasing and selling a commodity can constitute false signaling. Kraft maintains that as a matter of law, Kraft taking an open market position cannot send a false signal as alleged by the CFTC, as Kraft argued in its motion to dismiss.

fact as to whether Kraft's trading strategy "conveyed a false sense of demand," or that "the resulting prices in the market … were influenced by Kraft's false signals of demand." *Id*. at 27.

The CFTC has not identified the testimony of any participant in the wheat cash or futures market that testified it believed that Kraft intended to load out the 15 million bushels of wheat associated with its futures position, much less that they were misled. That is not for an inability to identify these traders. The CFTC has had available to it, through discovery and its ISS database, the identity of persons who traded in the wheat futures and cash markets in November and December 2011. ¶ 44.[7]

The parties deposed eight non-party wheat market participants. Not one testified that they were deceived by, or that their market actions were influenced by, Kraft's actions before, during, or after the December delivery period. ¶ 45. This includes [redacted] and were the purported targets of Kraft's alleged deceptive scheme to drive down cash prices. The undisputed evidence shows that no market participant expected Kraft to load out when it stood for delivery:

- [redacted]
- [redacted]

[7] The CFTC refused to produce the list of individuals who traded in the wheat futures market during the relevant time period, purportedly because it could not disclose such proprietary information under Section 8 of the CEA. Kraft only discovered the identities of market participants during the December delivery period during expert discovery, when the CFTC produced the information as part of [redacted]. Accordingly, Kraft was hamstrung during fact discovery in its ability to identify further market participants who were not deceived by Kraft's conduct. Regardless, the undisputed facts show that the CFTC has no evidence any market participants were deceived.

[redacted]" ¶ 47.

- [redacted] ¶ 48.
- [redacted] ¶ 59.
- [redacted] ¶ 60.
- [redacted]. ¶¶ 61, 62.
- [redacted]
- [redacted]

That evidence shows that market participants did not receive a signal from Kraft's standing for delivery that it intended to load out wheat. To be sure, certain market participants testified that a large commercial end-user like Kraft standing for delivery may signal demand for wheat by that end-user. [redacted]

But that is irrelevant to the CFTC's false signaling theory. The CFTC alleges that Kraft's standing for delivery falsely signaled that Kraft *intended to load out futures wheat*. *See* Compl. ¶ 25 (alleging that Kraft's strategy was "to induce sellers to believe that Kraft would take delivery, *load out, and use that wheat in its Mill*") (emphasis added); *see also id.* ¶ 34 (same). As to that issue, the CFTC has no evidence.

[redacted]

In sum, no market participant testified that they traded or otherwise were deceived by a "false signal" from Kraft that it would take physical delivery of futures wheat, as the CFTC alleges.

B. There Is No Genuine Dispute That A Miller Like Kraft Placing A Large Long Position And Standing For Delivery Does Not Signal An Intent To Load Out Wheat.

The undisputed facts demonstrate that Kraft's standing for delivery—that is, merely doing nothing to close its futures position before the delivery period started—could not have, by itself, signaled to the market that Kraft would load out the wheat. A market participant who takes delivery of shipping certificates has *four* principal options for disposing of those certificates, and only *one* of those options involves physically loading out the wheat that those certificates represent. ¶ 19. Specifically, [redacted]

[redacted] First, they could redeliver the shipping certificates by establishing a short position and tendering the certs to close out that position. *Id.* Second, they could sell the certificates in [redacted]. ¶ 19; [redacted]. Alternatively, they "could resell the certificate to the issuer of the certificate," which [redacted] was "a standard option." [redacted] Third, they could "hold on to the certificate" and "[redacted]," because the wheat represented by a shipping certificate "doesn't ever have to be loaded out." [redacted] Kraft's fourth option would have been to actually physically load out wheat, ¶ 19—but none of its first three options would involve loading out.

Every witness who was questioned about these options confirmed the viability of all options. [redacted] ¶ 21. [redacted]

Further, the fact that certificate holders have multiple options other than loading out wheat is confirmed by the CME's own guidance. The CME issued a bulletin advising market participants what to do if they could not economically load out wheat from delivery locations on a river that require load out by barge. ¶ 24. That advisory provides:

> "Market participants who take delivery of shipping certificates issued from a river delivery facility and would like to load-out wheat using a conveyance other than barges may do one of the following:
>
> 1. Privately negotiate with the shipping certificate issuer to arrange mutually acceptable alternative load-out procedures.
>
> 2. Re-deliver the shipping certificates on the futures market.

3. Trade the shipping certificates in the cash market.

4. Hold the shipping certificates and pay premium (storage) fees."

Id. [redacted]. ¶ 25. [redacted], most certificates that are delivered are not ultimately loaded out because it is uneconomic to do so. ¶ 31. Finally, and consistent with CME guidance, the undisputed testimony [redacted] establishes that they do not expect a certificate holder to load out wheat from uneconomic locations. *See* pp. 7 above. Indeed, as noted above, [redacted] thought it would be uneconomic for Kraft to load out those certificates. *See* pp. 15-16 above. And ultimately Kraft did not load out any of the certificates. *See* pp. 8-9 above.

There is no genuine dispute that Kraft's standing for delivery and receiving shipping certificates—especially in locations that were obviously uneconomic—did not signal to the market that Kraft would physically load out wheat.

C. Wilson's False-Signaling Opinion Is Inadmissible And Insufficient to Create A Genuine Issue of Material Fact.

The CFTC cannot rely upon the opinions of its proffered expert, Wilson, to meet its burden to "'make a showing sufficient to establish the existence of'" the essential false-signaling element of the CFTC's case. *Modrowski*, 712 F.3d at 1168 (quoting *Celotex*, 477 U.S. at 322). Wilson asserts that [redacted] But as explained in Kraft's concurrently filed motion to exclude Wilson's opinions under *Daubert*, Wilson's [redacted] is not based on any

reliable methodology, academic studies, or any record facts. To the contrary, the undisputed record facts refute his findings—[redacted]. *See* § I.A above. Accordingly, Wilson's opinions are based on pure speculation and inadmissible say-so. *See* Wilson *Daubert* Motion at 28-36. Wilson's opinion thus is not admissible and cannot create a genuine issue of material fact on the false-signaling element.

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In sum, the undisputed facts demonstrate that the CFTC cannot establish the false-signaling element of its Section 6(c)(1) claim. There is no evidence that any market participant was deceived or misled by Kraft, despite six years of investigation and three years of fact discovery. It is undisputed that Kraft had at least four different options for handling the shipping certificates it received—three of which did not involve Kraft physically loading out wheat. Based on that undisputed evidence, there is no genuine issue of material fact: Kraft's standing for delivery did not send—and the market did not perceive—a false signal that Kraft intended to load out the wheat from the futures market. And without that key premise—that the market *in fact* was misled by Kraft's position—the CFTC's Section 6(c)(1) claim fails.[8]

II. The CFTC Has Failed To Produce Evidence From Which A Reasonable Jury Could Find That Kraft Violated Section 9(a)(2).

To prove its Section 9(a)(2) market manipulation claim, the CFTC must show that (1) Kraft possessed the "ability to influence prices"; (2) "an artificial price existed"; (3) that Kraft "caused the artificial price"; and (4) that Kraft "specifically intended to cause the artificial

[8] Although not pled in the Complaint, to the extent that the CFTC were to argue that Kraft engaged in deception or used a manipulative device in violation of Section 6(c)(1) by causing an artificial price, the CFTC would have to establish the elements of an artificial-price market manipulation claim under Section 9(a)(2). For the reasons discussed in Section II, the CFTC cannot do so.

price." MTD Op. at 35.[9] Kraft disputes that the CFTC will be able to establish any element of its Section 9(a)(2) claim if this case were to go to trial. For purposes of summary judgment, however, Kraft contests only the second and third elements—existence of artificial prices and causation—both of which are independently essential to the CFTC's claim. The CFTC cannot offer any admissible evidence in support of either of these related elements.

A. The CFTC Has No Record Evidence That Artificial Prices Existed Or That Kraft Caused Them.

To establish that a price is artificial, the CFTC must demonstrate that prices did not reflect actual supply and demand, but instead were the result of an "extraneous" factor. (MTD Op. at 43 (quoting *In re Indiana Farm Bureau Coop. Ass'n*, CFTC No. 74-14, 1982 WL 30249, at *4 n.2 (Dec. 17, 1982).) There is no evidence in the record from which a reasonable jury could find artificial prices. The CFTC cannot simply point to price changes—even anomalous ones—to show artificiality. An "allegation of unusual market prices, without more, is insufficient to establish artificial prices, as a matter of law." *In re Rough Rice Commodity Litig.*, 2012 WL 473091, at *6 (N.D. Ill. Feb. 9, 2012); *see also In re Cox*, CFTC No. 75-16, 1987 WL 106879, at *4 (July 15, 1987). The CFTC itself has adopted this principle: "The Commission has identified one generally applicable factor [to consider in deciding whether a price was 'artificial'], namely, that a statistically unusual high (or low) price will not on that basis alone be deemed artificial." *In re DiPlacido*, CFTC No. 01-23, 2008 WL 4831204, at *30 (Nov. 5, 2008).

The CFTC also has no evidence establishing causation. The CFTC's theory is that Kraft's false signal that it would load out caused the December futures price to rise and futures spreads

[9] The CFTC also alleges market manipulation under Section 6(c)(3) of the Act and Regulation 180.2, but as this Court has acknowledged, the elements to establish a violation of either are the same as under Section 9(a)(2). (*See* MTD Op. at 35 & n.7.) Accordingly, this discussion applies equally to the alleged violations of Section 9(a)(2), Section 6(c)(3), and Regulation 180.2, which the CFTC pled in a single count (Count II).

to narrow. Compl. ¶¶ 25, 34. When Kraft first stood for delivery on November 29, 2011—immediately prior to when the CFTC contends that Kraft first sent the "false signal" that it would load out—the December 2011 futures price closed at $5.9450. ¶ 40. With an immaterial exception, Kraft did not trade December futures again until December 8 and 9, when it executed two trades to liquidate its remaining futures position. ¶ 39.[10] On December 8, the December futures price closed at $5.7675, and on December 9 it closed at $5.7350. ¶ 40. On December 14, the December futures price closed at $5.88, still below the price it was on November 29, 2011. *Id.* In other words, the futures price was *lower* when Kraft liquidated its position than it was immediately prior to when Kraft supposedly sent the "signal" that the CFTC claims drove up December futures. The price movement on the days Kraft itself traded are exactly the opposite of the movement that the CFTC claims was artificial.

Given that Kraft's own trades did not drive up December prices, to the extent that the CFTC claims that Kraft caused any futures price increases, to prove causation the CFTC would have to prove that *other* market participants traded in response to Kraft's decision to stand for delivery, causing the December price to increase and the December-March spread to narrow. That is because the undisputed facts show both that only trades can move futures market prices and that market participants trade for many different reasons. ¶¶ 42-43.

Yet the record reveals no evidence that any market participants traded because of anything having to do with Kraft. No market participant testified that he or she traded because anyone, including Kraft, stood for delivery. No market participants testified that they traded out of fear of a market manipulation or squeeze by anyone, much less Kraft. This lack of evidence is

[10] Kraft sold four long positions in the December contract on December 5. Ex. 69, Kraft Account Statements at 347. To the extent that such a small trade could move prices at all, selling a futures contract would only cause the futures price to *fall*, not *rise. See* Ex. 6, Wilson Tr. 45:17-20.

not due to the CFTC's inability to obtain it. The CFTC could have attempted to establish causation by asking the market participants who actually made the trades that moved futures prices whether they did so in response to Kraft's actions, out of some fear of a market squeeze, or because of other events occurring in the delivery market. Unlike Kraft, the CFTC knew the identity of most if not all of these market participants from the outset of this case. ¶ 44. But the CFTC did not develop evidence from *any* of them as to why they traded wheat futures during the relevant time period. The lack of evidence supporting the CFTC's position is particularly noteworthy given that [redacted], testified that he did not lower the price at which he was willing to sell wheat because of anything occurring in the futures market, and did not feel victimized by anything occurring in the market. ¶¶ 41, 50, 52.

In sum, because the CFTC cannot establish either that artificial prices existed or that Kraft caused them, Kraft is entitled to summary judgment on the CFTC's Section 9(a)(2) claim.

B. The CFTC Cannot Establish Artificial Prices Or Causation Without Admissible Expert Testimony.

Here, the CFTC has mustered no direct evidence of causation—such as the testimony of even a single market participant that he or she traded because of Kraft's strategy. *See* pp. 15-16 above. Accordingly, the CFTC can only establish causation through reliable expert testimony. *In re Mirena IUD Products Liab. Litig.*, 202 F. Supp. 3d 304, 311-12 (S.D.N.Y. 2016) ("Expert testimony is required in cases involving complex causation issues …. Thus, summary judgment is appropriate where required expert testimony is absent from the record."), *aff'd*, 713 Fed. Appx. 11 (2d Cir. 2017) (unpublished); *see also C.W. ex rel. Wood v. Textron, Inc.*, 807 F.3d 827, 838 (7th Cir. 2015) ("With no experts to prove causation … the appellants cannot prove their toxic-tort case …. Accordingly, we hold that summary judgment in this case was proper.").

Courts have repeatedly held that establishing causation in complex commodities and securities fraud cases requires expert testimony. *See, e.g.*, *Hershey v. Pac. Inv. Mgt. Co.*, 697 F. Supp. 2d 945, 955 (N.D. Ill. 2010) (holding that expert testimony, and "some form of statistical analysis," was required to prove artificial-price causation in commodities manipulation case); *Fener v. Operating Eng'rs Constr. Indus. & Miscellaneous Pension Fund*, 579 F.3d 401, 409 (5th Cir. 2009) (holding that "the testimony of an expert—along with some kind of analytical research or event study—is required to show loss causation").

Those principles apply here. Determining both that artificial prices existed and that Kraft caused those prices are the kinds of complex economic questions that necessitate expert testimony—especially in the absence of direct evidence of causation. Accordingly, the CFTC cannot establish artificial prices or causation with admissible expert testimony. The CFTC cannot and has not offered that evidence.

C. Wilson's Artificial-Price And Causation Opinions Are Inadmissible And Insufficient To Create A Genuine Issue Of Material Fact.

The CFTC's entire case with respect to the existence of an artificial price and causation hinges on the testimony of its expert, Wilson. But as Kraft explains in greater detail in its concurrently filed *Daubert* motion, Wilson's [redacted] opinions are inadmissible because: (1) he is not qualified to give them; (2) he did not follow a reliable methodology to reach them, (3) his opinions have no support in accepted economic principles; (4) he and the CFTC failed to develop available evidence from market participants as to what caused them to trade in ways that moved market prices; and (5) Wilson did not account for record evidence that fatally undermines his opinions. Wilson *Daubert* Motion at 28-38. [redacted] Ex. 6, Wilson Tr.

201:3-7, 202:23-203:13. Accordingly, the CFTC cannot rely upon Wilson's [redacted] opinions to withstand summary judgment as to the CFTC's Section 9(a)(2) claim.

III. The CFTC's Position-Limits Claim Fails Because CME Undisputedly Told Kraft That It Had A Valid Hedge Exemption.

Count III of the Complaint, the CFTC's position-limits claim, similarly fails based on the undisputed facts. In that count, the CFTC alleges that Kraft exceeded the CME's position limits (under 7 U.S.C. § 6a(e) and 17 C.F.R. § 150.2).[11] In particular, the CFTC alleges that Kraft violated the CEA by exceeding the CME's speculative position limit of 600 contracts during five separate days in December 2011. Compl. ¶¶ 72-73. The CFTC claims that Kraft did not have a valid exemption from those limits. *See id.* ¶¶ 45-47. The CFTC's claim fails for a simple reason: the undisputed facts show that Kraft had a valid hedge exemption.

The CME expressly informed Kraft that it had an exemption covering its December 2011 futures position. The CME has been delegated the authority to set its position limits and to grant hedge exemptions to traders from those limits. *See* 7 U.S.C. § 7 (authorizing boards of trade to qualify as "contract markets" if they set and enforce position limits); 17 C.F.R. § 38 (instructing "contract markets" to set position limits, enforce those limits, and allows contract markets to grant hedge exemptions); Compl. ¶ 17 (stating that CBOT is a "designated contract market[]" and that the "CME conducts surveillance and compliance activities related to CBOT trading").

Pursuant to that authority, the CME made clear that Kraft had a valid exemption during the critical time period. The Complaint alleges that Kraft exceeded CME position limits on five days: "December 2, 5, 6, 7, and 8, 2011." *Id.* ¶ 73. Kraft's FCM, [redacted] inquired with CME

[11] The CFTC has affirmatively abandoned any claim for a violation of the *CFTC*'s position limits under 7 U.S.C. § 6a(b). (*See* Dkt. No. 99 at 6 ("Nothing in Count III can be plausibly read as alleging that Kraft violated CFTC position limits …. The CFTC has not made any allegations related to … violations of CFTC position limits.").)

in advance of the December delivery period to confirm Kraft had a hedge exemption to cover its position. ¶ 74. [redacted] advised the CME of Kraft's intention to stand for delivery in December. ¶¶ 64, 75. Knowing of Kraft's intentions, CME confirmed twice that Kraft had a hedge exemption and that the hedge exemption covered Kraft's position in the December 2011 futures contract—once on November 29, 2011 and again on December 7, 2011. ¶¶ 75, 76. And on December 20, 2011, CME told Kraft that its "current hedge exemption" had been extended until May 31, 2012 because the CFTC had issued new rules on November 18, 2011, which required CME to postpone the hedge exemption renewal process until later in 2012. ¶ 77.

It is indisputable that CME's communications confirmed that Kraft had a CME hedge exemption before the December delivery period, during the December delivery period, and after the December delivery period, through the time when it was ultimately renewed later in 2012. Accordingly, the CME conferred a valid hedge exemption on Kraft that covered the December 2011 time period pursuant to the authority conferred on the CME by statute and regulation.

The CFTC will likely respond that Kraft did not have a valid hedge exemption because the CME's prior grant of an exemption stated that it expired by its terms on December 1, 2011. *See* Compl. ¶¶ 46-47. But that does not matter. The CME is authorized to grant hedge exemptions. CME personnel informed Kraft that its prior hedge exemption covered its December 2011 position and had been extended until May 2012. That is the granting of a hedge exemption to Kraft for the entire period from December 1, 2011 until May 2012. And even if, as the CFTC alleges, Kraft's hedge exemption had expired on December 1, 2011, notwithstanding CME's confirmations to the contrary, the CFTC's claim that Kraft violated CME position limits is barred by the official authorization defense. That "defense is available to someone who makes complete and accurate representations to a public official and then receives permission from that

official, when acting within the scope of his or her authority." *Fitzpatrick v. Sessions*, 847 F.3d 913, 915 (7th Cir. 2017); *U.S. v. Howell*, 37 F.3d 1197, 1204 (7th Cir. 1994).

Here, it is undisputed that the CME knew what Kraft's position was and knew it was standing for delivery in December 2011. CME officials told Kraft that it had a valid hedge exemption that covered the entirety of its futures position at the start of the December 2011 delivery period. CME and its employees were "entitled to speak for the government" on the subject of CME's position limits. *Keathley v. Holder*, 696 F.3d 644, 647 (7th Cir. 2012). Accordingly, the CFTC's position-limit claim is barred by the official authorization doctrine.

IV. The CFTC's Non-Competitive Trading Claim Fails As A Matter of Law.

Count IV alleges that Kraft's off-exchange transactions between 2009 and 2014, in which Kraft allegedly offset short and long positions in separate accounts five times per year, violated Sections 4c(a)(1) and (2) of the CEA and Regulation 1.38(a).[12] The CFTC alleges that Kraft violated Section 4c and Regulation 1.38(a) because, when its FCM offset Kraft's own long and short positions against one another, those offsetting transactions were non-competitive trades under Section 4c(a) and Regulation 1.38(a) that were not exempt from the non-competitive trading bar as legitimate EFPs.

The CFTC's non-competitive trading claim fails for four reasons: *First*, [redacted] made all of the relevant decisions regarding how to offset Kraft's positions and chose to do so in a way that the CFTC alleges violate the Act. But Kraft did not direct [redacted] to execute the transactions as EFPs and is therefore not liable for [redacted] conduct. *Second*, Kraft's direction to offset its own positions with itself are not "purchases" or "sales" of futures contracts under the relevant statutory and regulatory provisions. *Third*, the CFTC cannot establish that the

[12] For simplicity, this brief will refer to Count IV as the "non-competitive trading claim."

transactions were "wash" or "fictitious" sales because they did not evade market risk, an element of a wash or fictitious sale claim. *Fourth*, the CFTC cannot show that Kraft caused a non-bona fide price to be recorded or registered, as required by statute.

A. Kraft Is Not Liable For [redacted] Alleged Violations Of The Act And CFTC Regulations on Non-Competitive Trading.

The undisputed facts show the following as to the CFTC's claim. Kraft maintained separate accounts for long and short hedge positions. ¶ 82. Five times per year, in advance of the five contract expirations, Kraft instructed [redacted] to offset, "switch," or "match" long and short positions in the same contract, which Kraft held in different accounts, such that they would net against each other. ¶ 83. Kraft did so because it had to close its positions if it did not wish to make or stand for delivery. *Id.* [redacted] determined how to carry out Kraft's instruction. ¶ 85. [redacted] chose to record the offsetting transactions as an "Exchange for Physical" ("EFP") transaction. *Id.* Accordingly, Kraft is entitled to summary judgment on the CFTC's non-competitive trading claim in its entirety.

B. A Firm Offsetting Its Own Long And Short Position Off-Exchange Is Not a "Purchase Or Sale" Subject To The Non-Competitive Trading Statute And Regulation.

Section 4c states that it is "unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction . . . *involving the purchase or sale* of any commodity for future delivery" in certain circumstances. 7 U.S.C. § 6c(a)(1) (emphasis added). Similarly, CFTC Regulation 1.38(a) states that "*purchases and sales* of any commodity for future delivery . . . shall be executed openly and competitively." 17 C.F.R. § 1.38(a). Accordingly, both Section 4c and Regulation 1.38 only govern a "purchase" or "sale" of a futures contract.

The Act does not define either term, so they bear their ordinary meaning. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012). "A sale is a transfer of the absolute title to

property . . . between two parties, one of whom acquires thereby a property in the thing sold, and the other parts with it for a valuable consideration." *Sale*, Black's Law Dictionary (10th ed. 2014) (quoting William W. Story, *A Treatise on the Law of Sales of Personal Property* § 1, at 1 (1853)). A "purchase" is an "acquisition of an interest in real or personal property" by certain means. *Id.* (definition of "purchase").

Kraft's direction to [redacted] to offset Kraft's own long and short positions was neither a "sale" nor a "purchase" under the above definitions:

- To qualify as a sale, a transaction must transfer title between two parties. That did not happen here, because Kraft was on both sides of the "transaction" in question.
- To qualify as a purchase, Kraft would have had to "acquir[e] . . . an interest" in either or both of its long or short positions. That did not happen either. Before the transaction, Kraft owned both positions. After the transactions, the positions did not exist. Kraft did not "acquire" or "sell" anything by offsetting its own long and short positions.

In sum, by definition a party offsetting its own long and short positions off-exchange cannot violate either Section 4c or Regulation 1.38(a) because such a transaction does not involve two distinct parties and because a party does not acquire anything when offsetting its positions with itself. Kraft is therefore entitled to summary judgment as a matter of law because the non-competitive trading statute does not apply to Kraft's direction that [redacted] offset Kraft's own positions.

C. The CFTC Cannot Establish That Kraft's Conduct Constitutes A Wash Sale Or Fictitious Trade.

Kraft is entitled to summary judgment on the CFTC's non-competitive trading claim to the extent that the CFTC contends Kraft engaged in an impermissible "wash sale" or "fictitious sale." *See* 7 U.S.C. § 6c(a)(2)(A)(i), (ii). A wash sale is a form of fictitious transaction. *In re Mayer*, CFTC No. 92-21, 1998 WL 39411, at *21 (Feb. 3, 1998). A fictitious transaction employs "pre-arranged trades that give the appearance of submitting trades to the open market

but is protected from market risk and price competition." *U.S. Commodity Futures Trading Comm'n v. Yumin Li*, No. 15-cv-5839, 2016 WL 8256392, at *6 (N.D. Ill. Dec. 9, 2016) (citing *In re Mayer*, 1998 WL 39411, at *21). As the CFTC itself has determined, "the liability of a participant in the wash sale depends upon the demonstration that the participant knew, at the time he chose to participate in the transaction, that the transaction was designed to achieve a wash result in a manner *that negated risk.*" *In re Hencorp Becstone Futures LC*, CFTC No. 05-06, 2004 WL 2965025, at *4 (Dec. 22, 2004) (emphasis added).

Here, the CFTC has not produced any evidence—expert or otherwise—that Kraft or [redacted] intended to negate market risk or price competition. To the contrary, by definition, Kraft did not have any price risk because it held offsetting positions in separate accounts. Any increase in the price of a particular contract would increase the value of Kraft's long position while simultaneously decreasing the value of Kraft's short position by the same amount. Accordingly, Kraft's direction to offset long and short positions did nothing to "negate" Kraft's price risk, as required to establish that Kraft engaged in an impermissible wash or fictitious sale. Nor is there any evidence that Kraft or [redacted] did anything to create the appearance that these "trades" were done on the open market. Kraft is thus entitled to summary judgment.

D. The CFTC Cannot Establish That Kraft Caused The Transmission Of A Non-Bona Fide Price.

Kraft is also entitled to summary judgment on the CFTC's non-competitive trading claim to the extent the CFTC bases that claim on the allegation that Kraft "cause[d] any price to be reported, registered, or recorded that is not a true and bona fide price." 7 U.S.C. § 6c(a)(2)(B). Discovery has revealed no evidence in support of that claim. In particular, there is no evidence that Kraft caused any price to be "reported, registered, or recorded." Rather, the only evidence is that [redacted] decided how to offset the positions and how to report them and, as discussed in

Section IV.A above, the CFTC cannot establish that Kraft is liable for [redacted] actions. Accordingly, the CFTC cannot "make a showing sufficient to establish" this element. *Modrowski*, 712 F.3d at 1168 (quoting *Celotex*, 477 U.S. at 322).

CONCLUSION

For the reasons set forth above, Kraft respectfully requests that this Court grant Kraft summary judgment on Counts I, II, III, and IV of the CFTC's Complaint.

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Respectfully submitted,

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