

Securities Regulation Daily Wrap Up, TOP STORY—N.D. Ill.: CFTC leadership looks to outside law firm ahead of hearing on contempt charges and sanctions, (Sept. 25, 2019)

Securities Regulation Daily Wrap Up

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

In advance of a hearing scheduled for October 2, 2019 in Chicago to consider whether the CFTC violated the District Court's [consent order](#), a major law firm has appeared on behalf of agency leadership and staff, and has filed additional sealed pleadings.

The plot continues to thicken in the *CFTC v. Kraft Foods* case pending in the Northern District of Illinois. An evidentiary hearing scheduled for October 2, 2019 will feature the live testimony of Chairman Heath Tarbert, Dan Berkovitz, Commissioner Rostin Behnam, and Division of Enforcement Director James McDonald, if the hearing, in fact, goes forward. If the CFTC leadership has its way, it will not.

In the latest case developments, Zachary Fardon, a former U.S. attorney for the Northern District of Illinois and now at the law firm King and Spalding, has filed an appearance on behalf of the CFTC leadership and other Commission staff. Other motions and documents have also been filed by both parties. Some of those are under seal as well (*CFTC v. Kraft Foods Group, Inc.*, September, 24, 2019, Blakey, J.).

In this closely watched case, the CFTC has been charged with violating the terms of a consent order settling the action as a result of public statements made by the agency and three of its commissioners. Kraft filed a motion for contempt claiming the CFTC breached a post-settlement gag provision. That motion was retroactively sealed from public viewing, as well as a number of other filings in the case.

CFTC leadership lawyers up. Fardon, along with King & Spalding lawyers [Christopher O'Malley](#) and [Patrick Otlewski](#), have filed appearances on behalf of Chairman Heath Tarbert, Commissioner Dan Berkovitz, Commissioner Rostin Behnam, and Division of Enforcement Director James McDonald. The King & Spalding team is also appearing for Commission Enforcement Division personnel Susan Gradman, Robert Howell, Stephanie Reinhart, and Neel Chopra.

A request for a status conference in advance of the October 2 hearing. In a heavily redacted motion, King & Spalding attorneys have asked the court to hold a status conference at its earliest convenience. Some of the visible portions of that motion indicate:

- Following the district 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 King & Spalding regarding its representation. They were retained on September 18, 2019, and promptly began its efforts to become acquainted with the factual and legal issues. They noted they were not previously involved in this case.
- There is a tremendous amount of work that King & Spalding lawyers must conduct in order 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 the preparation process by ensuring that counsel have a full and proper appreciation of the court's expectations.

The King & Spalding team also offered to provide the court with very preliminary suggestions for a framework to address the motion for contempt and indicated it would appreciate an opportunity to present their position on the merits.

Seals all the way down. The cloak of secrecy in this matter has continued as both sides have filed additional items, some of which are sealed from public viewing. For its part, the CFTC has filed a sealed memorandum regarding privileges. Meanwhile, the defendants requested leave to file [an oversized brief](#), which the CFTC did not oppose. The attachments to the brief were filed under seal.

In support of its request to file an oversized brief, the defendants noted:

- Since the August 19 hearing, the CFTC has filed four additional substantive briefs, all of which contain argument relevant to the issues addressed in defendants' supplemental brief;
- The CFTC filed a 20-page motion to vacate the evidentiary hearing;
- The CFTC filed a 15-page supplemental brief in opposition to defendants' contempt motion; and
- The CFTC filed a 33-page petition for a writ of mandamus, and another memorandum concerning "privileges."

The CFTC has also filed an appeal to the Seventh Circuit Court of Appeals in this matter as reflected by [a notice dated September 13, 2019](#). However, that docket entry has mysteriously disappeared from public viewing as of today's date. Moreover, the matter will continue to be shrouded in mystery as long as pleadings and documents are sealed from public view. Nonetheless, the recent docket entries reveal some of the developments and dynamics at play in this highly unusual proceeding.

The case is [No. 15-cv-02881](#).

Attorneys: Daniel Davis for the CFTC. Dean N. Panos (Jenner & Block LLP) and Gregory S. Kaufman (Eversheds Sutherland) for Kraft Foods Group, Inc. and Mondelez Global LLC. Zachary Fardon, Christopher O'Malley, and Patrick Otlewski (King and Spalding LLP) for Heath Tarbert, Dan Berkovitz, Rostin Behnam, James McDonald, Susan Gradman, Robert Howell, Stephanie Reinhart, and Neel Chopra.

Companies: Kraft Foods Group, Inc.; Mondelez Global LLC; Mondelez International, Inc

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