

[Securities Regulation Daily Wrap Up, TOP STORY—N.D. III.: No interlocutory appeal for Kraft in CFTC manipulation suit, \(Jul. 20, 2016\)](#)

Securities Regulation Daily Wrap Up

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By [Lene Powell, J.D.](#)

Kraft Foods Group, Inc. lost its bid to have two questions certified for interlocutory appeal in a CFTC enforcement action alleging that Kraft manipulated prices in the wheat markets. The questions, involving whether there can be an artificial price if cash and futures prices converge or "false signaling" absent misrepresentation, were not contestable questions of law for which the court's decision was likely to be reversed on appeal. The court also struck all of Kraft's affirmative defenses (*CFTC v. Kraft Foods Group, Inc.*, July 19, 2016, Blakey, J.).

A motion for interlocutory appeal involving similar questions is currently pending in *Ploss v. Kraft Foods Group*, a private action involving the same alleged manipulation being heard by a different judge.

CFTC allegations. In April 2015, the CFTC charged Kraft and Mondelēz Global LLC with manipulating and attempting to manipulate the price of cash wheat and wheat futures. In December 2015, the court [ruled](#) that the CFTC had adequately pleaded its claims and denied Kraft's motion to dismiss.

Following the ruling, Kraft sought to have two questions certified for interlocutory appeal:

- (1) whether 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 (CEA) and corresponding Regulations 180.1 and 180.2"; and
- (2) whether, 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.

To certify an order for interlocutory appeal, there must be a question of law that is contestable and controlling, and resolution of the question must promise to speed up the litigation.

Misrepresentation not required. Kraft cited *Sullivan v. Long* (1995), involving short selling of securities in violation of the Securities Exchange Act of 1934, to assert that short selling is neither deceptive nor manipulative absent other representations, actual or implicit—even if the trader intends to depress the stock price. Kraft urged the court to find that similarly, some sort of false communication or other misrepresentation is required to state a claim for market manipulation under CEA Sections 6(c)(1) or 9(a)(2).

The court declined to require an element of misrepresentation for 9(a)(2), noting that the Seventh Circuit has articulated a four-part test for price manipulation under that section, and the test does not include misrepresentation. As to the 6(c)(1) claim, the Seventh Circuit held in *Sullivan* that a viable manipulation claim under Rule 10b-5 requires proof of either deception or manipulation—thus making clear that there is a class of manipulation claims not based upon deception or misrepresentation. According to the court, this reasoning was supported by Judge Chang's [decision](#) in *Ploss v. Kraft Foods Group*.

Artificial price and price convergence. Kraft's question relating to artificial price and price convergence was not a question of law, said the court, because the appellate court would need to determine an essential factual predicate before making any meaningful decision regarding convergence. In *Sullivan*, the court had before it a record establishing the "objective" or "true" stock price, as well as evidence showing that the defendants' actions had moved the stock price in the direction of the true value of the stock. Such information was missing here and, in fact, the complaint alleged the opposite, so the Seventh Circuit would need some factual predicate to know what those "true" prices were.

Moreover, the court explained, *Sullivan* did not overturn the generally accepted rule that artificial prices are those that do not reflect underlying conditions of supply and demand. Rather, it provided an additional way in which, under specific circumstances, a court may need to evaluate price artificiality based upon a complete factual record and the goals underlying securities regulations. *Sullivan* was driven by the facts presented and the purposes of the securities laws, and those facts and purposes did not align exactly with the Kraft case or the purposes of the CEA. The court declined to read *Sullivan* so broadly as to mean there can never be an artificial price where there is price convergence.

The court further found that the resolution of the artificial price question would not expedite the resolution of the litigation. Because artificial price is not an element of attempted manipulation, discovery would still be needed for that claim.

Affirmative defenses struck. The court struck all five of Kraft's affirmative defenses. Kraft had previously withdrawn or conceded that four of the defenses were improper. On the remaining defense of unclean hands, the court noted that as a matter of law under the "vast majority of case law," the unclean hands defense is not available in actions brought by the government in the public interest. Two cases from the Northern District of Indiana were no longer good precedent on this point. The court also struck the defense to the extent it relied on laches, saying that as a general rule, U.S. government enforcement actions are not subject to the equitable defense of laches.

The case is [No. 15 C 2881](#).

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Companies: Kraft Foods Group, Inc.; Mondelēz Global LLC

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