UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
JOHN ROBERT BLAKEY
JUDGE

312-435-6058

October 7, 2019

Gino J. Agnello, Clerk of Court
U.S. Court of Appeals for the Seventh Circuit
Everett McKinley Dirksen United States Courthouse
219 S. Dearborn Street
Room 2722
Chicago, IL 60604

Re: No. 19-2769 In Re: Commodity Futures Trading Commission

Dear Mr. Agnello,

I thank Judges Easterbrook, Rovner, and Sykes for the opportunity to share a few thoughts regarding the CFTC's mandamus petition. I hope the Court will find my input helpful.

First, as you can see from the record, the exact nature and scope of Kraft's contempt motion has been in flux, and thus, I haven't yet ruled on important questions of privilege or other procedural objections. As such, I believe the appeal is premature and the petition for mandamus should be denied.

If you can believe it, this unfortunate series of events all began with a settlement. At the outset of a March 22, 2019 settlement conference, I made an explicit ruling that the discussions in settlement, of course, remain confidential:

> . . . a settlement conference is like Las Vegas. Whatever happens stays here even if you settle the case. So anything I say during the settlement conference, anything the parties say during the settlement conference – whether it's the joint session or the separate ex parte sessions – is not admissible or even disclosable to anyone at any time in any pleading or at any cocktail party so that's a condition of going forward.

[2-1], pp. 71–72.[1] Thereafter, the parties consented to proceeding in this fashion, *id.* at 4, and I facilitated private negotiations between the parties. Ultimately, they agreed to the material terms of a settlement on the record, and I ordered them to "submit a proposed consent order to this Court's proposed order inbox" before the next court date. *See id.* at p. 68. In my order, I again warned that "[c]onsistent with the settlement protocol, the parties may not discuss the settlement conference." *Id.*

Subsequently, the parties submitted an agreed consent judgment, which I entered, [2-1], pp. 85–93. The agreed consent judgment also included a confidentiality provision, at paragraph 8:

> Neither party shall make any public statement about this case other than to refer to the terms of this settlement agreement or public documents filed in this case, except any party may take any lawful position in any legal proceedings, testimony or by court order.

Id. at p. 87.

Despite the confidentiality of the settlement conference itself and paragraph 8 of the consent order, a series of press releases were issued on the official CFTC website about the content of the settlement conference and the case generally. For example, the CFTC published the "Statement of the Commission," dated August 15, 2019, which states, in pertinent part:

> In unanimously approving the settlement, our Commission considered carefully Paragraph 8 of Section I of the Consent Order, which was included at *the Court's request* . . .

[2-1], p. 115. Putting aside for the moment that the terms of the settlement came from the parties (not from me), this statement ostensibly discloses the content of the settlement conference, in violation of my orders.

Likewise, Kraft alleges that the press releases issued on the CTFC website also violated paragraph 8, because the disclosures were neither pre-authorized (by me), nor made pursuant to any legal duty. For example, the CFTC website published contentious statements, allegedly beyond the public documents filed in the case, including:

- "We support entering into the consent order with Kraft, despite the absence of findings of fact, because the penalty and injunctive relief imposed reflect, in our view, the gravity of Kraft's conduct." 8/15/19 Statement of Commissioners Berkovitz and Behnam, [2-1], p. 117;

[1] This confidentiality requirement also arose from my prior orders setting the conference [296].

- "The $16 million penalty and injunctive relief that the Commission has obtained in this consent order is as much as the Commission could reasonably expect to obtain if it were to prevail at trial." *Id.*;

- "Even where a court does not make any evidentiary findings or conclusions of law, the fact that a U.S. district court, through a consent order, imposes a civil monetary penalty demonstrates that the Commission has provided sufficient evidence to find that the defendants violated the law." *Id.* at p. 118;

- "In this case, it is not only Kraft's $16 million payment that is doing the talking. The Commission is speaking loudly and clearly as well: those who manipulate or attempt to manipulate our commodity markets will be prosecuted and punished." *Id.*

Based upon such remarks, Kraft filed its contempt motion, and I held an initial status hearing. At the status, I asked the parties whether any factual disputes existed and whether the parties intended to assert any privileges or procedural objections. The parties disagreed on the need for an evidentiary hearing, and, to my surprise, counsel for the CFTC asserted the Fifth Amendment (among other privileges) on behalf of the CFTC and its high-ranking officials. At the hearing, counsel for the CFTC also argued that the press releases did not violate any of my orders, because the CFTC commissioners were not bound by those orders. As the Statement of the Commission puts it: "Our decision to approve the Consent Order was based on the fact that while this provision ... limits what *the Commission* (*i.e.*, the 'party referenced in Paragraph 8) can say about the *Kraft* litigation, it does not restrict individual Commissioners when speaking in their personal capacities." [2-1], p. 115 (emphasis in original).

After hearing from both sides, I set the matter over by agreement for an evidentiary hearing on Kraft's motion for civil contempt and required those with personal knowledge of the press releases to appear and provide live testimony (or a sworn factual proffer). *See* [2-1], p. 132. In this same order, I also set a deadline for "any supplemental filings or memorandum of law, including any assertions of privilege (or any procedural or substantive objections) by anyone." *Id.*

Obviously, I didn't set a hearing with the commissioners lightly (and granted continuances upon request). But, under the extraordinary circumstances, where the high-ranking executive officials made some of the challenged statements and appeared to be in sole possession of the relevant information, I determined that it was the right call, at least prior to some convincing argument to the contrary by the CFTC. Kraft's contempt motion cites public statements made not only by the CFTC, but by the commissioners themselves, and argues that those statements run afoul of my orders. Because any finding of civil contempt requires some showing of state of mind, the commissioners would seem to possess unique information on disputed

issues of fact.[2] *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019) (civil contempt sanctions may be warranted when a party acts in bad faith); *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 799 (7th Cir. 2013).

Nevertheless, instead of briefing their procedural objections and allowing me an opportunity to rule in their favor about the necessity of the commissioners' testimony, the CFTC instead filed an emergency motion on August 28, 2019 with the Court of Appeals [2-1], pp. 144–68. Given the apparent confusion in the CTFC's appellate motion, I issued an order clarifying that the hearing was a "civil proceeding" and that I had not ruled on "any procedural objections or assertions of privilege by any party." [336]. Also, in response to a request by recently-retained counsel for the commissioners themselves, I set another status conference to further clarify the nature and scope of any hearing on Kraft's contempt motion and to address any pre-hearing concerns. [344]. I cancelled this hearing upon the issuance of the stay.

Given the posture of these proceedings, the CFTC's mandamus petition simply is not ripe.

Additionally, I believe it's important to note that the CFTC's fears of an unlawful criminal inquisition are unfounded. Despite the prior invocations of the Fifth Amendment, the prospects of having to make a referral for a criminal contempt investigation are extremely remote—particularly based upon the recent withdrawal of the prior Fifth Amendment assertions and Kraft's more recent pleadings clearly requesting an order of civil (not criminal) contempt. Moreover, even if the unexpected were to present itself at a hearing, I would obviously terminate any factual inquiry and follow the requisite procedures with a referral to the appropriate authority. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987); *F.T.C. v. Trudeau*, 579 F.3d 754, 769 (7th Cir. 2009); *Lightspeed Media Corp. v. Smith*, 830 F.3d 500, 509 (7th Cir. 2016) (explaining that civil contempt is either coercive or remedial, while criminal contempt sanctions are punitive).

Lastly, the CFTC also contends that if an evidentiary hearing becomes necessary, then it should be conducted by a different district judge because I allegedly have knowledge of disputed facts making me a material witness to the proceedings. But knowledge of disputed facts requires disqualification only where the knowledge finds its roots in an extrajudicial source, and the CFTC bases its argument upon my participation in the parties' settlement conference. *United States v. Widgery*, 778 F.2d 325, 328 (7th Cir. 1985). Thus, any knowledge I may have of certain disputed facts here would stem solely from in-court proceedings, and not warrant disqualification;

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[2]Although the CFTC seeks to preclude the commissioners from testifying, it appears the commissioners themselves are not resistant to testifying; indeed, the commissioners recently submitted a brief stating that they "are concerned that the CFTC's briefing risks leaving a misimpression that the Commissioners and Chairman are resisting an appropriate inquiry into the circumstances surrounding the alleged consent-order violation." [8], p. 148.

nor would I ever constitute a material witness to the evidentiary hearing, because other witnesses—such as representatives for the CFTC or Kraft, who attended the settlement conference—are available to provide the same testimony. *E.g.*, *United States v. Lanier*, No. 2:14-CR-83, 2018 WL 296725, at *3 (E.D. Tenn. Jan. 3, 2018); *Arrowood Indem. Co. v. City of Warren, Mich.*, 54 F. Supp. 3d 723, 728 (E.D. Mich. 2014); *see also* 46 Am. Jur. 2d Judges § 101 ("A judge is not a material witness where there are other available witnesses who can give the same testimony.").

Thank you again for inviting my input in this matter. I look forward to your guidance.

Best Regards,

John Robert Blakey
United State District Court Judge
Northern District of Illinois