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

U.S. COMMODITY FUTURES TRADING COMMISSION, **Plaintiff,** **v.** **KRAFT FOODS GROUP, INC. and MONDELĒZ GLOBAL LLC,** **Defendants,**	**Civil Action No: 15-cv-2881** **Hon. John Robert Blakey**

RESPONSE AND INCORPORATED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO CERTIFY ISSUES FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b) AND TO STAY PROCEEDINGS

Neither of the two questions for which Defendants Kraft Foods Group, Inc. and Mondelēz Global LLC (collectively "Defendants" or "Kraft") have requested certification for interlocutory appeal ("the Proposed Questions") meets the high bar set for interlocutory appeals under Section 1292(b). The Court's Memorandum Opinion and Order of December 18, 2015 (Dkt. No. 87; the "Order") contains a detailed, well-reasoned analysis of the factual allegations in the Complaint filed by Plaintiff U.S. Commodity Futures Trading Commission ("Commission" or "CFTC"). The Order makes abundantly clear that Counts I and II of the Complaint state claims upon which relief can be granted, such that the Defendants' Motion to Certify Issues for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) and to Stay Proceedings (Dkt. No. 91; "Motion") is simply not likely to result in success before the Court of Appeals.

Moreover, Defendants have distorted the Order in crafting Proposed Questions that focus on issues that are, at best, tangential to the Order and that also are premised on facts not alleged in the Complaint. Neither Proposed Question is controlling or contestable, and even if both questions were resolved in Defendants' favor, that resolution would not expedite this litigation in any meaningful way. Accordingly, Defendants' Motion should be denied in its entirety.

I. NEITHER PROPOSED QUESTION MEETS THE REQUIREMENTS OF §1292(b)

By its terms, § 1292(b) is a narrow exception to the rule that a party may only appeal a judgment that is final as to all counts, issues and parties.[1] Accordingly, "permission to take an interlocutory appeal should be granted sparingly and with discrimination." *Praxair v. Hinshaw & Culbertson,* No. 97 C 3079, 1997 WL 662530, at * 1 (N.D. Ill. Oct. 15, 1997) (quoting *In re Folding Carton Antitrust Litig.,* 75 F.R.D. 727, 738 (N.D. Ill. 1977). Interlocutory appeals are frowned on, and the party seeking interlocutory review thus "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.'" *Id*. (quoting *Fisons Ltd. v. United States,* 458 F.2d 1241, 1248 (7th Cir. 1972)). In order for a question to be properly certified for interlocutory appeal under Section 1292(b), it must be: (1) a question of law; that is (2) controlling, (3) contestable, and (4) the resolution of which promises to speed up the litigation. *Ahrenholz v. Bd. of Trustees of the Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000).[2]

[1] 28 U.S.C. § 1292(b) provides that "[w]hen a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order."

[2] There is also a non-statutory requirement that "the petition must be filed in the district court within a reasonable time after the order sought to appeal." *Ahrenholtz*, 219 F.3d at 675 (emphasis omitted).

"Unless *all* these criteria are satisfied, the district court may not and should not certify its order to [the Seventh Circuit] for an immediate appeal under section 1992(b)." *Id.* at 676. (emphasis in original). Defendants have failed to meet this exceptionally high burden for either of their two Proposed Questions, which are both premised on facts not alleged in the Complaint. In addition, neither Proposed Question is controlling or contestable, nor will resolution of these questions expedite the litigation. Accordingly, this Court should deny the Motion in its entirety.

A. The Proposed Questions are Premised on Facts not Alleged in the Complaint

For a proposed question to be certified for appeal under § 1292(b), it must present "an abstract legal issue" that the Court of Appeals can "decide quickly and cleanly without having to study the record." *Ahrenholz,* 219 F.3d at 676-67. Questions that satisfy this requirement generally pertain to "the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Id*. at 676. Where the proposed question involves application of law to specific facts, *i.e.*, a mixed question of law and fact, it is not a pure question of law under § 1292(b). *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 986 F.Supp.2d 524, 532 (S.D.N.Y. 2013). Interlocutory appeals of analogous, fact-specific applications of law to fact in securities cases have been recognized as "particularly inappropriate." *Id.* at 533-34 (collecting cases).

Here, each of Kraft's Proposed Questions asks whether a particular set of facts could constitute a violation of certain anti-manipulation provisions in the Commodity Exchange Act ("CEA") and Commission Regulations.[3] The first Proposed Question asks "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

[3] As discussed below, neither Proposed Question is addressed to all of the violations alleged in Counts I and II.

manipulation." Motion at 1. The second Proposed Question asks "whether, when a defendant's purchases in the futures market cause cash and futures prices to converge, those converging prices are 'artificial.'" *Id*.

While they may be carefully phrased to read like questions of law, neither Proposed Question accurately reflects the factual allegations in the Commission's Complaint. For example, the Commission did not allege merely that Kraft put on a "large futures position." Instead, the Commission alleged that Kraft held an enormous position in the *delivery* month constituting 87% of the open interest in wheat which, among other things, violated exchange position limits, and that Kraft held that position well into the delivery period although it ultimately took delivery of just a tiny fraction of that wheat. *See, e.g.*, Complaint ¶¶ 35-39. Similarly, Defendants' Second Proposed Question presumes facts not alleged in the Complaint regarding the functioning of the wheat markets and convergence of cash and futures prices in those markets as well as mischaracterizing the Court's ruling. As this Court has already noted, "(1) there is nothing in the Complaint suggesting that Defendants' theory regarding convergence in the wheat market applies to 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.'" Order slip op. at 45.

Proposed questions that mischaracterize a prior ruling or a Complaint's allegations are obviously not appropriate grounds for the certification of an interlocutory appeal. *See, e.g., Whitmore v. Symons Int'l Group, Inc.*, 09-cv-391, 2012 WL 3308990, at *2 (S.D. Ind. Aug. 13, 2012); *Rise, Inc. v. Malheur County,* No. 10-cv-00686, 2012 WL 1903880, at * 4 (D. Ore. May 25, 2012); *Glaberson v. Comcast Corp.,* No. 03-6604, 2006 WL 3762028, at *13 (E.D. Penn.

Dec. 19, 2006). Because of their mischaracterization of the allegations in the Complaint, neither of Kraft's Proposed Questions raises an abstract legal issue appropriate for resolution through interlocutory appeal.

B. The Proposed Questions are Not Controlling and will not Expedite the Litigation

In addition, to be eligible for interlocutory appeal, a proposed question must be "controlling," meaning that if the appellant obtains a favorable ruling on appeal, that ruling would prove dispositive. *Id*. at 676. Neither of Defendants' Proposed Questions meets this standard because even if Defendants were to prevail on both questions on appeal, such a ruling would not, as Defendants claim, "effectively end the market manipulation aspect of this case." Motion at 5. The Motion glosses over the significant legal differences between the different forms of manipulation and attempted manipulation alleged in Counts I and II of the Complaint, but, as discussed in detail in the Order, slip op. at 11-14, these Counts arise from different statutory and regulatory provisions, which contain different elements of proof. Even if Defendants were to obtain fully favorable rulings on both of the Proposed Questions, at least part of the Commission's market manipulation case would survive (as well as the two other non-manipulation counts in the Complaint).

Specifically, Count I of the Complaint alleges the use or attempted use of a manipulative or deceptive device in connection with contracts for sale of commodities or futures, in violation of CEA Section 6(c)(1), 7 U.S.C. § 9(1) (2012), and Commission Regulation 180.1, 17 C.F.R. § 180.1 (2015). Enacted as part of the Dodd-Frank Act,[4] new Section 6(c)(1) broadly makes it "unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, § 753, Pub. Law No. 111-203, H.R. 4173 (111th Cong. 2d Sess. 2010) ("Dodd-Frank").

connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of" Commission Regulations, 7 U.S.C. § 9(1) (2012), while newly promulgated Regulation 180.1 makes it "unlawful for any person, directly or indirectly, in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to intentionally or recklessly: (1) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud." 17 C.F.R. § 180.1(a)(1) (2014). See 76 Fed. Reg. 41,398, *Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation* (July 14, 2011). In its Notice of Proposed Rulemaking for Regulation 180.1, the Commission made clear that its intent was "to interpret CEA section 6(c)(1) as a broad, catch-all provision reaching fraud in all its forms—that is, intentional or reckless conduct that deceives or defrauds market participants." *Prohibition of Market Manipulation*, 75 Fed. Reg. 67,657, 67,658 (CFTC Nov. 3, 2010).

Count II of the Complaint alleges traditional manipulation and attempted manipulation under Sections 9(a)(2) and 6(c)(3) of the Act, 7 U.S.C. §§ 9(3) and 13(a)(2) (2012), and Regulation 180.2, 17 C.F.R. § 180.2 (2015). Perfected manipulation under Sections 9(a)(2) and 6(c)(3) requires proof that (1) the defendant had the ability to influence prices; (2) the defendant specifically intended to do so; (3) an artificial price existed; and (4) the defendant caused the artificial price. *CFTC v. Parnon Energy*, 875 F. Supp. 2d 233, 244 (S.D.N.Y. 2012); *In re Cox*, 1987 WL 106879, at * 4, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,786, at 34,061 (CFTC July 15, 1987). Attempted manipulation under Sections 9(a)(2) and 6(c)(3) requires only proof that Defendants (1) intended to affect the market price; and (2) made some

overt act in furtherance of that intent. *See In re Hohenberg Bros. Co.*, 1977 WL 13562, at *7, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,271 (CFTC Feb. 18, 1977); *see also CFTC v. Amaranth Advisors, LLC*, 554 F. Supp. 2d 523, 532 (S.D.N.Y. 2008); *CFTC v. Johnson,* 408 F. Supp. 2d 259, 267 (S.D. Tex. 2005).

1. The First Proposed Question is of Potential Relevance only to the Manipulation Alleged in Count I

Although Defendants' first Proposed Question includes references to the statutes and regulations charged in both Counts I and II, the substance of the Proposed Question goes solely to the issue of whether the Commission sufficiently pled that Kraft used a manipulative or deceptive device, which is only relevant to Count I. In particular, the first Proposed Question goes solely to the issue of whether the enormous long position that Kraft put on, with the intention of misleading the market about whether it would take delivery and use that wheat, constitutes the use or attempted use of a manipulative or deceptive device under Section 6(c)(1) and Regulation 180.1.

Nothing about this Proposed Question touches in any way on the elements of manipulation or attempted manipulation under Sections 9(a)(2) and 6(c)(3) and Regulation 180.2, as set forth above, which do not require a showing of the use or attempted use of a manipulative or deceptive device. Therefore, even in the unlikely event that Defendants were to obtain a ruling in their favor on this Proposed Question, at best that would result in a finding that Count I alone is inadequately pled.

2. The Second Proposed Question is of Potential Relevance Only to the Perfected Manipulation Alleged in Count II

Similarly, Defendants' second Proposed Question goes solely to the issue of whether Defendants' conduct, as alleged in the Complaint, resulted in the creation of an artificial price. While Defendants again reference all of the statutes and regulations charged in Count I and II in

this Proposed Question, the only portion of the CFTC's manipulation case that actually requires proof of an artificial price is perfected manipulation under Sections 9(a)(2) and 6(c)(3) and Regulation 180.2. Attempted manipulation under Sections 9(a)(2) and 6(c)(3) does not require the proof of an artificial price, nor does the manipulation alleged in Count I of the Complaint. Thus, even if Defendants were to prevail on this issue on appeal, at best that would result in a finding that the CFTC has failed to adequately plead perfected manipulation under Sections 9(a)(2) and 6(c)(3).

Regardless of the outcome of any interlocutory appeal, then, at least part of the market manipulation aspect of this case will remain to be litigated. Even if Defendants obtained favorable appellate rulings on both of their Proposed Questions, the attempted manipulation portion of Count II would remain untouched. Not only does this mean that the Proposed Questions are not controlling, but it also means that resolution of these questions at this juncture would not expedite the litigation in any meaningful way. While the elements of legal proof differ significantly between the different types of manipulation and attempted manipulation alleged in the Complaint, the underlying facts of Defendants' manipulative conduct are identical for both counts. Because there is no chance that both Counts I and II could be eliminated in their entirety through Defendants' proposed interlocutory appeal, fact discovery on the manipulation allegations will proceed regardless of the outcome of any appeal and the parties will still engage in expert discovery. In addition, fact discovery related to the non-manipulation claims in Counts III and IV, some of which will also overlap with the discovery needed for the manipulation counts, will also proceed. Consequently, resolution of Defendants' Proposed Questions at this point would not expedite the litigation in any meaningful manner. *See Isra Fruit Ltd. v. Agrexco Agr. Export Co. Ltd.*, 804 F.2d 24, 25-26 (2d Cir.1986) (finding it "quite unlikely" that an

immediate appeal would materially advance the termination of the litigation where discovery as to the challenged claims "appears likely to overlap to a considerable extent" with claims that were not challenged).

C. The Proposed Questions are Not Contestable

A question meets the "contestability" requirement only when there is a "difficult central question of law which is not settled by controlling authority" and there is a "substantial likelihood" that the district court ruling will be reversed on appeal. *In re Brand Name Prescription Antitrust Litig.*, 878 F. Supp. 1978, 1081 (N.D. Ill. 1995) (quoting *In re Heddendorf*, 263 F. 2d 887, 889 (1st Cir. 1959) and *TCF Banking and Sav., F.A. v. Arthur Young & Co.*, 697 F. Supp. 362, 366 (D. Minn. 1988)). Defendants pin much of their contestability argument for their first Proposed Question on the fact that the Court's opinion with respect to Count I of the Complaint is a matter of first impression. That, itself, does not make a question contestable for purposes of interlocutory appeal because "the mere lack of judicial precedent on the issue does not establish substantial ground for difference of opinion." *In re Demert & Dougherty, Inc.*, 01-CV-7289, 2001 WL 1539063, at *6 (N.D. Ill. Nov. 30, 2001). In other words, "substantial ground for difference of opinion does not exist merely because there is a dearth of cases." *White v. Nix*, 43 F.3d 374, 378 (8th Cir. 1994). *See also Union Co. v. Piper Jaffray & Co.*, 525 F.3d 643, 646 (8th Cir. 2008) (finding district court abused discretion by authorizing interlocutory appeal on grounds of "lack of Eighth Circuit precedent on this issue."); *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996) ("the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion").

Furthermore, while there is little case law discussing Section 6(c)(1) and Regulation 180.1, as the Court recognized, these provisions are modeled on the Securities Exchange Act

Section 10(b) and SEC Rule 10b-5. Cases discussing those provisions guide, but do not control, the interpretation of Section 6(c)(1) and Regulation 180.0. *See* Order, slip op. at 17-18, fn. 3. As the Supreme Court established in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976), manipulation under SEC law connotes "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." Numerous other courts have found manipulation whenever a party seeks to trick other investors into believing that a stock price is the result of genuine supply and demand without imposing a requirement of additional false statements or actions. *See, e.g.*, *Koch v. SEC,* 793 F.3d 147, 154 (D.C. Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3362 (U.S. Dec. 14, 2015) (No. 15-781); *Markowski v. SEC*, 274 F. 3d 525, 529 (D.C. Cir. 2001); *SEC v. Sierra Brokerage Servs., Inc.*, 608 F. Supp. 2d. 923, 961 (S.D. Ohio 2009) (quoting *SEC v. Resch-Cassin & Co.*, 362 F. Supp. 964, 975 (S.D.N.Y. 1973)); *SEC v. Kwak*, No. 3:04-cv-1331, 2008 WL 410427 at *4 (D. Conn. Fed. 12, 2008); *SEC v. Commonwealth Chem. Sec.*, 410 F. Supp. 1002, 1016 (S.D.N.Y. 1976) (*aff'd in part and modified in part on other grounds*, 574 F.2d 90 (2d Cir. 1978)). The same general rule applies to Defendants' actions in the commodities markets. It is not substantially likely that the Seventh Circuit would find otherwise on an interlocutory appeal.

Defendants argue that "there is substantial reason to believe that the Seventh Circuit would decide these issues consistent with its closely analogous decision in *Sullivan & Long v. Scattered Corp.*, 47 F.3d 857 (7th Cir. 1995)." Motion at 2. The facts of *Sullivan & Long* are, however, readily distinguishable here. *Sullivan & Long* dealt with a party that used publically-available information to develop a plan involving short sales of stocks that did not violate any laws or rules and that was intended to benefit from the disclosed price differences between old shares of stocks and new shares being issued pursuant to a bankruptcy reorganization. *Id*. at 859-

62. In contrast, here Defendants developed an internal plan to put on an enormous long position and hold that position into the delivery month in violation of exchange position limits with the intent of deceiving other market participants into believing that Defendants would take delivery, and thus moving prices in a direction favorable to Defendants. The facts of *Sullivan & Long* are not "closely analogous" and there therefore is no reason to conclude that the Seventh Circuit would rely on that case to reach a different outcome than this Court did on an interlocutory appeal.

There is similarly no basis for finding contestability with respect to Defendants' second Proposed Question. As discussed above, the question itself presumes facts not alleged in the Complaint regarding the functioning of the wheat markets and convergence of cash and futures prices in those markets. Even if an interlocutory appeal were to be permitted and the Seventh Circuit were to find as a matter of law that actions that cause convergence between cash and futures prices do not cause artificial prices,[5] that finding would not itself control on any aspect of this case, as it would not address the numerous factual questions that would have to be answered before a determination could be made of whether or not Kraft's actions caused convergence in the wheat markets.[6]

II. CONCLUSION

Neither of Defendants' Proposed Questions satisfies the requirements for an interlocutory appeal under § 1292(b). The Motion should be denied in its entirety.

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[5] The Commission would, of course, vigorously contest this issue on appeal.

[6] As a non-exhaustive list, such questions would include whether or not wheat markets were converging before Kraft engaged in its manipulative conduct, when the markets began to converge, by how much, and whether there were any deviations from any pattern of convergence.

Date: February 2, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jennifer E. Smiley, certify that on February 2, 2016, I served the foregoing **Response and Incorporated Memorandum of Law in Opposition to Defendants' Motion to Certify Issues for Interlocutory Appeal Pursuant to 28 U.S.C. § 1291(b) and to Stay Proceedings** on counsel of record via the Court's CM/ECF system.

Dated: February 2, 2016 /s/ Jennifer E. Smiley