

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

U.S. COMMODITY FUTURES TRADING)	
COMMISSION,)	
)	
Plaintiff,)	
)	Case No. 15 C 2881
v.)	
)	Judge John Robert Blakey
KRAFT FOODS GROUP, INC. and)	
MONDELÉZ GLOBAL LLC,)	
)	
Defendants.)	

MOTION FOR CONTEMPT, SANCTIONS, AND OTHER RELIEF

PUBLIC REDACTED VERSION

The statements of the CFTC and its Commissioners demonstrate that they never intended to comply with the agreement they negotiated, that they presented to the Court as having been approved by the CFTC *and* its Commissioners, and that the Court ultimately ordered. Instead, the CFTC and its Commissioners engaged in a deliberate, orchestrated effort to violate the Court’s Consent Order within minutes of its entry. Defendants Kraft Foods Group Inc. and Mondelēz Global LLC (collectively “Defendants”) therefore respectfully move this Court for an order (1) finding the CFTC and its Commissioners in contempt of court for violating the terms of the Consent Order agreed to by the parties and entered by the Court, Dkt. No. 310, and (2) ordering the CFTC and its Commissioners to take the remedial actions and pay the monetary sanctions requested at the end of this motion.

BACKGROUND

As the public record reflects, before the Court’s entry of the Consent Order, the CFTC faced several pending motions that threatened to resolve the case in Defendants’ favor or, at the very least, had the potential to substantially trim the relief the CFTC could seek at any trial.

On August 15, 2019, however, this Court entered a Consent Order memorializing the parties’ agreement to settle the CFTC’s claims against Defendants. Among other things, the Consent Order stated that “[n]either 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.”

(Dkt. No. 310 at 3 ¶ 8.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Dkt. No. 303 at 5-6.

[REDACTED]

[REDACTED]

[REDACTED]

¹ [REDACTED]

[REDACTED]

On August 15, 2019, immediately after the Court entered the Consent Order and dismissed the case with prejudice, the CFTC published to its website a press release, boasting in the title, “Penalty Valued at Three Times the Alleged Gain.”² The press release also provided a statement from Chairman Heath P. Tarbert in which he claimed the settlement remedied conduct

² As explained below, this statement is false.

that inflicted “real pain on farmers by denying them the fair value of their hard work and crops,” and “hurt[] American families by raising the costs of putting food on the table.”³ Ex. 1. The CFTC’s official press release also directed readers to two additional statements, also posted to the CFTC’s website, effectively incorporating those additional statements by reference: one titled the “Statement of the Commission” and the other titled “Statement of Commissioners Berkovitz and Behnam.” Ex. 1 (linking to Exs. 2 and 3). As discussed in the section below, all three statements clearly and intentionally violate Paragraph 8 of the Consent Order.

ARGUMENT

This Court has the inherent power to enforce its orders through civil contempt proceedings. *Shillitani v. United States*, 384 U.S. 364, (1966); *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 737 (7th Cir. 1999). To establish a defendant’s liability for civil contempt, a party must show that (1) a valid court order existed; (2) a party had knowledge of the order; and (3) the party failed to comply with the order. *See, e.g., Stotler & Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989). To hold defendant in contempt, the Court need not find that defendant willfully violated the order; the court need only find that defendant has not been “reasonably diligent and energetic in attempting to accomplish what was ordered.” *Goluba v. School Dist. of Ripon*, 45 F.3d 1035, 1037 (7th Cir.1995). If the court finds defendant in contempt of the original order, it may impose civil sanctions to compel compliance with the order and to compensate parties for harm suffered as a result of defendant's non-compliance. *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947).

³ The CFTC never alleged that Kraft deprived farmers of the fair value of their hard work and crops, nor that Kraft raised the cost of putting food on the table.

I. The CFTC and Its Commissioners Willfully Violated The Consent Order

There is ample evidence that the CFTC and its Commissioners violated the Consent Order, that their violations were willful, and that they never intended to comply with the bargain they struck to settle the case.

A. The CFTC's and Its Commissioners' Willful Violations Were Part of an Orchestrated Strategy to Violate the Consent Order

The Statement of Commissioners Berkovitz and Behnam makes clear that its very *purpose* is to circumvent Paragraph 8 of the Consent Order. The Commissioners initially claim that Paragraph 8 does not apply to them. Ex. 3 at 1 (“[Paragraph 8] does not impede our ability to provide information about this case to the public in light of each Commissioner’s right to discuss this case freely.”). Then they admit that the reason for their statement is to supply their version of supposed facts that improperly tout a supposed victory for the CFTC, commentary the CFTC agreed to forego as part of its agreement with Defendants. *Id.* (Commissioners stating “in settlements where there are no evidentiary findings, it is critical that a Commissioner be able to speak publicly about his or her reasons for determining that the law has been violated, why the agreed penalties are appropriate, and why the agency did not obtain findings of fact or proceed to trial”). To the extent there is any doubt as to whether the CFTC and its Commissioners intended their statements to comply with the Court’s Order, the Statement of Commissioners Berkovitz and Behnam resolves that question: they did not.

Nor should the CFTC—or as it describes itself, the only “party” to the case and thus the only party bound by the agreement—be excused for the conduct of its individual Commissioners. *See* Ex. 2 at 1. As a government agency, the Commission can only act or speak through its Commissioners and its staff. The CFTC’s argument would allow everyone at the CFTC capable of making a public statement to violate the Order with impunity. Moreover, even if only the

amorphous “CFTC” were bound by the Order, the “CFTC” violated Paragraph 8 when it endorsed the statements of its Commissioners by identifying them *in the CFTC’s official press release*, linking to them, and posting them prominently on the CFTC’s webpage announcing the settlement. It is obvious from the statements at issue that the CFTC, its Commissioners, and possibly certain of its enforcement lawyers and General Counsel, assisted with the drafting of all three statements while they waited for the Court to enter the Consent Order.⁴ The CFTC released all of the statements simultaneously as part of a coordinated effort. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

These facts demonstrate a deliberate and orchestrated effort by the CFTC, its Commissioners, and possibly certain of its staff, to violate the Consent Order. They also demonstrate a total disregard for the authority of this Court. There will be no reason for future parties to agree to settlements if the Commissioners—the only parties with the power to bind the CFTC to an agreement in the first place—may simply disregard the agreement without consequence.

B. The CFTC Deliberately Misrepresented the Court’s Role with Regard to the Limitations Set Forth in Paragraph 8

Perhaps to obscure its failure to comply with a term critical to the agreement, the CFTC misrepresents Paragraph 8 as being “included at the Court’s request.” Ex. 2. This statement not only violates Paragraph 8’s prohibition on public statements “other than to refer to the terms” of

⁴ The attempt at legal argument to vindicate Commissioners’ right to violate the Consent Order, contained in both Exhibits 2 and 3, make it likely that the CFTC’s lawyers played a role in all three statements.

the settlement; it is also blatantly false and inexplicable.⁵ [REDACTED]

[REDACTED] The CFTC

nevertheless attempted to pin responsibility for the restriction in Paragraph 8 (with which it did not comply anyway) on the Court.

C. All Three Statements the CFTC Published Violate the Consent Order in Whole or in Part

All three of the documents the CFTC published to its website are replete with self-aggrandizing, and often false, statements that violate Paragraph 8's prohibition on public statements, other than those that refer to the terms of the settlement or publicly filed documents.

The offending statements include, but are not limited to:

- Commissioners Berkovitz and Behnam's statement that "[t]he \$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." Ex. 3 at 1.⁶
- Commissioners Berkovitz and Behnam's numerous statements that Defendants' agreement to pay a monetary penalty means the Court necessarily found the CFTC had established facts sufficient to prove its claims, such as:
 - "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." Ex. 3 at 2.
 - "Because the court can only impose civil monetary penalties in instances where the government has made a proper showing, it must be presumed that the Commission has provided sufficient evidence to find a violation—even where the order itself does not explicitly say so." Ex. 3 at 2.

⁵ [REDACTED]

⁶ In addition to being barred by Paragraph 8, this statement is false. [REDACTED]

- “As part of its review, the district court will necessarily establish that a factual basis exists for the proposed decree.” Ex. 3 at 2.⁷
- Commissioners Berkovitz and Behnam’s suggestion that Defendants “neither admitted nor denied the allegations,” mischaracterizing the Consent Order which reflects Defendants’ denial of all the CFTC’s claims. Ex. 3 at 2.
- Commissioners Berkovitz and Behnam’s statement that “[i]n this case, it is not only [Defendants’] \$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.” Ex. 3 at 2.
- Commissioners Berkovitz and Behnam’s statement that “the penalty and injunctive relief imposed reflect, in our view, the gravity of [Defendants’] conduct.” Ex. 3 at 1.
- Commissioners Berkovitz and Behnam’s statement that “[t]his action demonstrates the CFTC’s resolve to aggressively prosecute and punish those who manipulate or attempt to manipulate our nation’s commodity markets.” Ex. 3 at 1.
- Commissioners Berkovitz and Behnam’s statement that “we believe that [Defendants] manipulated the wheat market.” Ex. 3 at 1.
- The CFTC’s statement that “[t]he \$16 million penalty is approximately three times defendants’ alleged gain.” Ex. 1 at 1; Ex. 2 at 1.⁸
- The CFTC’s statement that the Consent Order represents “a successful resolution” to the case.
- The CFTC’s statement that the Consent Order “advances our mission of fostering open, transparent, and competitive markets.” Ex. 2 at 1.
- The CFTC’s statement that it only agrees to limitations such as those in Paragraph 8 “where our statutory enforcement mission of preventing market manipulation is substantially advanced by the settlement terms.” Ex. 2 at 1.

⁷ These statements violate Paragraph 8 and misrepresent the Consent Order, which plainly states that “[n]othing in this Order reflects an agreement or a legal determination that Defendants have or have not violated any provision of the CEA.” Dkt. No. 310 at 3.

⁸ Like the statement of Commissioners Berkovitz and Behnam, this statement is false. [REDACTED]

All of the foregoing statements violate the Consent Order because they are not limited to referring to the terms of the Consent Order or to publicly filed documents. The purpose of nearly every statement is to accomplish exactly what the CFTC specifically agreed not to do by consenting to Paragraph 8: insisting publicly that the settlement was favorable to the agency, while implying that the Court found evidence that Defendants had manipulated the market and that Defendants admitted as much. The Court made no such finding and Defendants made no such admission. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In one fell swoop, the CFTC eviscerated both of these provisions.

II. The Court Should Impose Civil Sanctions to Compel the CFTC and Its Commissioners to Comply with the Court's Consent Order.

Because the CFTC and its Commissioners have violated the Court's Order, the Court may impose civil sanctions to compel their compliance and to compensate Defendants for the harm suffered as a result of the CFTC's non-compliance. *See Mine Workers*, 330 U.S. at 303-04.

Defendants have already incurred significant reputational damage because of the CFTC's premeditated media strategy in violation of the Consent Order. As public companies, Defendants and their counsel have received dozens of press inquiries about the CFTC's statements. But because Defendants, unlike the CFTC, have abided by the terms of the Consent Order, the primary reporting on the case has reflected the CFTC's self-aggrandizing version of the settlement—exactly what the CFTC agreed it would not do. The Court need only to review the media coverage of the case to appreciate that the CFTC's and its Commissioners' violations of

the Consent Order have created the misleading (or outright false) impression of the settlement that Paragraph 8 prohibited. For example:

- “[W]e are left with a Commission declaring victory and a respondent paying a substantial penalty.”⁹
- “Message from the CFTC: (1) We Won and (2) Don’t Expect Similar Concessions in the Future.”¹⁰
- “The Commission specifically noted that it ‘considered carefully Paragraph 8 of Section I of the Consent Order, which was *included at the Court’s request*.’”¹¹
- “The Commission expressed pleasure in bringing the matter to ‘a successful resolution’ and touted the settlement amount as equaling ‘nearly three times the unlawful profit the Commission alleged the Defendants obtained’ (which is one way of calculating the maximum penalty allowed).”¹²
- “In the CFTC’s announcement, Chairman Heath P. Tarbert said, “America is the breadbasket of the world; wheat markets are its heart. Market manipulation inflicts real pain on farmers by denying them the fair value of their hard work and crops. It also hurts American families by raising the costs of putting food on the table. Instances of market manipulation are precisely the kinds of cases the CFTC was founded to pursue,” he added.”¹³
- Reporting on the Commissioners’ statement, “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.”¹⁴

⁹ *Long Awaited CFTC v. Kraft Settlement Resolves Manipulation Allegations*, National Law Review, Aug. 15, 2019, available at <https://www.natlawreview.com/article/long-awaited-cftc-v-kraft-settlement-resolves-manipulation-allegations>.

¹⁰ *Id.*

¹¹ *Id.* (emphasis original in article).

¹² *Id.* As discussed above, the CFTC’s statement that the \$16 million represented triple the alleged gain is (1) false, [REDACTED] and (2) a transparent effort to (falsely) imply that it achieved through settlement the same penalty it would have received if it prevailed on every claim at trial.

¹³ *Kraft, Mondelēz To Pay \$16M in CFTC Wheat Futures Case*, Law360, Aug. 15, 2019, available at <https://www.law360.com/articles/1189061>.

¹⁴ *Feds Reap \$16 million settlement with Kraft, Mondelēz But Sow Confusion*, Chicago Sun-Times, Aug. 15, 2019, available at <https://chicago.suntimes.com/2019/8/15/20807794/feds-reap-16-million-settlement-with-kraft-mondelez-but-sow-confusion>.

Accordingly, in order to compensate Defendants for the harm from the CFTC's non-compliance, and to compel the CFTC and its Commissioners to comply with the Consent Order its Commissioners approved (but apparently do not like), Defendants respectfully request that the Court enter an order:

Stating or Finding:

1. The CFTC and Commissioners Berkovitz and Behnam violated the Consent Order and are therefore in contempt of court;
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]
5. [REDACTED]
6. [REDACTED]

And Ordering:

7. [REDACTED]
8. [REDACTED]
9. [REDACTED]

10. [REDACTED]

11. [REDACTED]

12. [REDACTED]

CONCLUSION

For the reasons discussed above, Defendants respectfully requests that the Court grant Defendants the foregoing relief as a result of the CFTC’s and its Commissioners failure to comply with this Court’s August 15, 2019 Consent Order.

Dated: August 16, 2019

Respectfully submitted,

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