

No. 19-2769

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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IN RE: COMMODITY FUTURES TRADING COMMISSION

U.S. COMMODITY FUTURES TRADING COMMISSION,  
*Plaintiff/Petitioner,*

v.

KRAFT FOODS GROUP, INC. & MONDELÉZ GLOBAL LLC,  
*Defendants/Parties-in-Interest.*

On Petition for a Writ of Mandamus to the United States District Court for the  
Northern District of Illinois, Eastern Division, No. 1:15-cv-02881  
John Robert Blakey, District Court Judge

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**Kraft Foods Group, Inc. & Mondelēz Global LLC's Response In Opposition  
To Petitioner's Petition For A Writ Of Mandamus**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No. No. 19-2769

Short Caption: CFTC v. John Robert Blakey

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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- (3) If the party or amicus is a corporation:

- i) Identify all of its parent corporations, if any; and  
see Attachment A

- ii) list any publicly held company that owns 10% or more of the party’s or amicus’ stock:  
see Attachment A

Attorney’s Signature s/ Dean N. Panos Date: October 7, 2019

Attorney’s Printed Name: Dean N. Panos

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X  
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**Attachment A to  
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Attorney’s Signature s/ J. Kevin McCall Date: October 7, 2019

Attorney’s Printed Name: J. Kevin McCall

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes**

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Attorney's Signature s/ Gregory S. Kaufman Date: October 7, 2019

Attorney's Printed Name: Gregory S. Kaufman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes**

**No** X

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Attorney's Signature s/ Nicole A. Allen Date: October 7, 2019

Attorney's Printed Name: Nicole A. Allen

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes**

**No** x

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Attorney's Signature s/Thomas E. Quinn Date: October 7, 2019

Attorney's Printed Name: Thomas E. Quinn

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes**

**No** x

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## INTRODUCTION

The CFTC's petition for a writ of mandamus presents two issues relating to criminal contempt, both of which are irrelevant. Defendants never sought, and Judge Blakey never ordered, a criminal contempt proceeding. To the extent there was any doubt that the hearing he scheduled was a "civil proceeding," Judge Blakey eliminated it with his September 19 minute entry, in which he stated the hearing was "simply an evidentiary proceeding, set in response to Kraft's motion for [civil] contempt." Dkt. No. 336.<sup>1</sup>

The only issues actually before the Court are (1) whether Judge Blakey can hold a hearing to determine compliance with his own Order, and to determine an appropriate contempt sanction if it has been violated, and (2) whether Judge Blakey can order certain "high ranking" CFTC officials to testify at that hearing under the circumstances present here. The answer to both questions is yes. Judge Blakey has the inherent authority to hold a hearing to determine compliance with his own Order. And he has the authority to take testimony from the Commissioners because the positions the CFTC and the Commissioners have taken in opposition to the motion for contempt have put the knowledge of the Commissioners directly at issue. The Commissioners' personal statements, which the CFTC posted to its website, gave rise to the most egregious violations. The Commissioners have admitted they can be liable for those statements if they aided and abetted the CFTC's violation, but they

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<sup>1</sup> All citations to "Dkt. No." in this Response are to the docket below in Case No. 1:15-cv-02881 (N.D. Ill.).

deny the factual assertions establishing that they did, and they further assert they acted in good faith. These positions, and others, put the knowledge of the Commissioners directly at issue. Judge Blakey can take testimony to evaluate the Commissioners' disputed assertions.

No writ of mandamus should issue from this Court.

### **ISSUES PRESENTED FOR REVIEW**

1. Whether a district court may hold a hearing on a motion for contempt to determine compliance with its own order and to decide the appropriate sanction for noncompliance?

2. Whether the district court may require the presence of CFTC Commissioners at an evidentiary hearing where the Commissioners were directly involved in the alleged contempt, and where the CFTC and the Commissioners have put the Commissioners' conduct and intent at issue as a defense to a motion to find them in contempt?

### **STATEMENT OF FACTS**

On March 22, 2019, the CFTC and Defendants reached agreement on the material terms of a settlement to resolve an enforcement action they had been litigating for over four years. *See* Dkt. Nos. 303; 310. As the CFTC's Chief Trial Counsel advised the district court, the final settlement had to be approved by a majority of the Commissioners because the CFTC "is composed of and governed by five Commissioners," who had final authority to enter into a settlement on behalf of the CFTC. Dkt. No. 339, Ex. 5.

By July 24, the parties had reduced their agreement to writing so it was ready to be approved or rejected by vote of the CFTC Commissioners. Dkt. No. 339, Ex. 1 (“McCall Decl.”) ¶ 3. The agreement included as Section I, Paragraph 8, the following provision (“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.

Dkt. No. 310 § I.8. Judge Blakey identified the same language as a “material term” of the settlement when he read those terms into the record on March 22. *See* Dkt. No. 303 at 5.

Two days later, on July 26, and prior to the Commissioners voting on the agreement, the CFTC’s Chief Trial Counsel advised Defendants’ counsel that he had been directed to ask Defendants to remove Paragraph 8 from the agreement because certain Commissioners, and possibly others, did not like being limited by a court as to what they could say about the case. McCall Decl. ¶¶ 4-6. Defendants rejected the CFTC’s request—Paragraph 8 was material to Defendants and it was a negotiated provision in the agreement. Paragraph 8 remained part of the settlement agreement. *Id.* ¶ 8.

On July 31, prior to the Commissioners voting on the agreement, Defendants’ representatives and counsel had a telephone call with the CFTC’s Director of Enforcement, Chief Trial Counsel, and other CFTC personnel, in which the CFTC again requested that Defendants agree to remove Paragraph 8. *Id.* ¶¶ 17-18. The CFTC’s Director of Enforcement said he was making the

request because certain Commissioners did not want to be limited by a court as to what they could say publicly about the settlement. The Director of Enforcement also stated the reason the Commissioners wanted Paragraph 8 removed was not because any Commissioner planned to make a statement, but because the Commissioners were uncomfortable with the provision and wanted to vindicate the principle that the CFTC would not agree to be limited in what they could say about settlement agreements. *Id.* Defendants again declined to remove Paragraph 8. The CFTC warned that the Commissioners may not approve the agreement as long as it included Paragraph 8. *Id.* ¶¶ 20-21.

On August 8, the CFTC approved the settlement agreement (including Paragraph 8) by unanimous vote of its five Commissioners. *Id.* ¶ 22.

On August 12, the parties submitted the executed agreement to Judge Blakey for his review and approval. *Id.* ¶ 23. In negotiating the settlement, the CFTC insisted the settlement be memorialized through a consent order rather than a settlement agreement. As a result, the agreement provided that its terms were subject to Judge Blakey's review and approval before he entered the order, and that the Court would be asked to enter a consent order resolving the case. At no time did the CFTC or any Commissioner indicate in any way that they were of the view that Paragraph 8 did not apply to the Commissioners, or could not apply to the Commissioners as a matter of law. To the contrary, the CFTC requested Defendants remove Paragraph 8 so they could comment on the settlement, thereby acknowledging that Paragraph 8 applied to the Commissioners.

On August 15 at approximately 8:43 a.m., Judge Blakey entered the settlement agreement as a final consent order (“Consent Order”) on the public docket. Dkt. No. 310; *see also* McCall Decl. ¶ 24.

Less than two hours later, at 10:21 a.m. on August 15, Defendants became aware of three statements that the CFTC simultaneously posted on the CFTC’s website and which contained statements in violation of Paragraph 8:

- (1) a CFTC press release titled “Kraft and Mondelez Global to Pay \$16 Million in Wheat Manipulation Case Penalty Valued at Three Times the Alleged Gain,” which included quoted remarks from Chairman Heath Tarbert (one of the five Commissioners) and contained hyperlinks to the Statement of Commission and joint Commissioner statement identified below;
- (2) a “Statement of Commission” issued by the CFTC, which asserted that Paragraph 8 did not restrict Commissioners’ statements and falsely stated that the district court had requested it; and
- (3) a statement issued by Commissioners Berkovitz and Behnam regarding the settlement.

Dkt. No. 315, Exs. 1-3; McCall Decl. ¶¶ 25-26.

The statement of Commissioners Berkovitz and Behnam cited the CFTC’s so-called “legal determination” that they, as Commissioners, were not restricted by Paragraph 8 of the Consent Order. *See* Dkt. No. 315, Ex. 3 (citing Ex. 2). The Commissioners proceeded to make statements that both violated Paragraph 8 and falsely characterized the settlement they had just voted to approve. For example, the Commissioners stated:

- 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.* ¶ 11.
- 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. *Id.*

Paragraph 8 does not allow for such statements, nor do the statements accurately reflect the Consent Order. Rather, the Consent Order states that Judge Blakey had made no findings or conclusions of law on any of the allegations in the CFTC’s complaint. Dkt. No. 310 at 3. Judge Blakey confirmed the same when he read the material terms of the settlement into the record in March. *See* Dkt. No. 303 at 5-6, 10.

Defendants promptly initiated a civil contempt proceeding in the district court. Dkt. Nos. 312; 315. On August 19, Judge Blakey held a hearing on Defendants’ motion. Judge Blakey ultimately delayed any hearing on contempt and ordered the parties to brief any substantive and procedural issues related to the motion.

Nine days later, although it had already agreed to the evidentiary hearing—and asked for a date in September to accommodate one Commissioner’s schedule—the CFTC moved to vacate the hearing. Dkt. No. 324. The CFTC also requested an extension of the briefing and hearing deadlines. The court granted that extension and ordered Defendants to respond to the motion to vacate, which they have done. Both Defendants’ motion for

contempt and the CFTC's motion to vacate are fully briefed and pending before Judge Blakey. Judge Blakey also granted the Commissioners' September 24 motion for a status conference to clarify the nature of the upcoming hearing. He vacated that status conference after this Court stayed proceedings in the district court.

### **REASONS WHY THE WRIT SHOULD NOT ISSUE**

A writ of mandamus is a “drastic remedy traditionally used to confine a lower court to the lawful exercise of its jurisdiction or to compel it to exercise its authority when it has a duty to do so.” *Abelesz v. Erste Grp. Bank AG*, 695 F.3d 655, 662 (7th Cir. 2012) (quoting *United States v. Lapi*, 458 F.3d 555, 560–61 (7th Cir. 2006)). “Only exceptional circumstances, amounting to a *judicial usurpation of power*, will justify the invocation of this extraordinary remedy.” *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (emphasis added). The reason for the writ's disfavor is obvious: “Its use has the unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation.” *Id.* The writ should not be used to circumvent direct appeals. See *In re Lewis*, 212 F.3d 980, 982 (7th Cir. 2000).

This Court will only consider granting a writ of mandamus when the following three conditions are present:

*First*, the party seeking the writ must demonstrate that the challenged order is not effectively reviewable at the end of the case, that is, without the writ it will suffer irreparable harm. *Second* the party seeking the writ must demonstrate a clear right to the writ. *Third*, the issuing court must be satisfied that issuing the writ is otherwise appropriate.

*Abelesz*, 695 F.3d at 662 (emphasis added). All three conditions must be met and, even then, the Court may still decide against issuing the writ. *Lusardi v. Lechner*, 855 F.2d 1062, 1070 (3d Cir. 1988) (citing *Kerr v. U.S. Dist. Court for N. Dist. of California*, 426 U.S. 394, 403 (1976)).

The crux of the CFTC's argument is that Judge Blakey cannot lawfully hold a hearing because, in its view, he should not need anything beyond the parties' written submissions to rule on Defendants' motion. The petition does not come close to satisfying the three conditions for mandamus. First, Judge Blakey's "ruling" has not caused the CFTC any irreparable harm because he has not made it yet, and any purported errors in his future ruling can be addressed on direct appeal. Second, the CFTC has not explained how any action by Judge Blakey is wrong, let alone patently erroneous or usurpative in nature. Third, issuing a writ of mandamus would not otherwise be appropriate because it would set a dangerous precedent and invite every party that believes a district judge *may* rule unfavorably to seek mandamus relief on a preemptive basis, or at the very least ask for another judge.

**I. A Writ Of Mandamus Is Premature And Unnecessary Because The District Court's Ruling, Once It Occurs, Is Reviewable Through The Normal Appellate Process**

The first condition for a writ of mandamus is not present here because Judge Blakey has not made any ruling on Defendants' contempt motion, including the substantive legal arguments the CFTC improperly presents to this Court in its petition. *See* Pet. at 24-30. Nor has Judge Blakey ruled on the CFTC's motion to vacate the evidentiary hearing he initially requested, and to

which the CFTC originally agreed. As this Court has recognized, a request for a writ of mandamus is premature and inappropriate when it asks this Court “to prejudge a matter before the district court has had the opportunity to consider it.” *In re Ezell*, 678 F. App’x 430, 432 (7th Cir. 2017) (Rovner, J., concurring); *see also Daniels v. United States*, 26 F.3d 706, 708 (7th Cir. 1994) (referencing earlier denial of petition for writ of mandamus as “premature” because “[t]he district court ha[d] not yet had an opportunity to evaluate all of the evidence with regard to petitioners’ claim”); *cf. In re: United States of America*, No. 10-2678, ECF No. 6 (7th Cir. July 15, 2010) (denying petition without prejudice where district court made clear it had “made no definitive ruling on the record admitting or excluding [certain] evidence at issue”).

Even if Judge Blakey had ruled on Defendants’ motion, the CFTC still would not be entitled to mandamus. If Judge Blakey in the future enters a sanction in error or based on inadmissible evidence, any error can be corrected by a direct appeal once he enters a contempt judgment. *Allied Chem.*, 449 U.S. at 35 (“party seeking issuance [must] have no other adequate means to attain the relief he desires”). This Court is perfectly capable of reviewing the interpretation of the Consent Order via a post-judgment contempt order.

The only “irreparable harm” the CFTC identifies is the supposed burden of preparing for and attending a hearing. *See Pet.* at 16-18. As an initial matter, the “ongoing harm” the CFTC and its staff were “suffering” by “having to prepare for the unlawful hearing” is not a basis for mandamus. *Pet.* at 17. It is well-settled that “unrecoverable costs of litigation . . . do not count as

irreparable harm” sufficient to warrant mandamus. *In re Nat’l Presto Indust., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003). The only possible “harm” is having to appear for the hearing. But the CFTC identifies no case law to support the burden of “appearing” as sufficiently irreparable to warrant mandamus relief for anyone other than high ranking officials. And, as discussed below, the Commissioners cannot rely on the case law the CFTC cites because they were personally involved and have put their personal conduct and intent at issue.

Once Judge Blakey rules on Defendants’ motion and, if necessary, determines the appropriate remedy, the CFTC can appeal to this Court and seek whatever redress it may hope to obtain. If Judge Blakey does not order a sanction, appellate review may not be necessary. Mandamus is not an appropriate vehicle for a party to seek preemptive direction on how a district court should proceed to resolve a motion seeking contempt for a violation of the district court’s order.

## **II. The CFTC Has Not Shown That The District Court Took Any Action That So Far Exceeded The Proper Bounds Of Judicial Discretion To Be Usurpative In Nature**

The CFTC has not satisfied the second condition for a writ of mandamus because it has not identified *any* inappropriate action by Judge Blakey. A writ of mandamus should not issue unless the right to the issuance is “clear and indisputable.” *Allied Chem.*, 449 U.S. at 35 (citation omitted). The underlying “order must so far exceed the proper bounds of judicial discretion as to be legitimately considered usurpative in character, or in violation of a clear and indisputable legal right, or, at the very least, patently erroneous.” *In re Rhone-*

*Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995); *In re Sandahl*, 980 F.2d 1118, 1121 (7th Cir. 1992) (same). “The mere fact that a court acts erroneously is not usurpation of power.” *United States v. Horak*, 833 F.2d 1235, 1252 (7th Cir. 1987) (citation omitted); *see also Bogard v. Wright*, 159 F.3d 1060, 1063 (7th Cir. 1998) (rejecting notion that “all procedural rulings in proceedings to enforce consent decrees” are immediately appealable via mandamus); *In re GlaxoSmithKline, LLC*, 557 F. App’x 578, 579 (7th Cir. 2014) (“A district court does not abuse its power by taking one view, rather than another, of a debatable legal issue.”).<sup>2</sup>

As set forth below, the CFTC has not identified any action by Judge Blakey that even debatably exceeded his authority, let alone one that was “patently erroneous.”

**A. There Are No Criminal “Inquisitorial Proceedings”**

The CFTC is not entitled to a writ of mandamus to halt an improper criminal inquest because there is no such inquest pending or threatened in the district court. The CFTC devotes a substantial portion of its petition—indeed, two of its three “issues presented”—to the propriety and procedure of criminal

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<sup>2</sup> Other circuits have similarly confined mandamus to extraordinary abuses of power. *See Fisher v. Tucson Unified Sch. Dist.*, 588 F. App’x 608, 610 (9th Cir. 2014) (denying mandamus to overturn district court’s interpretation of consent order); *see also In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 62-63 (3d Cir. 2018) (district court ruling that petitioners were “closely related” parties subject to contract did not “approach[] the magnitude of an unauthorized exercise of judicial power” necessary to grant mandamus relief) (citation omitted); *Scipar, Inc. v. Simses*, 354 F. App’x 560, 563-64 (2d Cir. 2009) (denying mandamus “[b]ecause the district court’s interpretation of the preliminary injunction and attachment was neither a ‘usurpation of power’ nor a ‘clear abuse of discretion’).

“inquisitorial proceedings.” Pet. at 2-3, 15. But Defendants never sought a finding of criminal contempt against the CFTC or its Commissioners. And Judge Blakey never ordered a hearing on criminal contempt.

If there was any doubt as to the nature of the proceedings in the district court, Judge Blakey’s September 19 minute entry resolved it. He stated the October 2 hearing would be a “civil proceeding” where he would consider the remedy of “civil contempt.” Dkt. No. 336. Judge Blakey also reiterated that, if supported by the record, he would consider a “*referral for a potential investigation* into criminal contempt or ethical violations,” consistent with the “[c]onstitutional and procedural requirements” the CFTC wrongly claims he ignored. *Id.* (emphasis added); *see also* Dkt. 326 at 16:8-17:8 (making same statement at initial hearing). That referral would be to the U.S. Attorney’s Office, as is appropriate. *Id.* at 20:2-3. Judge Blakely has not suggested that he will entertain criminal proceedings against the CFTC. There is no need for a writ of mandamus to halt them.

**B. A District Court May Hold A Hearing To Determine Compliance With Its Orders**

Judge Blakey’s decision to hold a hearing is not a clear-cut abuse of discretion or usurpation of power. Defendants’ motion for contempt and supplemental brief pose four questions Judge Blakey must resolve. First, Judge Blakey must decide if the statements at issue violate Paragraph 8 of his Order. Second, he must determine whether Paragraph 8 applies to the Commissioners’ statements or whether they can otherwise be held in contempt

for aiding and abetting the CFTC's violation.<sup>3</sup> Third, regardless of whether Paragraph 8 applies to the Commissioners' statements, Judge Blakey must determine whether their statements should be imputed to the CFTC. And fourth, if he finds a violation has occurred, Judge Blakey must also decide the appropriate remedy.

These issues have been briefed and are pending before Judge Blakey. Judge Blakey has decided that a hearing would assist him in resolving whether the CFTC and the Commissioners have violated his Order and in fashioning the appropriate remedy. Indeed, the parties accorded him that prerogative in the Consent Order itself. Dkt. No. 310 § IV.9 ("this Court shall retain jurisdiction of this action to ensure compliance with this Consent Order"). But now, having been accused of violating the Consent Order within hours of its entry, the CFTC seeks the extraordinary relief of a writ of mandamus forcing Judge Blakey not to hold a hearing on his own Order. This Court should reject the CFTC's request. There is no basis to conclude that Judge Blakey has usurped his authority as a district judge, or to order him (in advance) to rule "based on the written submissions alone." Pet. at 24, 31.

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<sup>3</sup> As Defendants explained in their district court briefs, for a number of reasons, the idea that the very individuals who comprise and control an organization, and who caused the organization to violate a court order, are somehow not subject to sanctions for that violation, is legally unsupportable. See Dkt. No. 339 at 3-10. The CFTC's alternative theory that Paragraph 8 somehow covers CFTC staff and *all* of Defendants' officers, directors, and employees—but not the CFTC's Commissioners—has no support in the language of the Order. *Id.* at 5-6. The theory also ignores the Commissioners' admissions that they were bound by Paragraph 8 and their liability, even as so-called non-parties, under Rule 65 for aiding and abetting. *Id.* at 7-10.

**1. A District Court May Hold A Hearing Pursuant To Its Inherent Authority**

The CFTC's argument, for which it offers no legal support, would undermine one of the core prerogatives of a trial judge: holding hearings to determine compliance with his or her orders. A district judge's inherent power to hold a hearing is fundamental to his exclusive role as the fact-finder. *See Bethel v. Baldwin Cty. Bd. of Educ.*, 371 F. App'x 57, 62 (11th Cir. 2010) (“[The plaintiffs’] contention that the district court lacked the jurisdiction to order [one of the plaintiffs] to appear at a hearing is without merit because the district court has the inherent ‘authority to enforce its orders and provide for the efficient disposition of litigation.’” (quoting *Zocaras v. Castro*, 465 F.3d 479, 483 (11th Cir. 2006))); *cf. Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962) (courts have “inherent power” to “manage their own affairs so as to achieve the orderly and expeditious disposition of cases”).

In fact, the judicial branch's own education agency directs judges to hold such hearings in contempt cases. When presented with a civil contempt petition, the manual instructs a district judge to:

1. Set down a time and place for a hearing on the petition . . . .
4. The hearing is to be by way of the live testimony of witnesses, not by way of affidavit . . . .
5. The respondent is to be found in civil contempt only if his or her contempt is established by clear and convincing evidence.

Federal Judicial Center Benchbook for U.S. District Court Judges, Sixth Edition (March 2013) at 236. *See also* N.D. Ill. L.R. 37.1 (alleged contemnor has right to hearing when he “puts in issue the alleged misconduct giving rise to

the contempt proceedings”). The process Judge Blakey set out is literally “by the book.”

In all events, deciding what evidence to consider and what weight to give that evidence, is uniquely within the province of the district court. Moreover, a district court’s authority to hold a hearing and thoroughly consider the issues is no doubt one of the reasons this Court defers to a district judge’s interpretation of his own orders. *See United States v. Saadeh*, 61 F.3d 510, 521 (7th Cir. 1995) (“[I]f there were any ambiguity as to the extent of the pre-trial order, the district court was in the best position to interpret its own order, which it did, concluding that this inquiry was permissible.”); *Local Area Network Dealers Ass’n v. Olsen Dev. Co. Sys.*, 989 F.2d 502, 1993 WL 64843, at \*2 (7th Cir. 1993) (“Although the parties quarrel over the meaning of the August 28, 1990, settlement order, its author, Judge Aspen, has explained its meaning in his November 18, 1991, order which is the subject of this appeal. Certainly he is the most qualified to interpret his own text”); *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775, 779 (7th Cir. 1992) (“we give deference to a court’s interpretation of its own orders”).

## **2. The CFTC And Commissioners Admit They May Be Liable And Sanctioned For Contempt**

The CFTC’s request for such an extraordinary writ is even less reasonable in light of its admission that both the CFTC and the Commissioners may be liable for contempt. The agency admits it can be held in contempt for violating Judge Blakey’s Order. *See* Dkt. No. 315, Ex. 2 at n.1; Dkt. No. 318 at 4. The Commissioners (unlike the CFTC) admit the CFTC can be liable for the

Commissioners' actions.<sup>4</sup> Dkt. No. 344 at 3. And the Commissioners admit they may be held liable if they aided and abetted the CFTC's violations. *Id.* at 4.

Put simply, the CFTC and the Commissioners concede they may be held in contempt, but assert that Judge Blakey cannot hear or consider any evidence to support such a determination and, if necessary, fashion the appropriate sanction. The CFTC cites no authority to constrain Judge Blakey in such a manner before he has even made a ruling. Nor are Defendants aware of any instance in which an appellate court has prospectively barred a district judge from holding a hearing, and instead ordered him to rule on written submissions. Accordingly, the CFTC has no "clear and indisputable" right to the writ of mandamus it seeks. *Allied Chem.*, 449 U.S. at 35 (citation omitted).

**C. Judge Blakey Has The Authority To Take Testimony From The Commissioners To Find Facts Relevant To The Contempt Proceeding**

If he determines it necessary to resolve Defendants' motion, Judge Blakey has the authority to hear and consider evidence, including testimony from the Commissioners. For at least three reasons, testimony from the Commissioners is highly relevant to that purpose: (1) the Commissioners' own statements gave rise to the most egregious violations of Judge Blakey's Order; (2) the Commissioners admit they can be found in contempt if they aided and abetted the CFTC's violation; and (3) the CFTC has attempted to defeat

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<sup>4</sup> The CFTC claims it is not responsible for the Commissioners' statements (which it published). The Commissioners, on the other hand, claim they cannot be held personally responsible for the statements, but the CFTC can—if their statements are properly imputed to the CFTC and deemed to violate Paragraph 8. Dkt. No. 344 at 3.

Defendants' contempt motion and sanctions by putting the Commissioners' good faith at issue.<sup>5</sup>

**1. Judge Blakey May Require Testimony From The Commissioners Because The Commissioners Were Directly Involved In Violating His Order**

Judge Blakey ordered the Commissioners to appear and testify on behalf of themselves because their own conduct is at issue. As set out in Defendants' briefing below, the Commissioners directed enforcement staff to negotiate the removal of Paragraph 8 so they could comment on the settlement, thereby admitting that Paragraph 8 applied to the Commissioners. The Commissioners were unsuccessful, but decided to make their statements anyway, and those statements are the most egregious violations of the Consent Order. Judge Blakey has not ordered the Commissioners to speak to, or answer for, the CFTC's conduct in which they were not personally involved. Courts often compel testimony from such "high ranking" officials when they have "unique first-hand knowledge related to the litigated claims or [where] the necessary information cannot be obtained through other, less burdensome or intrusive means." *Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013). Under those standards, Judge Blakey may hear and consider the testimony of the Commissioners because they obviously have "unique first-hand knowledge related to the litigated claims"—they made the

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<sup>5</sup> Even if this Court determines the Commissioners should not have to appear at the hearing, there is no reason to stay any proceeding relating to the CFTC or its staff. Whether certain evidence is relevant is not an issue that merits mandamus relief.

statements after admitting Paragraph 8 restricted their ability to do so. And the CFTC has not offered any other witness as a substitute to testify about the Commissioners' actions. *Id.*

None of the cases the CFTC cites address a situation in which the “high ranking” official in question was personally involved in the contemptuous conduct or where the agency has not offered a substitute witness. Pet. at 18, 32.<sup>6</sup> By contrast, numerous courts have ordered high ranking individuals to provide testimony where they were directly involved in the matter at issue. *See, e.g., Bagley v. Blagojevich*, 486 F. Supp. 2d 786, 789 (C.D. Ill. 2007) (allowing deposition of governor when there was evidence that “Governor was either the ultimate decision maker or at least personally involved in” the alleged unlawful conduct); *Sherrod v. Breitbart*, 304 F.R.D. 73, 75-76 (D.D.C. 2014) (allowing deposition of Secretary of Agriculture when Secretary had “personal knowledge that [was] directly relevant to the claims and defenses”); *Estate of Richardson v. Kanouse*, No. CV 10-5999 DDP (SSx), 2013 WL 12113222, at \*2 (C.D. Cal. Mar.

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<sup>6</sup> *See In re United States*, 624 F.3d 1368, 1369, 1377 (11th Cir. 2010) (EPA offered another substitute, high ranking official to testify concerning EPA action); *In re McCarthy*, 636 F. App'x 142 (4th Cir. 2015) (no allegation administrator was personally involved in EPA actions at issue); *In re United States*, 542 F. App'x 944, 949 (Fed. Cir. 2013) (sought deposition of Chairman on behalf of Federal Reserve Board in what court described as a “fishing expedition”); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (denying deposition because office of Vice President “has no apparent involvement in this litigation”); *In re United States*, 197 F.3d 310 (8th Cir. 1999) (litigant failed to explain why information sought was only available from Attorney General and not other sources); *In re F.D.I.C.*, 58 F.3d 1055 (5th Cir. 1995) (no allegation that FDIC directors were personally responsible for the actions at issue); *In re United States*, 985 F.2d 510, 512-13 (11th Cir. 1993) (official in question was not even in office during events at issue).

18, 2013) (allowing deposition where undersheriff had taken personal role in actions at issue).

**2. Judge Blakey May Require Testimony From The Commissioners Because They Admit They May Be Held In Contempt For Aiding And Abetting The CFTC's Violation**

The Commissioners admit Judge Blakey has the authority to impose contempt sanctions on them if they aided and abetted the CFTC in attempting to thwart his Order.<sup>7</sup> Dkt. No. 344 at 3-4. Accordingly, if Judge Blakey finds that he needs their testimony to make that determination, his decision to hear it is not a “usurpation of power” or “clear abuse of discretion.” The Commissioners admit such evidence is highly relevant. *Id.* at 4 (Commissioners acknowledging whether they aided and abetted “necessarily requires some inquiry into [their] state of mind”) (citation omitted). Judge Blakey may also subject that testimony to cross-examination. *See Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”); *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962) (“where motive and intent play leading roles” and “the proof is largely in the hands of the alleged conspirators,” it is critical that the relevant

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<sup>7</sup> The CFTC made the Commissioners’ liability for aiding and abetting highly relevant by arguing they are not “parties” whose statements are restricted by Paragraph 8. As discussed above, the CFTC’s position that “parties” somehow includes Defendants; Defendants officers, directors, and employees; and even the CFTC’s staff—but *not* the Commissioners—attempts to graft a carve-out onto Paragraph 8 that is unsupported by any language in the provision. Rather, that carve-out is something the Commissioners attempted to bargain for, but failed to achieve. *See supra* at 13 n.3; Dkt. No. 339 at 3-10.

witnesses be “present and subject to cross-examination” so “that their credibility and the weight to be given their testimony can be appraised.”).

By denying (in generalities and without specifics) the facts that demonstrate the Commissioners aided and abetted the CFTC, the CFTC has put the Commissioners’ conduct and intent squarely at issue.<sup>8</sup> *See, e.g.*, Pet. at 15 (denying assertions as “a conspiracy story, which is both false and irrelevant”). Judge Blakey may decide he needs the Commissioners’ testimony to weigh the CFTC’s general denials against the specific facts currently in the record. For example, Judge Blakey may need to determine whether the Commissioners deliberately misled Defendants, when they admitted through enforcement counsel that they were bound by Paragraph 8. He may need to determine whether the Commissioners and the CFTC misled the district court by presenting the Consent Order as lawful to secure its entry, while apparently withholding the Commissioners’ intent to ignore Paragraph 8 (contrary to their admissions when requesting its removal). And Judge Blakey may need to determine whether the CFTC and its Commissioners worked in concert to thwart his Order while manufacturing a supposed legal obligation to publish

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<sup>8</sup> The CFTC has called Defendants’ factual assertions “false” or “inaccurate” in five separate briefs. *See* Dkt. No. 318 at 6; Dkt. No. 334 at 1-2, 9; Dkt. No. 337 at 2-3, 8, 10, 12; Pet. at 9, 15, 29; App. Dkt. No. 4 at 5. It has never identified what, precisely, it believes to be untrue. Contested facts, if there are any, are resolved by holding hearings.

statements in violation of that Order, and then orchestrating the coordinated release of all three statements at issue.<sup>9</sup> See Dkt. No. 339 at 11-15, 21.

**3. Judge Blakey May Require Testimony From The Commissioners Because The CFTC Has Asserted A Good Faith Defense On Their Behalf, Which Is Relevant To The Appropriate Remedy For The Violations**

Finally, Judge Blakey may require testimony because the CFTC has offered its Commissioners' supposed good faith as a defense to Defendants' motion. See Dkt. No. 318 at 7 (arguing Commissioners adopted "good faith and reasonable interpretation" of the Consent Order); Dkt. No. 337 at 9 (relying on Commissioners' alleged consultation with legal counsel before making statements to establish "*good* faith"). Although the CFTC is wrong that good faith is a defense to contempt, the Supreme Court recently held that determinations of subjective intent to assess bad faith or good faith may help determine the appropriate sanction. See *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019) (evidence of bad faith or good faith may support contempt finding and help the court determine the appropriate sanctions). Accordingly, for the same reasons discussed in the previous section, Judge Blakey may require the Commissioners to testify so he can evaluate their supposed good faith—or credit Defendants' evidence as establishing bad faith—and fashion the appropriate remedy.

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<sup>9</sup> As explained in Defendants' brief in the district court, the statutory provision the Commissioners rely on to justify their statements does not apply to statements concerning enforcement actions and, even if it did, the provision is triggered only if the CFTC first makes a statement on a matter, which the CFTC had no obligation to do. See Dkt. No. 339 at 12-15.

### **III. A Writ Of Mandamus Is Not Otherwise Appropriate**

Even if the first two conditions for a writ of mandamus could be deemed satisfied, “the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.” *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004). A writ of mandamus should not issue for “anything less than an extraordinary situation[.]” *Kerr v. U.S. Dist. Court for N. Dist. of California*, 426 U.S. 394, 403 (1976).

The CFTC offers no argument on this third requirement other than to rehash its view that high-ranking Commissioners should not be compelled to testify. Pet. at 32. Those concerns do not merit mandamus relief for the reasons discussed above.

In contrast, allowing a party to obtain a writ of mandamus directing a district court *not* to hold a hearing—or, as discussed below, demanding the judge not preside over that hearing—sets a dangerous precedent. It would invite any party who fears an unfavorable ruling, or believes an issue should be resolved solely as a matter of law, to seek preemptive mandamus relief. It would also “encroach[] on the special role district judges play in managing ongoing litigation” and holding litigants accountable through their contempt power. *Abelesz*, 695 F.3d at 661.

### **IV. Judge Blakey Should Not Be Disqualified From Holding A Hearing To Determine Compliance With His Own Order**

The CFTC’s request that the “hearing” be reassigned to a different district judge appears to be tied to concerns about the criminal inquiry. Pet. at 1, 21-22. As shown above, there is no risk that Judge Blakey intends to supervise a

criminal proceeding. In any event, the “hearing” on Defendants’ civil contempt motion should not be assigned to a different judge. A reassignment is unnecessary given the CFTC’s assurance that it “has no concerns whatsoever about Judge Blakey presiding over any other aspect of this case,” which presumably includes actually ruling on Defendants’ contempt motion. Pet. at 16 n.6. Moreover, the CFTC’s request for reassignment runs contrary to well-established case law and is premised on a disingenuous portrayal of Judge Blakey’s knowledge of the facts at issue and his demeanor at the preliminary hearing on Defendants’ motion.

*First*, as discussed above, this Court has repeatedly held that a trial judge is best situated to interpret his or her own order, including consent orders memorializing settlement agreements. *See supra* § II.B.1.<sup>10</sup> Judge Blakey has overseen this litigation from its inception, entered the Consent Order at issue, and is particularly well-situated to address the misrepresentations contained in the violative statements as they relate to the

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<sup>10</sup> Other circuits likewise accord deference to a district judge’s interpretation of his or her own orders. *See Fisher*, 588 F. App’x at 610 (“Given the district court’s extensive experience with this case, we give deference to its reasonable interpretation of the [consent order]”); *Nehmer v. U.S. Dep’t of Veterans Affairs*, 494 F.3d 846, 855 (9th Cir. 2007) (“This court reviews de novo a district court’s interpretation of a consent decree ... but will give deference to the district court’s interpretation based on the court’s extensive oversight of the decree from the commencement of the litigation to the current appeal. A court of appeals will uphold a district court’s reasonable’ interpretation of a consent decree”) (internal quotation marks and citation omitted); *United States v. Spallone*, 399 F.3d 415, 423 (2d Cir. 2005) (“When an issuing judge interprets his own orders, we accord substantial deference to the draftsman, and we will not reverse the judge’s construction of an ambiguity in his own words except for abuse of discretion.”); *PACA Tr. Creditors of Lenny Perry’s Produce, Inc. v. Genecco Produce Inc.*, 913 F.3d 268, 275 (2d Cir. 2019) (same).

Consent Order (*e.g.*, the Commissioners' false implication that Judge Blakey made factual findings or legal determinations supporting a manipulation).

*Second*, the CFTC's suggestion that Judge Blakey may need to be disqualified because he has "personal knowledge of disputed evidentiary facts" is incorrect. Pet. at 21. Notably, the CFTC does not identify *any* disputed evidentiary facts of which Judge Blakey has personal knowledge. To the contrary, the facts relevant to the contempt proceeding—if the CFTC intends to dispute them—relate to statements in the public record, communications between CFTC staff and Defendants' counsel at the direction of the Commissioners, and communications between CFTC staff and the Commissioners. *See* McCall Decl. Judge Blakey has no "personal knowledge" of any of those facts.

*Third*, the CFTC's attempt to portray Judge Blakey's "temperament" at the August 19 hearing as raising "serious" "concerns," Pet. at 20-21, is simply disingenuous. This Court need only review the transcript to appreciate the misimpression created by the CFTC's selective splicing of Judge Blakey's statements. Judge Blakey never once raised his voice. He routinely granted the five CFTC lawyers present at the hearing breaks to meet and confer before responding to his questions. He repeatedly stated he was not making any findings or rulings in advance of providing the parties a full opportunity to develop the issues. He granted the CFTC a lengthy extension to brief the issues

and prepare for the hearing.<sup>11</sup> And immediately before this Court stayed the proceedings, Judge Blakey granted the Commissioners' request for a status conference to clarify the issues and procedure for the evidentiary hearing.

Judge Blakey has not presided in a way that would plausibly cause any litigant "concern," let alone "serious" "concerns." There is no reason to disqualify Judge Blakey before he has even had an opportunity to issue a ruling interpreting his own Order.

### **CONCLUSION**

For the foregoing reasons, Defendants Kraft Foods Group, Inc. and Mondelez Global LLC respectfully request that the Court deny the CFTC's petition for a writ of mandamus and lift the stay of proceedings in the district court.

Dated: October 7, 2019

Respectfully submitted,

KRAFT FOODS GROUP, INC. and  
MONDELEZ GLOBAL LLC

/s/ Dean N. Panos

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<sup>11</sup> The CFTC incredibly complains that the extension it requested, and Judge Blakey granted, afforded Defendants too much time to respond to its subsequently filed motion to vacate. Pet. at 13.

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**CERTIFICATE OF COMPLIANCE**

1. This document complies with the type-volume limitation of Fed. R. App. P. 21(d) because, according to the word count function of Microsoft Word 2013, this document contains 6,923 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 12 point Bookman Old Style for the main text and 11 point Bookman Old Style for the footnotes.

Dated: October 7, 2019

/s/ Dean N. Panos

Dean N. Panos

**CERTIFICATE OF SERVICE**

I, Thomas E. Quinn, an attorney, hereby certify that on October 7, 2019, I caused **Kraft Foods Group, Inc. & Mondelēz Global LLC's Response In Opposition To Petitioner's Petition For A Writ Of Mandamus** to be electronically filed with the Clerk of the Court for the United States Court Of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Thomas E. Quinn

Thomas E. Quinn