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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KALSHIEX LLC,

Plaintiff,

vs.

COMMODITY FUTURES TRADING
COMMISSION,

Defendant.

Civil Action

No. 1:23-cv-03257-JMC

May 30, 2024

1:00 p.m.

Washington, D.C.

TRANSCRIPT OF THE MOTION HEARING
BEFORE THE HONORABLE JIA M. COBB
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Official Court Reporter

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1 the sense that they can't prohibit trading on a regulated
2 exchange because of preemption principles. But the way I
3 understand what they're arguing is that they say, well, buying
4 and selling those contracts sort of amounts to a betting on an
5 election because you're staking something of value on the
6 electoral outcome. If you did that outside the context of a
7 regulated exchange, then it would violate these state laws and
8 therefore the trading of the contract relates to unlawful
9 activity.

10 So a couple problems with that. Number one, unlike
11 our interpretation, it doesn't align with the three that follow
12 it, because the key move that they're making there is instead
13 of looking at the underlying event and whether it is related to
14 the enumerated activity, they're looking at the trading of the
15 contract and whether it's related to the underlying activity.
16 That is a, sort of just a different focus of the analysis, and
17 it makes 1 sort of stand out relative to 2, 3 and 4.

18 THE COURT: Can I ask you about that, because I think
19 that this defendant made this point -- the government made this
20 point. Where it says "agreements, contracts or transactions
21 involved," what work do you argue "transactions" is doing in
22 the statute as it relates to involve?

23 MR. ROTH: As I understand it, the agreement, contract
24 or transaction sort of triplet, it appears throughout the
25 statute. It's just the way they refer to these types of

1 instruments when they define it. So I don't think that they
2 have independent significance. I think they're just capturing
3 any different way you might structure the arraignment.

4 THE COURT: So you're not reading transactions to
5 refer to the act of trading the thing, it's another way to say
6 contract agreement; it is the contract, itself.

7 MR. ROTH: It's the instrument, and I think that
8 follows from the fact that this is how it's used throughout the
9 statute, the three together.

10 And just to be clear, we're not saying that you
11 couldn't have a statute that said transaction involving X,
12 where what it meant was the act of contracting, it involves
13 that activity. It's not that that's semantically impossible.
14 It's grammatically appropriate, it makes sense; it's just that
15 it doesn't line up with the way the statute works for 2, 3 and
16 4, and so it makes it just an unusual, sort of strange way of
17 speaking.

18 The hypothetical I was thinking about as I was
19 preparing, you could say, my lunch generally involves a
20 sandwich, a salad, a pastry or robust conversation with my work
21 colleagues. You could say that, and yes, it could involve
22 those things, but putting them together in that way is weird.
23 It's not the way people normally speak.

24 But I actually don't think that's the most problematic
25 aspect of the Commission's reading of the unlawful category. I

1 THE COURT: Maybe it was your example, sorry.

2 MR. ROTH: I'm not sure it's a point where the parties
3 disagree. I think it goes to the difference between "involve"
4 and "based on."

5 THE COURT: I think that was your example.

6 MR. ROTH: So "based on" would speak literally about
7 the underlying event. That's too narrow for this, this says
8 involve, so there's this broader scope. Our point is that the
9 broader scope is tethered around the event.

10 THE COURT: Okay.

11 MR. ROTH: So you're still looking at the event and
12 saying does the event relate to unlawful activity, does it
13 relate to war, does it relate to terrorism. So you can sort of
14 game it by circumventing -- by sort of making it technically
15 something that's just a proxy, it would capture this.

16 THE COURT: I just wanted you to flesh that out.
17 Okay.

18 MR. ROTH: Okay.

19 THE COURT: So when they say that you're reading or
20 using the word involved too narrowly, you would dispute that.
21 You're not disputing that involve means relate to -- all those
22 other dictionary definitions of involve. It's just relates to
23 the underlying event in the contract.

24 MR. ROTH: It's what has to involve. We don't
25 actually disagree on what involve means; we disagree on what

1 has to involve what. Right? It's a subtle but important
2 point.

3 Okay, that takes us through Roman I. Unless Your
4 Honor has further questions about unlawful activity, I'll move
5 to gaming, which is the second one that they argue. Again, the
6 fight is about what does gaming mean in this statutory context.

7 Our core point is really simple: Gaming requires a
8 game. So if there's no underlying game, there's no gaming.
9 And so for example, if you have a contract on who's going to
10 win the Kentucky Derby, that's a game. It's a horse race, it's
11 a game. If you have an event contract on who's going to win
12 the Super Bowl or the point spread in the Super Bowl, it
13 involves a game. There's an underlying game. Same thing with
14 the lottery. They have an underlying game that forms the basis
15 for the contract. And if you read it and you understand it
16 that way, I think there are a number of benefits to that.

17 Number one, going back to what we were talking about
18 earlier, it lines it up with the others in the sense that there
19 is this connection back to the underlying event rather than
20 just talking about the act of trading in isolation.

21 Number two, I think is most consistent with the text.
22 The root word of gaming is game. I think it aligns with the
23 legislative history, the famous colloquy that gets a lot of
24 discussion in the briefing between Senators Feinstein and
25 Lincoln -- which by the way, if Your Honor wants to watch it on

1 MS. STUKES: So what's gambling? The Commission
2 looked at various definitions under state law of how "gambling"
3 is defined. And a common thread in many state law definitions
4 of "gambling" is to stake something of value on a contest of
5 others. It's within a common thread, a frequently used
6 phrasing included in the definition of "gambling," staking
7 something of value on a contest of others. A number of states
8 linked the terms "gaming" or "gambling" to betting or wagering
9 on elections.

10 The Commission also looked at this Unlawful Internet
11 Gambling Enforcement Act, which has the definition of "to bet"
12 or "wager." Betting or wagering is a common definition of
13 "gambling." And in that statute wagering on a contest --
14 staking something of value on a contest of others is included
15 in the definition.

16 THE COURT: Can I ask you a question.

17 MS. STUKES: Yeah, absolutely.

18 THE COURT: Besides elections, in your view, is there
19 a contest of others that doesn't involve a game as plaintiff
20 would define what game means?

21 MS. STUKES: I actually thought the horse race wasn't
22 a game. But there are contests, Academy Awards, award types of
23 things that doesn't seem like a game, just seems like a
24 contest. So --

25 THE COURT: Okay. So an event contract on something

1 admitted that's a de novo question for this Court to consider.
2 And, of course, in considering what the statute means, the
3 Court is going to look at how it would apply in other contexts.

4 That doesn't mean you need to figure out the answer to
5 every other hypothetical case that might exist. But the
6 Supreme Court, whenever it's considering a question of
7 statutory interpretation, looks at how it's going to apply
8 elsewhere, and if it's going to be absurd in a wide variety of
9 other cases that means it's a bad interpretation. That, I
10 think, covers unlawful.

11 The only thing I'll say about gaming, to add to
12 earlier, Your Honor asked if their interpretation of contests
13 would sweep in anything that isn't a game other than elections.
14 And counsel's response was potentially awards shows, like who's
15 going to win the Emmy or the Oscar, which I thought was a
16 fascinating example because Kalshi offers those and has offered
17 those for a long time, and they have never subjected those to
18 the review process.

19 And I think that really underscores the sort of
20 outcome-driven aspect of this. It's not a good-faith statutory
21 interpretation. It's an attempt to get it in without a real
22 coherent theory of what the statute means.

23 That's all I have, Your Honor, unless you have further
24 questions.

25 THE COURT: No. Thank you. I appreciate the briefs