UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	:	CFTC Docket No. 99-11
GLOBAL MINERALS & METALS CORP., R. DAVID CAMPBELL and CARL ALM	:	ORDER of DISMISSAL

The Division of Enforcement ("Division" or "DOE") filed a motion asking the Commission to dismiss this manipulation case against Global Minerals & Metals Corp. ("Global") and two Global employees. The Division asserts that the case has consumed an unexpectedly large amount of its time and resources, and will require a disproportionate share of resources for the foreseeable future. The misconduct alleged occurred nine years ago, the complaint was issued five years ago, yet no hearing on the merits has taken place and none is imminent. Other actors in the manipulation scheme at issue here have settled with the Commission and paid significant civil monetary penalties. In these circumstances, and as further discussed below, the Division states that its limited resources could be used more effectively on other matters. Respondents have not opposed the Division's motion.

The burdens of continuing this case outweigh the benefits that would flow from a successful outcome. Accordingly, the Division's Motion to Dismiss is granted and the Complaint is dismissed with prejudice, in its entirety.

Background

On May 20, 1999, the Commission issued an administrative enforcement complaint against Global, its principal, R. David Campbell ("Campbell"); and its chief copper trader, Carl Alm ("Alm") (collectively, "respondents"). The Complaint alleged that during the last three months of 1995, respondents, together with Sumitomo Corporation ("Sumitomo"), manipulated

the world price of copper, in violation of various provisions of the Commodity Exchange Act ("CEA" or "Act").

The Complaint also charged Merrill Lynch & Co., Inc. and two of its subsidiaries—Merrill Lynch International, Inc. and Merrill Lynch Pierce Fenner & Smith (Brokers & Dealers)—with aiding and abetting Global and Sumitomo. The subsidiaries settled the charges, agreeing to pay a $15 million civil monetary penalty, and the Complaint was dismissed against the corporate parent. *See* Order Making Findings and Imposing Remedial Sanctions (June 30, 1999). A separate enforcement action against Sumitomo resulted in a settlement pursuant to which it paid $150 million in civil monetary penalties and restitution. *In re Sumitomo Corporatio*n, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. ¶ 27,327 (CFTC May 11, 1998).

The instant case went forward against Global, Campbell and Alm. Respondents submitted answers denying liability and the parties commenced discovery. Discovery generally has been protracted and contentious, and has involved a number of nonparties seeking protective orders or raising other issues.[1] Nonparty discovery participants included financial regulators here and abroad.

The parties have battled repeatedly over whether the Division complied adequately with its obligations under the *Brady* doctrine and Commission Regulation 10.42(b). The rule requires the Division to produce to respondents in an enforcement action certain classes of documents obtained by the Division during its investigation of a matter before filing a complaint.

[1] *See, e.g., In re Global Minerals and Metals Corp.*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,635 at 52,420-21n.59 (ALJ Aug. 31, 2001) (order reissuing subpoenas subject to conditions), in which the ALJ noted that the "schedule for this case has been busted for quite some time by a formidable thicket of document production and discovery disputes pending before [the ALJ] or the Commission," including "Brady issues," "the sufficiency of the parties' responses to admissions requests ," "whether the Division has improperly withheld documents that were considered by the Division's expert witness in forming his opinion," and "whether the Division is required to produce to Respondents material obtained from the government of the United Kingdom." The order observed, the "case is still mired in these and other production disputes . . . with no hearing date in sight . . . ." *Id.*

A respondent is entitled separately to a copy of exculpatory information within the Division's possession or control, so-called "*Brady* material." *See In re First Guaranty Metals, Co*., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,074 at 24,340-41 (CFTC July 2, 1980) (holding, on due process grounds, that the prosecutorial disclosure rule of *Brady v. Maryland*, 373 U.S. 83 (1963), applies to administrative enforcement proceedings). The Division's burden under *Brady* is "a substantial and continuing obligation," and a search within the Commission for responsive documents must be "reasonably calculated to discover any producible material." *In re First National Monetary Corp*., [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,853 at 27,581 (CFTC Nov. 13, 1981).

The Division filed a prehearing memorandum in October 2000, identifying its legal theories, the documents it planned to introduce, and the witnesses it proposed to call. Its submission included the Verified Written Statement (written direct testimony) of its expert witness, economist Stephen C. Pirrong ("Pirrong").[2] Pirrong, who is not a Commission employee, was retained by the Division during the lengthy investigation that preceded issuance of the Complaint. Drafts of Pirrong's Verified Written Statement were prepared as early as 1997, two years before the Complaint was filed.

In December 2000, Dennis O'Keefe, the Division's lead attorney throughout the investigation and prosecution of this case, left the Commission and began working for businessman Herbert Black ("Black"), a prominent participant in the metals industry. Black had been "a vital source of information" for the Division during its investigation of respondents. Motion to Dismiss at 9. In 2002, Black himself sued Sumitomo, Global and others, alleging

[2] *See* Commission Regulation 10.66(d) ("direct testimony of expert witnesses may be made by verified written statement rather than presented orally at the hearing," and "[a]ny expert witness whose testimony is presented in this manner shall be available for oral cross-examination").

damages stemming from their alleged copper manipulation, and retained Pirrong as his expert. *Black v. Sumitomo Corporation*, 02 CV. 2671 (S.D.N.Y.) (JES) (filed Apr. 5, 2002). A year later, the parties stipulated to dismiss the case. Stipulation and Order of Dismissal with Prejudice (Apr. 8, 2003).

The Commission's case saw significant activity during the first half of 2002. In February, the Division asked the ALJ to establish adverse inferences against respondents based on the alleged destruction of material evidence. The ALJ deferred a decision pending a hearing on the merits.

In May 2002, respondents filed their prehearing memorandum and asked the ALJ for leave to file a motion for summary disposition. That request is pending. Also in May, the Division moved to exclude respondents' two expert witnesses, and respondents sought to exclude Pirrong. Both sides claimed that the other's proposed expert testimony failed to meet the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In further developments that month, respondents filed a motion seeking permission to depose fourteen individuals located variously in London, Tokyo, Beijing and Sydney. The ALJ ruled that the request was premature, and said that respondents could renew their request when the case was heard on the merits.

The parties' prehearing skirmishes continued through June 2003, when respondents submitted a second motion to exclude Pirrong's testimony, this time asserting that Pirrong's simultaneous engagements for the Commission and for Black constituted a conflict of interest and created an appearance of impropriety.

In a related motion filed the same month, respondents asked the ALJ to compel the production of exculpatory documents that they allege were withheld improperly by the Division.

Respondents stated that in defending Black's lawsuit against Global, they found notes from a 1999 meeting attended by Black, one of his lawyers, and O'Keefe, who at that time was a Commission employee, at which litigation strategy was discussed. Respondents argued that the notes contained comments bearing adversely on Pirrong's credibility, and thus should have been produced as exculpatory evidence.

On December 3, 2003, the ALJ ordered the Division to submit a memorandum that, among other things, described the nature of the document search it had conducted pursuant to its disclosure duties under *Brady*; and stated whether it had withheld exculpatory information relating to Pirrong. The Division responded on December 15 that it had searched its files and found no such material. The ALJ on January 6, 2004 issued an order finding the Division's response inadequate because it appeared to address only documents in the Division's own files, and failed to determine whether responsive documents were held by Commission employees outside the Division. *In re Global Minerals and Metals Corp.*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,653 (ALJ Order Jan. 6, 2004). The ALJ ordered the Division to go back and look again.

The Division's expanded search was more productive. It reported on January 28, 2004 that it had found documents outside its offices that included correspondence between O'Keefe and Pirrong, early drafts of Pirrong's written expert testimony, staff comments regarding the drafts, and other responsive documents. *See* Division's Response to the ALJ's January 6, 2004 Order at 3; *see also* Motion to Dismiss at 16-17. In particular, the Division stated that it had found a 1997 draft of Pirrong's testimony in which the expert "relied upon Herbert Black's investigative testimony for a portion of the text of his opinion." Division's Response at 4. The reference to Black's testimony was excluded from later drafts and does not appear in the Verified

Statement filed with the Division's prehearing memorandum. *Id.; see also* Motion to Dismiss at 16 & n.17.

The Division stated that its discovery of additional *Brady* material raised issues "regarding the maintenance of [its] files," and that Pirrong's "decision to delete his reference to Black's testimony in his final opinion complicate the existing issues surrounding Dr. Pirrong's status as an expert witness." Division's Response at 5; *see also* Motion to Dismiss at 17.[3] The Division advised the ALJ that "this case may not warrant further expenditure of resources," and asked him to stay proceedings while it sought dismissal of this action. The ALJ stayed the case on January 29, 2004. The Division subsequently filed the instant Motion to Dismiss.

Discussion

Under Section 6(c) of the CEA, if the Commission has reason to believe that any person is manipulating or attempting to manipulate the price of a commodity, or has done so or tried to do so, it "may" bring an action against that person. *See also* Section 6(d) (further authorizing discretionary enforcement action). This provision of the CEA, authorizing rather than mandating enforcement action, is consistent with the general principle that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion"[4] *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)

[3] Respondents had alleged earlier in this proceeding that the Division failed to disclose all of the material relied on by Pirrong in preparing his expert opinion, omitting, namely: (i) certain appendices to a report prepared by the United Kingdom Securities and Investment Board; and (ii) information in the possession of Lovell Stewart Halebian, a law firm for which Pirrong performed "preliminary" work relating to the copper market manipulation before being retained by the Commission. Pirrong disclosed this work before accepting the Division's offer of engagement. Issues centering on these alleged omissions remained unresolved when the Division filed its January 28, 2004 response to the ALJ's January 6, 2004 *Brady* order. *See generally* Motion to Dismiss at 8, 17-19.

[4] Absolute discretion is not available when "Congress . . . limit[s] an agency's exercise of enforcement power. *Chaney*, 470 U.S. at 833. None of the CEA's provisions relevant to this case limit the Commission's prosecutorial discretion, and the above-quoted provisions of the statute expressly grant discretion. *Compare Dunlop v. Bachowski*, 421 U.S. 560 (1975) (citing the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 482, under which the Secretary of Labor "shall" investigate certain complaints, and upon finding probable cause, "shall" bring a civil action).

(citing cases). "[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id. Accord Public Citizen, Inc. v. U.S. E.P.A.*, 343 F.3d 449 (5th Cir. 2003).

Chaney enumerates a non-exclusive list of factors that an agency may consider in deciding whether to initiate an enforcement action. 470 U.S. at 831. In our view, after an agency commences an action, it appropriately may evaluate the progress of its case against those and other relevant factors as the proceeding unfolds. If the balance of factors changes materially as a case goes forward, as has happened here, enforcement efforts may be terminated.

Such a decision properly is made by the Commission directly; the Division's delegated prosecutorial authority is not so broad. *See, e.g.*, Commission Regulation 11.2 (the Division director shall "recommend" enforcement action). Moreover, our precedent has recognized that it is appropriate to address motions to dismiss to the Commission in the first instance. *In re Trillion Japan Company, Ltd.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,082 (CFTC May 23, 1994).

In addressing the Division's Motion to Dismiss, we have considered the factors identified in *Chaney* as a matter of guidance. These include "whether a violation has occurred"; "whether agency resources are best spent on this violation or another"; the agency's likelihood of success; how the particular enforcement action fits into the agency's overall policies; and "whether the agency has enough resources to undertake the action at all." 470 U.S. at 831.

Most relevant to our decision is whether Commission resources are best spent on this alleged violation or others. At the outset of this case, the answer to that question was an unequivocal "yes," but our view has changed during the five years that this case has been pending. Unexpected issues tangential or unrelated to the allegations of the Complaint have

consumed increasing amounts of limited resources, with no end in sight. The Division states that it "does not believe proceeding in this matter without the assistance of Dr. Pirrong is a sensible or efficient course given the economically and factually dense subject matter present in this specific litigation." Motion to Dismiss at 27-28. To retain Pirrong's assistance, the Division must litigate successfully respondents' challenges to his testimony arising from his undertaking work for Black while working for the Commission, and the related conflict of interest issues surrounding Pirrong's status as the Division's expert.

Should the Division prevail, other issues remain unresolved, including but not limited to those discussed above. Assuming that this case ultimately is heard on the merits, there exists the possibility that a significant amount of time will elapse between the conclusion of the Division's case and respondents' defense should respondents renew their request to depose foreign nonparties. Given the pace of this proceeding, a decision on the merits is likely to be so far removed from the conduct at issue that, if the Commission prevails, the deterrent or remedial impact of the decision will be substantially diminished.[5]

Chaney asks also whether an agency, in deciding whether to bring a case, has enough resources to undertake it at all, and how a particular action fits into an agency's overall policies. We see these factors as intertwined. The subject matter of this proceeding—an alleged international conspiracy to manipulate the world price of a basic industrial commodity—lies at the heart of the Commission's regulatory mission. The Commission could not credibly have avoided taking enforcement action in this matter. Accordingly, resources were committed to undertake a thorough and reasonable and prosecution.

[5] We emphasize, however, that it is the particular circumstances of this case, and not the passage of time alone, that leads to us to dismiss the Complaint. *Compare In re Gorski*, CFTC Docket No. 93-5 (Mar. 24, 2004), in which a hearing on the merits against one remaining respondent was held five years after the complaint was filed, with four other respondents having settled. The misconduct alleged occurred in 1988 and 1989.

The Commission's interest in discovering and deterring manipulation generally, and the copper scheme in particular, was vindicated substantially through its successful prosecutions of Sumitomo and Merrill Lynch. At this juncture, the Commission cannot prudently continue to spend limitless sums on a case in which major goals have been achieved, but which cannot be concluded without litigating ancillary issues that have no likely prospect of being resolved expeditiously. The Commission's overall policies will not be irreparably damaged if the case against these respondents does not go forward.

Finally, in considering *Chaney*'s substantive factors—evidence of a violation and likelihood of success on the merits—we assume, for purposes of our decision, that the Division has properly evaluated the continuing validity of its case on the merits. Nevertheless, a close reading of the complex decisions in prior cases in this area suggests that healthy skepticism is an appropriate response to even good faith estimates of the likelihood of success on the merits in manipulation litigation. *See, e.g., In re Abrams*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,479 (CFTC July 31, 1995); *In re Cox*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,786 (CFTC July 15, 1987). In any case, when all factors are considered, we conclude that the benefits of ultimately prevailing on the merits would be outweighed by the ever increasing costs.

For the foregoing reasons, the Complaint is dismissed with prejudice.

IT IS SO ORDERED.

By the Commission (Chairman NEWSOME and Commissioners LUKKEN and BROWN-HRUSKA).

(s)_____
Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: June 22, 2004