UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

MARVIN A. HALBUR	:	
v.	:	CFTC Docket No. 02-R030
REFCO, LLC, VBI COMPANY, V&J COMMODITY BROKERS II, INC., DAVID ALLEN GLEASON and P. MARK VANDEN BERGE	:	ORDER

Attorney Jeffry Henderson ("Henderson") appeals from an order of the Administrative Law Judge ("ALJ") debarring him from appearing in this case pursuant to Commission Rule 12.9, for engaging in "contemptuous" conduct. Henderson argues that the ALJ erred by failing to apply the standards the Commission outlined in *In re Global Minerals and Metals Corp*., [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,189 (CFTC July 13, 2000). For the reasons set forth herein, the debarment order is vacated.

* * *

This case commenced on March 8, 2002, when Marvin Halbur ("Halbur") filed a reparations complaint against futures commission merchant Refco, LLC ("Refco") and other respondents.[1] Respondents filed a joint answer and the case was forwarded to an ALJ for disposition. Both sides were represented by counsel throughout the course of the case.

During written settlement negotiations with complainant's attorney, Henderson, who represented respondents, contended that Halbur's complaint was untimely under the one-year

[1] The other respondents are VBI Company, of Sioux Falls S. D.; Mark Vanden Berge and David Gleason, both of whom were associated with VBI; and V&J Commodity Brokers II, Inc. of Sioux Falls, now known as J&L Commodities, Inc. Refco LLC formerly was known as Refco, Inc.
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limitations period contained in his account agreement. He also warned that if respondents successfully sued for enforcement of the contract in U.S. District Court, Halbur would be responsible for costs and attorneys' fees. [2]

When the ALJ learned of the letter, he gave Henderson an opportunity to withdraw what the ALJ termed "specious arguments" and a "threatening stance." Order of July 26, 2002. In response, Henderson undertook remedial action, moving to file an amended answer that omitted the untimeliness defense. The ALJ found this response inadequate and debarred him. Order of September 12, 2002.

The parties subsequently reached an agreement and on January 8, 2003, the ALJ dismissed this case as settled. Henderson filed and perfected a timely appeal. Complainant has not filed an answering brief.

Whether the ALJ properly debarred Henderson is a question governed by the standards announced by the Commission in *Global Minerals, supra.*[3] Under *Global Minerals*, a finding that attorney conduct was "contemptuous" must be supported by clear and convincing evidence. In addition, *Global* recognizes that an assessment of attorney conduct must take into account each party's right to vigorous advocacy by counsel.

[2] Refco had raised its contractual limitations period as an affirmative defense in its answer to the complaint, and had asserted the defense again in its prehearing memorandum.

[3] *Global Minerals* involved a debarment order issued in an administrative enforcement case under Commission Rule 10.11. That rule, however, is identical to Rule 12.9, which governs debarment by presiding officers in reparations cases; *Global Minerals* thus applies here.

The record, read in light of *Global's* guidance, does not support the ALJ's finding that Henderson's conduct was contemptuous. The debarment order imposed by the ALJ upon Henderson accordingly is vacated.

IT IS SO ORDERED.

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

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Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: June 30, 2003

Concurring Opinion of Commissioner Sharon Brown-Hruska

Although the outcome adopted here is the appropriate one, I write separately to oppose the continued application of the *Global Minerals* standard for sanctioning attorney misconduct.

The adoption of a *criminal* standard in *Global Minerals* to deal with the problem of professional misconduct during the course of a *civil* enforcement proceeding did not come without considerable cost to our principles. First, the action rendered officers presiding over enforcement proceedings powerless to sanction attorneys for misconduct that did not rise to the level of criminal contempt, such as knowingly filing a false pleading with the court. Second, it invalidated *sub silentio* Commission Rule 10.12 (f)(3), which prior to *Global Minerals*, subjected attorneys who filed sham documents in such proceedings "to appropriate disciplinary action *pursuant to § 10.11(b).*" (emphasis added). Third, it obliged the Commission to recall and vacate its decision to debar an attorney in another proceeding on the recognition that the administration of that well-deserved sanction could not be reconciled with the standard announced in *Global Minerals*. *See In re Arnold*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,448 (CFTC Jan. 9, 2001).

The outcome here would not be affected by whichever standard we might use--Henderson's over-zealous attempt to vindicate a contractual provision in his client's customer agreement would not be considered worthy of debarment under either a civil or criminal standard. However, I believe that the Commission's decision to extend a standard derived from the Federal Rules of Criminal Procedure to a Part 12 reparations proceeding to be especially inappropriate given the nature of those proceedings. In light of the costs that *Global Minerals* has imposed upon our ability to deter attorney misconduct in Part 10 proceedings, it is time, in my view, for us to consider going back to the balanced standard that existed prior to *Global Minerals.*[1]

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[1] I recognize that there is precedent for the employment of a standard based upon criminal jurisprudence to our administrative proceedings. Our prohibition of "aiding and abetting" violations of the Act is modeled after the federal criminal statute prohibiting such conduct, 18 U.S.C. § 2. *See* Sec. 13(a) of the Act (requiring unlawful intent to further underlying violation). But the balance there was struck not by us, but by Congress "to make applicable to administrative proceedings, the same type of responsibility that applies in criminal proceedings under the provisions of title 18, U.S.C., section 2." *Proposed Amendments to the Commodity Exchange Act: Hearings on H.R. 11930 and H.R. 12317 Before the House Comm. on Agriculture*, 90th Cong. 66 (1967) (statement of Chairman Robert Dole), *quoted in In re Richardson Securities, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,145 at 24,642-643 (CFTC, Jan. 27, 1981).

Given that we have previously declared that we are not bound by other procedural and administrative rules, *see In re Ashman*, [1994-1996 Transfer Binder] Comm.Fut.L.Rep. (CCH) ¶ 26,221 at 41,980 n.20 (CFTC Aug. 4, 1994) (Commission not bound by Federal Rules of Civil Procedure); *In re Bilello* [1992-1994 Transfer Binder] Comm.Fut.L.Rep. (CCH) ¶ 26,032 at 41,311 (CFTC Mar. 25, 1994) (Administrative Procedure Act "subject to the published rules of the agency"); *In re Buckwalter*, [1990-1992 Transfer Binder] Comm.Fut.L.Rep. (CCH) ¶ 25,016 at 37,769 (CFTC Mar. 8, 1991) (Commission

Commissioner Sharon Brown-Hruska Date: June 24, 2003

not bound by Federal Rules of Evidence), our employment of a standard derived from federal criminal procedure to deal with the problem of professional ethics in a civil setting, without Congressional authorization, seems incongruous at best. *Cf. In re Lincolnwood Commodities, Inc.*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,986 at 28,254 (CFTC, Jan. 31, 1984) (noting incongruity of employing "a standard derived from criminal law in proving aiding and abetting in civil proceedings enforcing a remedial statute like the Commodity Exchange Act," but observing that "Congress has struck the balance" on that issue).