Dissent of

Commissioner Jill E. Sommers

from

Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions

In the Matter of ConAgra Trade Group, Inc.

I respectfully dissent from the Commission's action taken today to accept the settlement offer of ConAgra Trade Group, Inc. (ConAgra). In my opinion, based upon the investigative record developed by the Commission's Division of Enforcement, issuing this Order misapplies the Commodity Exchange Act (CEA or Act) and Commission legal precedent and imposes a civil monetary penalty greater than is authorized by the CEA.

Causing a non-bona fide price to be reported in violation of CEA Section 4c(a)(2)(B), 7 U.S.C. § 6c(a)(2)(B), is a serious violation, as are all trade practice violations. Such trade practice violations undermine the integrity of our markets and must be deterred and punished. While the $12 million settlement in this case sends a strong message that such violations will not be tolerated, the fact that an entity (while under threat of enforcement action) offers to pay a certain civil monetary penalty does not mean the Commission should accept that offer. The Commission has an independent obligation to conduct a factual and statutory analysis to determine whether the penalty is supported by the facts and applicable law. In this case, I believe the Commission has failed in its obligation.

When determining what civil monetary penalty to impose, the Commission is bound by Section 6(c) of the CEA, which at the time of the misconduct alleged here permitted the assessment "of not more than the higher of $100,000 [adjusted for inflation] or triple the monetary gain . . . for each . . . violation." 7 U.S.C. § 9(c); *see also Slusser v. Commodity Futures Trading Comm'n*, 210 F.3d 783, 786 (7th Cir. 2000) ("Just as the sentence in a criminal case is limited by the number of counts alleged in an indictment times the maximum punishment for each offense, so the penalty in an administrative prosecution is limited by the number of violations alleged in the complaint times the maximum fine per violation."). Adjusting for inflation, the maximum fine in this case cannot exceed the higher of $130,000 per violation, or triple the monetary gain to ConAgra per violation. Commission Regulation 143.8(a)(1)(iii), 17 C.F.R. § 143.8(a)(1)(iii).

The Division of Enforcement conducted a very thorough investigation of this matter over many months, but nothing has been presented to me indicating that ConAgra obtained any monetary gain attributable to any violation of the CEA or Commission regulations. As such, the Commission is limited to imposing a penalty that is no greater than $130,000 per violation. *See In Re Staryk*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,826 at 56,453 (CFTC July 23, 2004) ("[I]n the absence of sufficient reliable evidence to permit a reasonably precise determination of . . . monetary gain, we . . . [calculate] an appropriate civil money penalty under the Act's $100,000 per violation alternative."). After determining the maximum penalty authorized by the Act, we must then consider the level of penalty, within or up to the maximum, that appropriately reflects the gravity of each offense and is sufficient to deter future violations. *Id.* at 56,454; *In re Miller*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,825 at 56,437-38 (CFTC July 23, 2004).

In addition to being bound by Section 6(c) of the CEA and Commission Regulation 143.8, when considering what civil monetary penalty to impose the Commission is guided by its own precedent. In this regard, the Commission's 2008 opinion in *In Re DiPlacido*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,970 (CFTC Nov. 5, 2008), *aff'd in part and modified in part*, 364 Fed. Appx. 657 (2d Cir. 2009), is instructive.

By drawing on Commission precedent, the Commission in *DiPlacido* recognized that "a 'broad but common sense approach' is taken" when determining the number of violations committed by a respondent for purposes of fashioning a penalty within the statutory maximum. *Id.* at 62,492 (quoting *In re Slusser*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,411 at 54,745 (CFTC Feb. 28, 2003)). While the Commission typically pleads in its complaints that "each and every act or transaction" engaged in by a respondent in furtherance of a wrongful scheme is a separate and distinct violation of the Act or regulations, the purpose for doing so is to put the respondent on notice that the maximum penalty could potentially be expansive depending on the number of violations proven at trial.[1] Alleging that "each and every act or transaction" constitutes a separate violation, and proving separate violations, however, are two different things. When setting a penalty, the Commission must confine itself to the actual number of violations proven.

Thus, in *DiPlacido*, given that the complaint alleged numerous transactions and overt acts in furtherance of a manipulative scheme, the Commission noted that the respondent was on notice of charges that could have potentially led to the imposition of

[1] In *Slusser*, the 7th Circuit vacated a $10 million fine imposed by the Commission as being inappropriately based on the triple the monetary gain provision of the Act and instructed that, although the complaint filed by the Division of Enforcement could have separated the wrongful conduct into "tens if not hundreds of violations," or could have alleged that each day of a continuing violation constituted a separate offense, the complaint as drafted put the respondents on notice of only six violations. Thus, the maximum penalty allowable was $600,000 under the $100,000 per violation alternative. *Slusser*, 210 F.3d at 786. The Division of Enforcement's current practice in drafting complaints is to incorporate expansive notice pleading.

a fine in the millions of dollars. Nonetheless, the Commission based its penalty on 11 proven violations for a total of $1 million. *Id.* at 62,492-94.[2]

In this case, in order for the Commission's $12 million civil monetary penalty to be authorized by the CEA, ConAgra must have committed at least 93 separate violations of the CEA or Commission regulations (with the maximum penalty imposed for each).[3] While the facts of many of our Enforcement cases lend themselves to expansive violation counting, in my view this case is not one of them. I have reviewed this matter very closely and am convinced that there is no arguable basis in law or fact to support finding anywhere near 93 violations.[4] As the court stated in *Miller*:

> The Commission can set a penalty as a deterrent. Doing so, the Commission is exercising the important and delicate governmental function of punishing illegal conduct. In the background are the *Eighth Amendment's* prohibitions, although constitutional restraints are not at issue here. In the foreground, and determinative, is the law against any exercise of power by a federal agency that is an assertion of arbitrary power rather than an act of reason grounded on the record before the agency.

Miller, 197 F.3d at 1236 (citations omitted). In my view, in accepting ConAgra's offer the Commission has ignored Section 6(c) of the CEA and its own precedent, and is imposing a penalty not "grounded on the record before the agency." *Id.* I cannot go along with such an approach and under these circumstances, I cannot vote to accept this settlement.

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[2] *DiPlacido* was a litigated trade practice case where the Commission found that on four occasions, through trading activity on the floor of the New York Mercantile Exchange, DiPlacido successfully manipulated the settlement price of electricity futures contracts, among other things. The Commission imposed the maximum civil monetary penalty for each manipulation ($110,000 each), and lesser amounts for each of the other violations. On appeal, DiPlacido's civil monetary penalty was reduced on grounds not relevant to this Dissent. *DiPlacido v. CFTC*, 364 Fed. Appx. 657 (2d Cir. 2009). Notably, in calculating the number of violations, the Commission did not count the number of contracts or transactions entered into leading up to each manipulation, but rather looked to the number of settlement prices that DiPlacido ultimately manipulated.

[3] Interestingly, the Commission Order gives ConAgra cooperation credit, which implies that even more violations could have been found.

[4] One can only speculate as to why ConAgra was willing to settle this case for $12 million, however, costs and attorneys' fees can quickly escalate in the context of protracted litigation. Regardless of the strength of the prosecution's case, a respondent may be willing to pay a substantial premium to avoid a potentially lengthy trial.