

ACT

ADMINISTRATIVE PROCEEDING

FILE NO. 3-10607

SECURITIES & EXCHANGE COMMISSION  
UNITED STATES SERVICE

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

December 16, 2002

OFFICE NO. 15th Floor only

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In the Matter of :

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: ORDER DENYING MOTION  
: TO REOPEN RECORD

CHRIS WOESSNER :  
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On November 12, 2002, Respondent, pursuant to Rule 452 of the Commission's Rules of Practice, 17 C.F.R. § 201.452, (Rules) filed a Motion for Admission of Evidence (Motion) and a supporting brief. The notes, testimony and statements (collectively statements) proffered purport to impeach or rebut testimony or otherwise diminish the credibility of William Close (Close), a Division of Enforcement (Division) witness, in the instant proceeding.

The Division filed Oppositions to the Motion on November 18, November 27, and December 9, 2002, (Opposition). Respondent filed a Reply on December 9, 2002, (Reply). The Division opposes the Motion on procedural and substantive grounds. Procedurally, the Division states that Rule 452 does not provide authority for the Motion. Substantively, the Division contends that the statements are (a) incomplete and taken out of context, (b) consistent with the testimony in the instant proceeding, and (c) in some situations "not testimony (or therefore, evidence) at all."

The Division correctly points out that Rule 452 is not the correct Rule to permit the filing of the Motion. However, Respondent addresses this issue in his Reply, and invokes Rules 101(a)(5), 111(c), 320 and 323, as the bases for the admissibility of the statements. Respondent also relies upon Rules 230(b)(2) and 231(a) that deal with exculpatory material and prior witness statements.

The Motion seeks to admit in evidence the statements listed below:

1. Report of Interview of Close, dated June 5, 2000, conducted by the Inspector General, U. S. Department of Labor;
2. Transcript styled: In Re: Grand Jury Investigation, Examination of William Close, dated January 18, 2001;

3. Transcript of Sentencing Hearing Before Honorable Nancy Gertner, United States District Judge, dated September 5, 2002;
4. Transcript of Sentencing Hearing Before Honorable Nancy Gertner, United States District Judge, dated October 9, 2002.<sup>1</sup>

The Report of Interview of Close, dated June 5, 2000, consists of the interviewer's notes. There is nothing to show that Close adopted these notes. The notes are inadmissible as affirmative evidence, or for impeachment or rebuttal.

The transcript styled In Re: Grand Jury Examination of William Close dated January 18, 2001, was taken by an Assistant U.S. Attorney as a deposition "in lieu of grand jury because we could not get grand jury time." (EX. B to the Motion at 2.) The testimony was taken pursuant to a plea agreement in which Close agreed to cooperate with the government. However, unlike a grand jury proceeding, others were present during the taking of Close's testimony and he was represented by counsel.

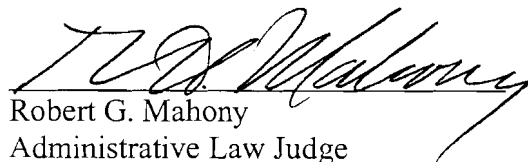
Respondent represents in his Reply that there was an "agreement" that this would be "grand jury testimony," but there is no indication of such an agreement or that the testimony was ever presented to a grand jury. My review of this testimony persuades me that it does not differ in any material respect from that given in the instant proceeding where Close was asked about the same matters, nor does it contain any exculpatory evidence that pertains to the charge of aiding and abetting a securities violation instituted against Respondent.

The Transcripts of Sentencing Hearings Before the Honorable Nancy Gertner, dated September 5, 2002, and October 9, 2002, do not include any testimony of Close, but only statements by Judge Gertner as to Close's credibility in the proceedings before her. They have no probative value in this proceeding and will not be admitted.

For the foregoing reasons, Respondent's Motion for Admission of Evidence is DENIED; and

Respondent's request for oral hearing on the Motion is DENIED.

SO ORDERED

  
Robert G. Mahony  
Administrative Law Judge

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<sup>1</sup> On November 15, 2002, Respondent, by letter, informed the undersigned of testimony taken on November 12, 2002, In the Matter of Clarke T. Blizzard, Administrative Proceeding No. 3-10007, that Respondent might seek to admit. As of the date of this Order, no motion has been received concerning this testimony.