

MAR 04 2002

UNITED STATES OF AMERICA

Before the

CTFD. NO. \_\_\_\_\_ SECURITIES AND EXCHANGE COMMISSION

March 4, 2002

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In the Matter of

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ORDER

F.X.C. INVESTORS CORP. and  
FRANCIS X. CURZIO

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On February 28, 2002, the Division of Enforcement (Division) filed a list of the exhibits it proposes to introduce at the upcoming hearing. The list describes proposed Division Exhibits 43 and 44 as transcripts of testimony taken during the investigation from Francis X. Curzio, a Respondent, and from Sabine Boehn DePaolis, a non-party. Both individuals are prospective Division witnesses, and they are expected to testify as part of the Division's case-in-chief. The exhibit list describes proposed Division Exhibit 45 as a Wells Submission by both Respondents on September 7, 1999, two years before the Commission issued the Order Instituting Proceedings.

If the Division intends to use the two investigative transcripts solely to refresh the witnesses' recollections or to impeach the witnesses, it should so state. However, if the Division intends to use the investigative transcripts for some broader purpose, it should articulate that purpose in advance of the hearing. The Division has attempted to introduce the investigative testimony of witnesses in other cases in the past. The issue usually arises late in the hearing, and its resolution is typically contested. At least two Administrative Law Judges (ALJs) have rebuffed the Division's efforts to deposit investigative transcripts in their entirety into the record. See, e.g., Del Mar Fin. Servs., Inc., 75 SEC Docket 1905, 1910-11 (Initial Decision) (Aug. 14, 2001), review granted; Angelo P. Danna, CPA, and Mark P. Dentinger, CPA, 56 SEC Docket 2166 (May 11, 1994). Although the Securities and Exchange Commission (Commission) has not yet ruled on the issue, another federal regulatory agency has come to the same conclusion as the Commission's ALJs did in Del Mar and Danna and Dentinger. See Shahrokh Nikkhan, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,129 at 49,883-84 (May 12, 2000).

In Nikkhan, the Division of Enforcement of the Commodity Futures Trading Commission (CFTC) appealed from an initial decision, arguing that the ALJ placed undue restrictions on its use of admissions Nikkhan made in an investigative deposition and in a customer's reparation case. The CFTC rejected the argument of its Division of Enforcement, stating:


At the time it raised its motion before the ALJ, however, the Division did not specify the portions of the two transcripts it viewed as admissions relevant to the disputed

issues of material fact in this case. Presiding officers are not required to evaluate these types of transcripts on an all or nothing basis. Indeed, the ALJ would have been within his discretion both in requiring the Division to specify the admissions it was relying on and in excluding “unduly repetitious evidence” in accordance with [the CFTC’s rules of practice].

Within ten days from the date of this order, the Division shall explain how it intends to use prospective Division Exhibits 43 and 44. If it intends to use the exhibits for some broader purpose than impeachment and/or refreshing the witnesses’ recollections, it must show cause why I should not apply the reasoning of Del Mar, Danna and Dentinger, and Nikkhan in this case.

Within the same ten-day period, the Division should also explain the basis for offering into evidence the Wells Submission. In particular, it should address the reasoning of former Chief Administrative Law Judge Warren E. Blair in Allied Stores Corp. and George C. Kern, Jr., 1988 SEC LEXIS 5247 (Mar. 21, 1988) (refusing to reconsider a prior ruling that denied admission into evidence of a Wells Submission). In addition, the Division should address the implications, if any, that Rule 240(c)(6) of the Commission’s Rules of Practice may have on the admissibility of a Wells Submission.

After the Division makes its filing, Respondents may submit a reply within five days.

  
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James T. Kelly  
Administrative Law Judge