

ALJ

ADMINISTRATIVE PROCEEDING
FILE NO. 3-10895

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
January 14, 2003

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE

JAN 15 2003

In the Matter of

ORDER

CTFD. NO. 1ST CLASS

OXFORD CAPITAL MANAGEMENT, INC.
and JOHN G. DANZ, JR.

On January 13, 2003, 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 30 through 33 as transcripts of testimony taken during the investigation from John G. Danz, Jr., a Respondent, and from two non-party officers/employees of Oxford Capital Management, Inc. All three individuals are prospective Division witnesses, and they are expected to testify as part of the Division's case-in-chief. The exhibit list also describes proposed Division Exhibit 147 (and Attachments A through S thereto) as a Wells Submission by both Respondents on July 1, 2002, approximately three months before the Securities and Exchange Commission (Commission) issued the Order Instituting Proceedings.

If the Division intends to use the investigative transcripts solely to refresh prospective witnesses' recollection or to impeach them, 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 such witnesses in other cases in the past, often invoking a sweeping argument that the entire transcript constitutes "the admission of a party opponent." It is my practice to examine closely any such claims. See Robert Bruce Lohmann, 77 SEC Docket 1173 (Apr. 11, 2002); F.X.C. Investors Corp., A.P. No. 3-10625 (Mar. 4, 2002) (unpublished). At least two other 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 Commission has not yet ruled on the propriety of depositing an entire investigative transcript into the record, another federal regulatory agency has come to the same conclusion as the Commission's ALJs did in Del Mar and Danna and Dentinger: namely, that the practice is inappropriate. 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 an initial decision of an ALJ, arguing that the ALJ placed undue restrictions on its use of admissions that 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 seven days from the date of this Order, the Division shall explain how it intends to use its proposed Exhibits 30 through 33. If it intends to use the exhibits for some broader purpose than impeachment and/or refreshing the prospective witnesses' recollection, it must show cause why I should not apply the reasoning of Del Mar, Danna and Dentinger, and Nikkhan in this case, and admit into evidence only excerpts from the investigative transcripts.

Within the same seven-day period, the Division shall also explain the basis for offering into evidence the Wells Submission and Attachments A through S thereto. 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., 52 SEC Docket 641 (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. While Wells Submissions are not settlement offers, they may be catalysts for settlements. As with the investigative testimony excerpts discussed above, the Division should identify the particular portions of the Wells Submission it intends to use as an admission or for impeachment or corroborative purposes. If the Division is aware of any Commission opinions addressing the admissibility of Wells Submissions, it should bring the relevant authority to my attention.

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

SO ORDERED.



James T. Kelly
Administrative Law Judge