

ALS

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11626

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
October 26, 2004

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE

OCT 27 2004

FIRST CLASS

In the Matter of :
:
JOHN A. CARLEY, :
MARK N. DOHLEN, :
EUGENE C. GEIGER, :
PAUL A. GILES, :
ROY E. GOULD, :
THOMAS A. KAUFMANN, :
ALFRED PEEPER, :
EDWARD H. PRICE, :
CHRISTOPHER H. ZACHARIAS, :
LE FOND MONDIAL :
D'INVESTISSEMENT S.A., :
and SPENCER EDWARDS, INC. :

ORDER

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on September 1, 2004. A hearing is scheduled for January 10-20, 2005, in Denver, Colorado.

Hearing Site

The parties are advised that the following site has been reserved for the hearing: Courtroom 2370, United States Tax Court, 1999 Broadway Building, Denver, Colorado 80202. The parties are encouraged to submit any necessary subpoena applications to this Office as soon as possible after they have filed their witness lists.

Motion for Severance

Respondent Thomas A. Kaufmann (Kaufmann) has filed a motion to sever his case from the case against the other Respondents. The Division of Enforcement (Division) has filed an opposition. Under Rule 201(b) of the Commission's Rules of Practice, such motions must be resolved by the Commission, and not an Administrative Law Judge. This Office has alerted the Commission's Office of the Secretary to Kaufmann's motion.

Motion for More Definite Statement

Respondent Christopher H. Zacharias (Zacharias) has filed with his Answer a Motion for a More Definite Statement of the charges against him (Motion). See Rule 220(d) of the Commission's Rules of Practice. The Division has opposed the Motion. As a separate matter, Zacharias and several other Respondents have raised a statute of limitations defense.

Rule 200(b)(3) of the Commission's Rules of Practice requires an OIP to "contain a short and plain statement of the matters of fact and law to be considered and determined, unless the order directs an answer pursuant to Rule 220 [of the Commission's Rules of Practice] in which case the order shall set forth the factual and legal basis [of the charges] in such detail as will permit a specific response thereto." The present OIP requires Respondents to file Answers.

The Commission has held that an OIP gives appropriate notice when the respondent is sufficiently informed of the nature of the charges so that he may adequately prepare his defense. However, a respondent is not entitled to disclosure of evidence in advance of the hearing. See Mutual Employees Trademart, Inc., 40 S.E.C. 128, 131 (1960).

This case has the potential of becoming unmanageable because of the number of actively defending Respondents (seven, so far), the size of the Division's investigative file (forty-two boxes of materials), and the Division's stated intent to present evidence of misconduct that took place more than five years before the OIP was issued (dating back to December 1997). I will need the cooperation of all parties to resolve this proceeding within the time limit set by the Commission. Under the circumstances, the Motion will be granted in part and denied in part.

Item One of the Motion requests additional specificity with respect to the allegations in OIP ¶ I.I.C.a.1. There is no such paragraph in the OIP. If Zacharias intended to refer to OIP ¶ I.I.C.3.a, the Motion is denied. OIP ¶ I.I.C.3.a alleges that Zacharias "caused [Starnet] securities to be issued knowing that the Peeper entities would act as conduits to sell the securities into the United States without registration or an exemption from registration."

Item Two of the Motion requests additional specificity with respect to the allegations in OIP ¶ I.I.C.3.b. To evaluate the Division's request for disgorgement, it may be necessary to distinguish the shares of stock allegedly resold by Zacharias from the shares allegedly resold by Carley, by Dohlen, and by Giles. In the alternative, it may be necessary to determine that the shares of stock allegedly resold by these four Respondents cannot be distinguished. The need for a more definite statement is underscored by the wording of OIP ¶ I.I.C.3.d, which asserts that certain Respondents "collectively realized" \$47 million in ill-gotten gains. At a prehearing conference on October 12, 2004, the Division intimated that it would seek joint-and-several disgorgement of \$47 million from certain Respondents. However, joint-and-several liability for disgorgement is not the default rule in all cases involving two or more respondents who have collaborated in misconduct. See Robert G. Weeks, 76 SEC Docket 2609, 2666-70 (Feb. 4, 2002) (collecting cases), summarily aff'd in part, 78 SEC Docket 2313 (Oct. 22, 2002), aff'd, 81 SEC Docket 1319 (Oct. 23, 2003).

This aspect of the Motion is granted to the following extent: the Division shall provide a more definite statement of its position regarding joint-and-several liability for disgorgement by each Respondent. Depending on the Division's response, it may be necessary to address the issue in more detail at the next scheduled prehearing conference. In all other respects, the Motion is denied as to OIP ¶ II.C.3.b.

Item Three of the Motion simply requests the Division to state whether the five misstatements and omissions identified in OIP ¶¶ II.D.4.a-e represent a complete list of the alleged antifraud violations by Zacharias that are at issue in this proceeding or, in the alternative, to state whether there are other (and as yet unidentified) alleged antifraud violations by Zacharias. The need for a more definite statement on this issue is underscored by the wording of OIP ¶ II.F.1, which incorporates OIP ¶¶ II.D.4.a-e by reference, but then goes on to state that there are unidentified "other things" that make the filings in OIP ¶ II.F.1 materially misleading.

This aspect of the motion for a more definite statement is granted. If OIP ¶¶ II.D.4.a-e represent a complete list of the alleged antifraud violations by Zacharias, Carley, Dohlen, and Giles that are at issue in this proceeding, the Division shall so state. On the other hand, if OIP ¶¶ II.D.4.a-e do not represent a complete list of the alleged antifraud violations by Zacharias, Carley, Dohlen, and Giles that are at issue in this proceeding, the Division shall provide a complete list, accompanied by a motion to amend the OIP pursuant to Rule 200(d) of the Commission's Rules of Practice. The Division must also provide specific amending language. Because the alleged antifraud violations in OIP ¶¶ II.D.4.a-e date back to December 1997, the Division shall also clarify whether alleged misconduct occurring more than five years before the OIP (*i.e.*, before September 1, 1999) will or will not be used to support civil penalty and registration sanctions against any Respondent.

Item Four of the Motion requests additional specificity with respect to the allegations of OIP ¶¶ II.D.4.a-b. I find these sub-paragraphs of the OIP to be ambiguous to the extent that they refer to OIP ¶¶ II.C.2.a-d. There are no such sub-paragraphs in the OIP. This aspect of the Motion is granted, and the Division is directed to clarify the references to OIP ¶¶ II.C.2.a-d. In all other respects, the Motion is denied as to OIP ¶¶ II.D.4.a-b.


Item Five of the Motion requests additional specificity with respect to the allegations of OIP ¶¶ II.C.4.c-d. There are no such paragraphs in the OIP. If Zacharias intended to refer to OIP ¶¶ II.D.4.c-d, the Motion is denied.

Item Six of the Motion requests additional specificity with respect to the allegations of OIP ¶ II.E.2. The Motion is granted to the following extent: the Division shall clarify its position as to whether ownership reports filed or required to be filed before September 1, 1999, (*i.e.*, more than five years before the OIP was issued) play any role in its request for civil penalty and registration sanctions against any Respondent. In all other respects, this aspect of the Motion is denied.

Item Seven of the Motion requests additional specificity with respect to the allegations of OIP ¶ II.F. The language in OIP ¶ II.F referring to unidentified "other things" has been discussed in connection with Item Three above. The Motion is also granted to the following

extent: the Division shall clarify its position as to whether the allegedly misleading Current Reports filed in December 1997, December 1998, and March 1999 (i.e., more than five years before the OIP was issued) play any role in its request for civil penalty and registration sanctions against any Respondent. In all other respects, this aspect of the Motion is denied.

IT IS ORDERED THAT the Division of Enforcement shall file and serve its More Definite Statement, and any necessary Motion to Amend the OIP, by November 8, 2004.



James T. Kelly
Administrative Law Judge