

ADMINISTRATIVE PROCEEDING
FILE NO. 3-10607

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 30, 2002

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE
DEC 30 2002

In the Matter of

CHRIS WOESSNER

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CTFD. NO. 8118705-2706

ORDER ON MOTION
FOR RECONSIDERATION
AND MOTION TO ADMIT
NEW EVIDENCE

On December 20, 2002, Respondent filed a Motion for Reconsideration (Reconsideration Motion), part of which is construed as a separate new motion; and a Motion to Admit New Evidence (New Evidence Motion).

The Reconsideration Motion requests reconsideration, in part, of the Order of December 16, 2002, (Order) that denied the admission into this record of a Transcript styled: In Re: Grand Jury Investigation, Examination of William Close, (Close) dated January 18, 2001. This testimony was taken pursuant to a plea agreement in which Close agreed to cooperate with the government. In the event that the testimony is not admitted for the truth of the assertions, Respondent proposes, as an alternative ground, that it be admitted "for the fact that Close gave testimony on the date in question." Respondent also asks reconsideration of the Order in so far as it denied admission of a Transcript of Sentencing Hearing Before Honorable Nancy Gertner, United States District Judge, dated September 5, 2002.

The New Evidence Motion seeks to admit into this record Close's testimony taken on November 12, 2002, In the Matter of Clarke T. Blizzard, et. al., Administrative Proceeding No. 3-10007. All testimony is proffered to impeach, rebut, or discredit the testimony of Close, a Division of Enforcement (Division) witness, in the instant proceeding.

The Division filed its opposition to the Reconsideration Motion and the New Evidence Motion on December 26, 2002.

Motion For Reconsideration

The December 16th Order noted that the testimony 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 Respondent's November 12, 2002, motion, p. 2.)

The Reconsideration Motion includes as an exhibit portions of the deposition transcript, that was not included with the original motion, stating that the parties would consider Close's statements to be taken pursuant to grand jury secrecy rules set out in Rule 6 (e) of the Federal Rules of Criminal Procedure. Notwithstanding this "agreement" between the Assistant U. S. Attorney and Respondent, as previously found, there is no evidence that the testimony was ever presented to a grand jury.

The Division's position is that Close's "deposition testimony" is not grand jury testimony simply by virtue of an agreement between the parties and, more importantly, there is no evidence that it was ever presented to a grand jury. Absent such evidence, I decline to construe Close's statements as grand jury testimony.

Substantively, Respondent argues that Close's testimony exculpates Respondent of the imputation that he was aware of the kickback scheme involving Close and others. Respondent acknowledges, however, that awareness of such a scheme is not pertinent to the pending charge of aiding and abetting a securities violation. Nevertheless, Respondent suggests that if a reviewing body were to consider the issue of Respondent's knowledge material, Close's testimony could be important.

The determination of admissibility or relevance of proffered evidence is within the sound discretion of the Administrative Law Judge. My review of this testimony, again, 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. The testimony does not contain any exculpatory evidence that pertains to the charge of aiding and abetting a securities violation, and I decline to speculate about how a reviewing body might consider it.

Respondent's motion pertaining to the September 5, 2002, sentencing transcript sought to admit the opinion of Judge Gertner about Close's credibility in matters before her. Respondent correctly points out that Close testified at this hearing about the terms of his sentence, but the original motion did not seek to admit Close's testimony.

Respondent's motion stated, in pertinent part: "[T]he Honorable Nancy Gertner found Close's testimony to be untrustworthy and not credible. Judge Gertner's opinion is material to an assessment of Close's credibility in these proceedings, and thus should be admitted into the record..." (Respondent's November 12, 2002, motion, p. 2.)

The Order denied admission of Judge Gertner's opinion on the grounds that her assessment of Close's credibility in matters before her was not probative of the matters in the instant proceeding.

The Reconsideration Motion does not address the ruling pertaining to Judge Gertner's opinion. Rather, it asks to include Close's testimony about the sentence he received or that I take official notice of it. This is, in effect, a new motion to include in this record the length of Close's sentence. Close testified that he was sentenced to twenty-three months, which he says was consistent with the plea agreement. The Division does not dispute the length, but asserts that it is irrelevant because Close testified in this proceeding

pursuant to his plea agreement and was examined about it by both sides. Since the sentence is a matter of public record and because there is no dispute about the length of twenty-three months, I take official notice of this fact.

Accordingly, the Reconsideration Motion is GRANTED. However, I DENY the relief requested pertaining to the admission of the Transcript styled: In Re: Grand Jury Examination of William Close, dated January 18, 2001; I DENY the relief requested pertaining to the admission of the Transcript of Sentencing Hearing Before Honorable Nancy Gertner, United States District Judge, dated September 5, 2002, except to take official notice of the fact that Close received a sentence of twenty-three months.

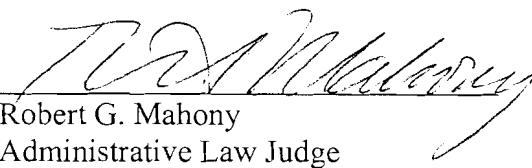
Motion to Admit New Evidence

The New Evidence Motion pertains to Close's testimony in the Blizzard proceeding. Respondent's position is that this testimony contains affirmative evidence that contradicts Close's testimony in the instant proceeding that it was the first time he testified in an "official courtroom."

However, in Blizzard he was asked about "the first time you testified about the subject matter in this case." Close gave testimony, which is discussed above and in the prior motion and order, under what appear to be deposition procedures that the parties considered "grand jury" testimony. Apparently, Close was truthful in stating that his appearance at this hearing was his first courtroom-type testimony. He could hardly be faulted if he was uncertain about how to characterize the January 18, 2001, testimony when the counsel taking it were not sure. In any event, the proffered testimony does not impeach his answer that this hearing was his first time in a courtroom setting.

The Motion to Admit New Evidence is DENIED.

SO ORDERED.


Robert G. Mahony
Administrative Law Judge