UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3934/June 22, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-15764

In the Matter of GARY L. MCDUFF	POST-HEARING ORDER AND PROTECTIVE ORDER

The hearing in this proceeding took place on June 15 and 16, 2016, at FCI Beaumont, Texas, where Respondent Gary L. McDuff is currently incarcerated. I ORDER the following:

1. The Division of Enforcement and Respondent shall file simultaneous opening post-hearing briefs by July 22, 2016, and any responsive briefs by August 19, 2016. Proposed findings of fact and conclusions of law are optional; if any are filed, they are due by July 22, 2016. Any electronic courtesy copies of these filings should be submitted in Word and in PDF text-searchable format, and may be emailed to ALJ@sec.gov.

2. The parties shall file declarations by July 22, 2016, describing their respective efforts to facilitate, and the results of, receiving, transmitting, disseminating, making available, and generally handling the investigative file, and any other pertinent matters concerning preparation for the hearing. The parties may file responsive briefs and declarations on this issue, which may be incorporated into their responsive post-hearing briefs, by August 19, 2016.

3. I admitted Division's exhibits 1 through 77 at the hearing. The Division is responsible for filing its exhibits in hardcopy form with the Office of the Secretary by July 22, 2016.

4. The Division submitted a privilege log at the hearing. The privilege log contains certain sensitive information, including the names of persons interviewed during the investigation leading to this proceeding, but who did not testify at the hearing, and I find that the harm resulting from the disclosure of such information outweighs the benefits of public disclosure. *See* 17 C.F.R. § 201.322(b). The Division shall file with the Office of the Secretary two copies of the privilege log, a public, redacted version, and a sealed, unredacted version, by July 22, 2016. The sealed, unredacted version of the privilege log may only be disclosed to Commissioners, employees and agents of the Commission, Respondent, and staff of FCI Beaumont.

5. The Division shall submit to this Office a copy of its exhibit list, in Microsoft Word or Excel format, and a complete set of its exhibits in electronic form, by July 22, 2016, either by

email to ALJ@sec.gov or by mailing a CD containing the exhibits. The exhibits should not be combined into a single PDF file, but submitted as separate attachments.

6. I admitted Respondent's exhibits 1 through 14 and 16 through 44, and I rejected Respondent's exhibit 15. This Office will file Respondent's exhibits, both admitted and rejected, with the Office of the Secretary. This Office will also promptly copy Respondent's exhibits and have them sent to the Division and to Respondent in hardcopy.

7. This Office has received English translations of two Spanish-language documents, which appear to be letters of support for Respondent, and which will be copied and handled in the same manner as Respondent's other exhibits. These documents will be designated as composite Respondent's exhibit 45, and the Division shall state in its opening post-hearing brief whether it objects to their admission.

8. The parties should address the following matters in their post-hearing briefs:

First, on June 14, 2016, the Commission issued an Opinion and Order of the Commission Denying Interlocutory Review. *See Gary L. McDuff*, Securities Exchange Act of 1934 Release No. 78066 (June 14, 2016). The Commission directed me to determine whether and to what extent certain considerations apply in this proceeding. *See id.*, slip op. at 14. These considerations include, among other things: the preclusive effect of Respondent's civil injunction and criminal conviction; the preclusive effect of Respondent's sentencing proceedings; and what weight to accord prior testimony where cross-examination was not available, and, presumably, what weight to accord prior testimony where cross-examination was available but Respondent voluntarily elected not to conduct it. *See id.*, slip op. at 12-14. Although I made findings on these issues during prehearing conferences, the Commission's Opinion and Order suggests that they should be reconsidered.

Second, to my knowledge this was the first Commission administrative hearing to be held in a prison in over twenty years, and it was a learning experience. I commend the Division's efforts to make the hearing happen, and I am grateful for the assistance of the staff of FCI Beaumont. Nonetheless, of necessity the hearing did not proceed in quite the same way other Commission administrative hearings have proceeded. I am concerned, particularly in light of the Commission's Opinion and Order, that the hearing may need to be reconvened. Alternatively, given the unique circumstances of this case it may not be reasonably possible to conduct a hearing that fully complies with the Commission's Rules of Practice; if so, the appropriate resolution may be dismissal.

Specifically, in addition to the issues raised by the Commission in its June 14, 2016, Opinion and Order, at least six other issues are potentially problematic:

(a) Although Respondent eventually received portions of the investigative file, he received much of it mid-hearing. Because Respondent was incarcerated at the time the OIP issued and has represented himself, he was never able to inspect or copy the investigative file "at the Commission office where [it is] ordinarily maintained, or at such other place as the parties, in writing, may agree," either personally or through counsel (although his family was able to inspect the file). 17 C.F.R. § 201.230(e).

And because he defaulted in the underlying civil proceeding, the investigative file was not duplicative of discovery he otherwise would have received. I directed the Division to address this issue post-hearing, but so far there is no evidence that Respondent has ever personally viewed the entirety of the investigative file, or ever had a meaningful ability to do so.

(b) The prison strictly limits who may visit inmates, and the time, place, and manner in which they do so, which makes public access difficult. For example, every participant in the hearing (except Respondent) had to be screened by prison staff before they were placed on the access list. I had to provide prison staff my state bar registration information several weeks prior to the hearing, and when we entered the prison grounds we all had to surrender our driver's licenses to a guard manning the control room. Once locked inside the room used for the hearing, the participants could not leave without the assistance of prison staff. The proceeding therefore may not have complied with the requirement that it be "public unless otherwise ordered by the Commission on its own motion or the motion of a party." 17 C.F.R. § 201.301.

(c) It was not practically possible to avoid ex parte communications on housekeeping matters, especially on the first hearing day, when the participants set up the hearing room and determined how to address the many logistical issues that arose from conducting a hearing inside a prison. Although it is my normal practice to go on the record even for housekeeping matters, I could not carry out that practice under the circumstances. Fortunately, such ex parte communications are not "relevant to the merits of the proceeding" and therefore prohibited. 17 C.F.R. § 200.120. But conducting a hearing where the parties, witnesses, and the ALJ are locked in a room together for hours at a time creates a potentially significant risk of prohibited communications, even though no prohibited communications actually occurred in this instance.

(d) Along similar lines, the logistical assistance provided by the Division went well beyond the typical. Normally this Office locates a hearing venue, notifies the parties of the location, and, in some cases, arranges for a court reporter. In this case, the Division made all arrangements with prison staff to hold the hearing in the prison visiting room, otherwise acted as a liaison between the prison and this Office, arranged for a court reporter, and forwarded my identifying information to prison staff. Although I am unaware of any formal proscription against such intertwining of the activities of the Division and this Office, it was an intertwining that potentially threatened this Office's independence and that I am disinclined to repeat.

(e) The physical location of the hearing may have been acceptable as a prison visiting room, but it was otherwise inhospitable. Of particular concern is that witnesses may not reasonably be expected to appear and give testimony if the hearing were to reconvene in the same venue. This is especially true as to witnesses for Respondent, because the Division has greater resources available to obtain witness testimony, and as to witnesses hostile to the proponent of their testimony. The hearing was held in a locked prison visiting room inside the grounds of the prison. The room was approximately the size and shape of a tennis court, with a number of plastic chairs, a

few padded chairs, and several banquet tables where the parties, the court reporter, and I sat, and where the witnesses sat while testifying. The room had air conditioning, windows, restrooms, and a drinking fountain (which on the second hearing day disrupted the proceedings by periodically emitting a very loud noise). I adjourned the hearing for lunch for thirty minutes each day, but the only food available was from several vending machines. The vending machines contained the usual vending machine fare (chips, candy, and the like), plus sandwiches, microwaveable pizzas, and a locally popular sausage. I ate no lunch either hearing day, or anything else from the vending machines. One of the witnesses was a retired woman who walked with a cane; although she did not complain about being locked in the hearing room from approximately 8:45 a.m. to 3:00 p.m., she should not have been expected to endure such an experience. The second hearing day I prevailed upon the prison staff to release the Division's two remaining witnesses at approximately 11:30 a.m., after they had completed their testimony and we broke for lunch. On balance, the physical location of the hearing was undesirable, so much so that the hearing may not have been "conducted in a fair, impartial, expeditious and orderly manner," and any further proceedings in the same location may suffer from the same deficiency. 17 C.F.R. § 201.300.

(f) It may be, however, that no other venue or method of hearing testimony is reasonably available. Several other methods were discussed over the course of this proceeding, including: a furlough for Respondent, which I determined was so unlikely that it was not worth the effort to seek; a video hearing, to which Respondent objected and which would make it difficult to evaluate credibility for any witnesses appearing by video (particularly Respondent himself); and transferring Respondent to a prison with better hearing facilities, which would require the assistance of other agencies and a budget to pay for the transfer. If there are any other procedures that are both reasonably available and reasonably likely to comply with the Commission's Rules of Practice, the parties should describe them in their post-hearing briefs.

This list of issues is not meant to be exhaustive. The parties should address in their post-hearing briefs any other issues relevant to affording Respondent a lawful and fair hearing.

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Cameron Elliot
Administrative Law Judge