

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3190/October 2, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-15764

In the Matter of

GARY L. MCDUFF

ORDER DENYING THE DIVISION OF
ENFORCEMENT'S MOTION FOR
SUMMARY DISPOSITION AND ORDER
TO SHOW CAUSE

On February 21, 2014, the Securities and Exchange Commission issued an Order Instituting Administrative Proceedings (OIP) against McDuff, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that a federal district court enjoined McDuff from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 (Securities Act); and Exchange Act Sections 10(b) and 15(a) and Rule 10b-5 thereunder, in *SEC v. McDuff*, No. 08-cv-526 (N.D. Tex. Feb. 22, 2013) (Civil Case). OIP at 1-2.

Both McDuff and the Division of Enforcement filed motions for summary disposition. I issued an initial decision, granting the Division's summary disposition motion, denying McDuff's summary disposition motion, and imposing a collateral bar. *Gary L. McDuff*, Initial Decision Release No. 663, 2014 SEC LEXIS 3207 (Sept. 5, 2014). On review, the Commission remanded the case, determining that I erred in my determination that McDuff had been acting as an unregistered broker-dealer at the time of his alleged misconduct and that I improperly relied on allegations in the Civil Case complaint and an indictment in a related criminal case to determine whether a bar was in the public interest. *Gary L. McDuff*, Exchange Act Release No. 74803, 2015 SEC LEXIS 1657 (Apr. 23, 2015) (Remand Order).

Thereafter, I ordered the parties to submit supplemental briefing and additional evidence in support of their summary disposition motions by June 24, 2015, pertaining to the issues identified in the Remand Order. *Gary L. McDuff*, Admin. Proc. Rulings Release No. 2613, 2015 SEC LEXIS 1646 (Apr. 30, 2015); Admin. Proc. Rulings Release No. 2783, 2015 SEC LEXIS 2274 (June 8, 2015). In doing so, I specifically warned the Division that if it failed to establish that McDuff acted as a broker at the time of his misconduct, I may grant McDuff's motion. *Gary L. McDuff*, 2015 SEC LEXIS 1646, at *2.

On June 24, 2015, both McDuff and the Division submitted supplemental briefing and additional exhibits (Div. Supp. Brief and McDuff Supp. Brief). On July 17, 2015, McDuff submitted a voluminous appendix, containing his recent filings in the Civil Case and a related

criminal case and numerous exhibits. Because this submission was unsolicited, did not meet the deadline of June 24, 2015, and appears to contain numerous documents that have already been submitted in this proceeding, it will not be considered.

Summary Disposition Standard

A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b). The facts on summary disposition must be viewed in the light most favorable to the non-moving party. *See Jay T. Comeaux*, Securities Act Release No. 9633, 2014 SEC LEXIS 3001, at *8 (Aug. 21, 2014). However, once the moving party has carried its burden of establishing that it is entitled to summary disposition on the factual record, the opposing party may not rely on bare allegations or denials, but instead must present specific facts showing a genuine issue of material fact for resolution at a hearing. *See id.*; *accord Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *22 (Feb. 4, 2008), *pet. denied*, 561 F.3d 548 (6th Cir. 2009).

In considering the Division's motion for summary disposition, McDuff's Answer has been taken as true, except as modified by stipulations or admissions made by him, by uncontested affidavits, and by facts officially noticed pursuant to Rule of Practice 323. *See* 17 C.F.R. §§ 201.250(a), .323. Conversely, in considering McDuff's motion, the OIP has been taken as true, except as modified by stipulations or admissions made by the Division, by uncontested affidavits, and by facts officially noticed. *See id.* Sworn statements, such as declarations, certifications, and attestations, are equivalent to affidavits. *See Allen v. Potter*, 152 F. App'x 379, 382 (5th Cir. 2005).

In its motion, the Division seeks to impose a collateral bar on McDuff under Exchange Act Section 15(b)(6), which authorizes such a sanction if: (1) at the time of the alleged misconduct, McDuff was associated with a broker or dealer; (2) McDuff has been enjoined from any action, conduct, or practice specified in Exchange Act Section 15(b)(4)(C); and (3) the sanction is in the public interest. 15 U.S.C. § 78o(b)(4)(C), (b)(6)(A)(iii). On remand, the Commission directed me to first determine whether McDuff was acting as a broker, and if that criteria were met, to determine whether the sanction sought was in the public interest. *Gary L. McDuff*, 2015 SEC LEXIS 1657, at *14. I address only the broker issue below.

Broker Nexus

A broker is defined as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). The definition of a broker connotes "a certain regularity of participation in securities transactions at key points in the chain of distribution." *SEC v. Hansen*, No. 83-cv-3692, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984) (quoting *Mass. Fin. Servs., Inc. v. SIPC*, 411 F. Supp. 411, 415 (D. Mass. 1976), *aff'd* 545 F.2d 754 (1st Cir. 1976)). Courts assess a variety of factors to determine whether an individual was acting as a broker, including whether that individual (1) works as an employee of the issuer, (2) receives a commission rather than a salary, (3) sells or earlier sold the securities of another issuer, (4) participates in negotiations between the issuer and an investor, (5) provides either

advice or a valuation as to the merit of an investment, and (6) actively (rather than passively) finds investors. *Hansen*, 1984 WL 2413, at *10; *see also SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005) (citing the same factors); *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011) (same). These factors are not intended to be exclusive, and some factors, such as “regularity of participation in securities transactions at key points” and the receipt of “transaction-based compensation” have been considered more indicative of broker conduct than others. *Kramer*, 778 F. Supp. 2d at 1334 (citations omitted).

The Division’s motion and evidence

The Division argues that McDuff’s status as a broker is established by the following. McDuff created Lancorp Financial Fund Business Trust (Lancorp) and recruited Gary Lancaster to run it. Div. Supp. Br. at 3-6. McDuff then recruited most of the investors to Lancorp. *Id.* at 6. McDuff steered Lancorp into investing with the Megafund Corporation, later determined to be a Ponzi scheme, in contravention of Lancorp’s PPM restrictions. *Id.* at 4, 6-7, 12-14. Finally, McDuff received a share of Lancorp’s profits from its Megafund investment as compensation for his recruitment efforts. *Id.* at 8-10, 12-13. In effect, the Division argues that McDuff operated as a broker because he recruited investors and was paid for it. *Id.* at 12-14.

For support, the Division relies on the declaration of Michael J. Quilling, Lancorp’s receiver, originally submitted in the Civil Case. Div. Supp. Ex. 1. In his declaration, Quilling concludes that: 1) McDuff helped create Lancorp and was centrally involved in Lancorp’s affairs; 2) McDuff “introduced” at least 100 investors to Megafund and Lancorp; and 3) “for his efforts, McDuff received \$304,272.58 as his share of Megafund’s Ponzi payments to Lancorp.” Div. Supp. Ex. 1 at 1-3. Quilling’s declaration contains eleven exhibits, mostly spreadsheet summaries, in support of his claims. *See* Div. Supp. Ex. A-1 through A-11. These exhibits purport to establish that McDuff received some of the funds Megafund paid to Lancorp by routing those payments through an affiliated entity. However, they do not address or support Quilling’s specific claims relevant to McDuff’s alleged status as a broker: whether McDuff introduced at least 100 investors to Lancorp or whether he received a share of the Megafund payments “for his efforts” in soliciting investors. Div. Supp. Ex. 1 at 3.

The Division also relies on investigative testimony given by Lancaster during the Megafund investigation. Div. Supp. Exs. 2-3. Lancaster testified that McDuff and his team were responsible for bringing investors to Lancorp. Div. Supp. Ex. 3 at 200. However, he also testified that approximately 80% of Lancorp investors were referred by Robert Reese, an associate of McDuff’s, and that McDuff only personally referred about a dozen investors, though he did run financial background checks on investors. Div. Supp. Ex. 2 at 66, 73-74; Div. Supp. Ex. 3 at 194, 240, 292. Lancaster also testified that McDuff arranged an agreement in which an affiliated company received compensation in exchange for soliciting investors to Lancorp (Joint Venture Agreement). Div. Supp. Ex. 2 at 139-40; Div. Supp. Ex. 3 at 203-06, 209-213. In his testimony, Lancaster alternately characterized these payments to the affiliated company as “commissions” and “profit-sharing” but later stated that these payments “would only be out of the profit of the underwriting activity itself.” *See* Div. Supp. Ex. 3 at 203, 206, 213-14. Lancaster testified that he believed McDuff was the driving force behind the Joint Venture Agreement. *Id.* at 216-18.

The Division submits a letter from McDuff, as director of Secured Clearing Corporation, to Lancaster. Div. Supp. Ex. 11. In the letter, McDuff recounts Secured Clearing's role in creating Lancorp and selecting Lancaster to run it. *Id.* He describes Secured Clearing's role in locating the Megafund investment and recruiting investors, and discusses the agreement between Secured Clearing and Lancorp to evenly split profits from Megafund. *Id.* Finally, McDuff informs Lancaster that Secured Clearing is assigning its interest in the Megafund profits to MexBank S.A. de C.V. *Id.*

The Division also submits a letter from Lancaster explaining the Joint Venture Agreement (Div. Supp. Ex. 9) and the Joint Venture Agreement itself (Div. Supp. Ex. 10). The exhibits reveal that the Joint Venture Agreement involves Lancorp paying a portion of its Megafund earnings to MexBank in exchange for MexBank's recruitment of investors to Lancorp. Div. Supp. Exs. 9 at 1, 10 at 1. Finally, the Division submits subscriber data sheets from two Lancorp investors, each identifying McDuff as the person who "initially informed [them] of Lancorp." Div. Supp. Ex. 5 at SB-12; Div. Supp. Ex. 7 at SB-12.¹ The Division submitted exhibits beyond the ones mentioned, but they do not pertain to the broker issue.

McDuff's motion and evidence

McDuff argues that he had no control or authority over Lancorp, did not sell or attempt to sell Lancorp shares, did not advise investors regarding Lancorp, and was unaware of any deviation from Lancorp's PPM. McDuff Supp. Br. at 4-5. McDuff also argues that the Division has failed to establish that he effected the sale or purchase of Lancorp shares, effected transactions for others in Lancorp or other securities, gave advice to others regarding Lancorp securities, or was paid commissions for the sale of Lancorp securities. *Id.* at 7. In particular, he argues that he did not actively solicit purchases of Lancorp securities from Francis Lynn Benyo and Jay Biles. *Id.* at 8.

McDuff submits a sworn declaration in support of his supplemental brief. McDuff Supp. Ex. A. In the declaration, McDuff states that he was never associated with Lancorp nor did he ever represent Lancorp in any capacity. McDuff Supp. Ex. A at 2. He also claims that he never distributed Lancorp subscription agreements and PPMs, and never accepted money from investors on behalf of Lancorp. *Id.* at 3. Further, he argues that his relationship with Reese was limited, and involved occasional phone conversations regarding Lancorp, which McDuff directed to Lancorp's legal counsel. *Id.* at 3-4. McDuff disclaims any knowledge of Reese's clients or the means by which he acquired them. *Id.* McDuff claims to not have received any commission directly or indirectly from Lancorp for sales of Lancorp shares. *Id.* at 5.

¹ Div. Supp. Ex 6 is also a subscriber data sheet, but discloses McDuff as the individual who "initially informed [the investor] of The People's Avenger Fund." Div. Supp. Ex. 6 at SB-11. Because the document does not relate to McDuff's role in recruiting investors to Lancorp, I do not consider it.

McDuff also relies on a sworn declaration of Lancaster, filed in 2005, and two excerpted transcripts of the same Lancaster deposition testimony the Division submitted. McDuff Supp. Exs. B-D. He also submits two subscriber data sheets, one of which identifies a person other than McDuff as the person who “initially informed [her] of Lancorp.” McDuff Supp. Ex. F.² Finally, he submits the 2014 affidavit of Shinder Gangar, an individual who claims personal knowledge of Lancorp’s creation. McDuff Supp. Ex. I. Gangar states that McDuff’s “role was not to raise money from investors” and that he “was not asked to solicit investors.” *Id.* at 1.

Analysis of Division’s motion and evidence

In considering the Division’s motion, McDuff’s Answer is taken as true. 17 C.F.R. 201.250(a). McDuff’s Answer contains no explicit denial that he operated as a broker, but this is irrelevant because the OIP itself contains no explicit allegation that he acted as a broker. *See* Answer; OIP.³ McDuff’s Answer does deny the allegations of his conduct contained in paragraph B.3 of the OIP. Answer at 19-21. I interpret this to be a denial of any conduct giving rise to this action, including that of being a broker. The Division must overcome the denial in McDuff’s Answer with evidence in the form of admissions, stipulations, uncontested affidavits, or officially noticed facts. 17 C.F.R. 201.250(a). For summary disposition to be granted, it must also show that “no genuine issue” exists as to any material fact regarding McDuff’s status as a broker. 17 C.F.R. 201.250(b).

McDuff’s denial may only be rebutted by certain types of evidence, and much of the Division’s evidence does not qualify. For example, I cannot consider Quilling’s declaration, because it is not a stipulation or admission, and it is not an uncontested affidavit because McDuff contests many of its assertions. Nor is it subject to official notice, because its conclusions on the broker issue are unsupported by reliable evidence. *See* Div. Supp. Ex. 1; *see* 17 C.F.R. 201.323 (official notice may be taken of facts which might be judicially noticed by a U.S. district court); Fed. R. Evid. 201(b) (judicial notice may be taken from sources whose accuracy cannot reasonably be questioned).⁴ For the same reasons, I cannot consider Lancaster’s testimony, Lancaster’s letter, or the Joint Venture Agreement.⁵ Div. Supp. Exs. 2-3, 9-10.

² McDuff Supp. Ex. E is a subscriber data sheet, but discusses The People’s Avenger Fund rather than Lancorp, and therefore will not be considered.

³ In fact, the OIP states that McDuff “has never been associated with a registered broker dealer or investment adviser.” OIP at 1.

⁴ In determining whether I may take official notice of the Quilling Declaration, I consider it irrelevant that it was submitted in connection with the Civil Case. The Civil Case was decided on default and the court did not adopt any of Quilling’s findings. *See Gary L. McDuff*, 2015 SEC LEXIS 1657, at *7-8 & nn.12-13; Final Default Judgement, Civil Case (Feb. 22, 2013), ECF No. 41.

⁵ For obvious reasons, it would be particularly inappropriate to take official notice of the testimony of Lancaster, McDuff’s co-defendant in the Civil Case. *See* Complaint, Civil Case (Mar. 26, 2008), ECF No. 1.

The evidence that I am permitted to consider is unpersuasive. Under Rule 323, I take official notice of Division supplemental exhibits 5, 7 and 11. 17 C.F.R. § 201.323. Supplemental exhibits 5 and 7 establish that McDuff referred two investors to Lancorp. Supplemental exhibit 11 shows that McDuff was the director of an entity that (1) played a role in establishing Lancorp, including recruiting investors, (2) helped to locate the Megafund investment, and (3) assigned to MexBank its interest in a percentage of the Megafund profits. McDuff Supp. Ex. 11. To determine whether McDuff acted as a broker, I rely on the multi-factor test described in *Hansen*. 1984 WL 2413, at *10. The evidence I may consider touches on only one of the factors discussed in *Hansen*, that of actively recruiting investors, and even then just barely. This evidence is insufficient to overcome McDuff's denial and establish that McDuff acted as a broker. For this reason, the Division's motion must be denied.

However, the Division's motion suffers from issues beyond my inability to consider all of its evidence at this stage of the proceeding. If all the same evidence were submitted at hearing, I would find for McDuff on the broker issue and dismiss the proceeding. The Division's theory is that McDuff acted as a broker by recruiting investors and receiving compensation for it. See Div. Supp. Br. at 12-14. But this legal theory suffers from two serious flaws. One, the Division's evidentiary support is inconsistent on key points. Two, and more critically, the Division's theory is legally insufficient to support a finding that McDuff acted as a broker.

First, the Division argues that McDuff recruited investors to Lancorp. However, the Division cites evidence that differs wildly in its estimates of just how many investors McDuff recruited. Quilling claims McDuff recruited over one hundred investors. Div. Supp. Ex. 1 at 3. Lancaster estimated McDuff recruited only about a dozen investors. Div. Supp. Ex. 2 at 73-74. And the Division submitted subscriber data sheets from only two Lancorp investors recruited by McDuff. Div. Supp. Exs. 5, 7. There is also evidence suggesting that McDuff's involvement in recruitment was mostly through an affiliation with the entity that recruited investors to Lancorp. Div. Supp. Ex. 3 at 205-206, 213 (describing Secured Clearing's role in recruiting investors to Lancorp); Div. Supp. Ex. 11 (same). The ambiguity in the Division's evidence weakens its argument.

Second, the Division's theory focuses on facts that, even if true, do not support a finding that McDuff acted as a broker. The Division argues that McDuff recruited investors to Lancorp. Div. Supp. Br. at 12. However, "[m]erely bringing together the parties to transactions, even those involving the purchase and sale of securities, is not enough" to demonstrate broker activity. *Apex Global Partners, Inc. v. Kaye/Bassman Int'l Corp.*, No. 09-cv-637, 2009 WL 2777869, at *3 (N.D. Tex. Aug. 31, 2009). Instead, "the evidence must demonstrate involvement at 'key points in the chain of distribution,' such as participating in the negotiation, analyzing the issuer's financial needs, discussing the details of the transaction, and recommending an investment." *Kramer*, 778 F. Supp. 2d at 1336 (citing *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, No. 04-cv-586, 2006 WL 2620985, at *6 (D. Neb. Sept. 12, 2006)). The Division has provided no evidence of this nature. Moreover, under the factors listed in *Hansen*, an indicia of broker activity is not *how many* investors were recruited, but rather *how* those investors were recruited. *Hansen*, 1984 WL 2413, at *10 (listing as indicia of broker activity that an individual "is an active rather than passive finder of investors"). Courts have therefore focused their

analysis on the methods used by a purported broker to solicit investors. See *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 13 (D.D.C. 1998) (a key indicia of broker activity is “the extent to which advertisement and investor solicitation were used”); *Hansen*, 1984 WL 2413, at *11 (finding broker status where defendant “was an active and aggressive finder of investors” through “advertisements, correspondence, and . . . seminars”). The Division has provided no evidence of the methods McDuff used to solicit investors.⁶ As a result, McDuff’s generalized purported recruitment of investors is largely irrelevant in determining whether he acted as a broker.

The Division also argues that McDuff acted as a broker because he was compensated through the Joint Venture Agreement for recruiting investors to Lancorp. Div. Supp. Br. at 13-14. But merely receiving compensation, even for recruiting investors, is not indicative of broker activity. Instead, it is the receipt of “transaction-based compensation” that suggests broker activity.⁷ *Kramer*, 778 F. Supp. 2d at 1334. Transaction-based compensation means “compensation tied to the successful completion of a securities transaction.” Order Exempting the Federal Reserve Bank of New York, Maiden Lane LLC and the Maiden Lane Commercial Mortgage Backed Securities Trust 2008-1 from Broker-Dealer Registration, Exchange Act Release No. 61884, 2010 SEC LEXIS 1085, at *7 (Apr. 9, 2010). “Compensation based on transactions in securities can induce high pressure sales tactics and other problems of investor protection” which necessitate broker registration under the Exchange Act. Persons Deemed Not To Be Brokers, Exchange Act Release No. 22172, 1985 WL 634795, at *4 (June 27, 1985). The Division does not explicitly allege that McDuff received transaction-based compensation. Div. Supp. Br. at 12. Nor could it. The compensation paid out by the Joint Venture Agreement was profit-sharing, not transaction-based compensation. See Div. Supp. Ex. 10 at 2 (describing the payment of Megafund’s “monthly gross profit”); see also Div. Ex. 3 at 214 (Lancaster characterizing the Joint Venture Agreement as making payments “out of the profit of the underwriting activity itself.”). Accordingly, McDuff’s compensation was generated by Megafund’s activities, illicit or otherwise, and was not “tied to the successful completion of a securities transaction.”⁸ Because McDuff’s compensation was not transaction-based, it is irrelevant in determining whether he acted as a broker.

⁶ Indeed, the Division’s failure to submit such evidence leaves open the possibility that even if McDuff did recruit investors to Lancorp, he did so passively, which would not support a finding that McDuff acted as a broker. See *Hansen*, 1984 WL 2413, at *10.

⁷ The term “transaction-based compensation” is often used interchangeably with the term “commissions.” See *Cornhusker*, 2006 WL 2620985, at *6. Commissions are service charges “assessed by a broker or investment advisor in return for providing investment advice and/or handling the purchase or sale of a security.” Investopedia, ‘*Commission*,’ <http://www.investopedia.com/terms/c/commission.asp> (last visited Sept. 14, 2015).

⁸ As the name suggests, “transaction-based compensation,” is earned for each transaction conducted by the broker. See, e.g., *SEC v. Martino*, 255 F. Supp. 2d 268, 274 (S.D.N.Y. 2003) (Defendant earned 20.5% commission for each sale of a security); *Hansen*, 1984 WL 2413, at *2 (Defendant earned a 15% commission for each sale of a security). Such compensation schemes bear no resemblance to McDuff’s alleged compensation through the Joint Venture Agreement.

In sum, the Division's legal theory hinges on two issues, McDuff's recruitment of investors and his compensation, that are either largely or wholly irrelevant to whether McDuff operated as a broker. The Division has submitted no other evidence addressing the factors listed in *Hansen*. I had previously warned the Division that if it failed to establish McDuff's broker status, I may grant McDuff's motion for summary disposition. *Gary L. McDuff*, 2015 SEC LEXIS 1646, at *2. I find that the Division has failed to establish the broker issue and that, given deficiencies in its evidence and legal theory, the Division may be unable to establish the issue at a hearing. I now examine whether it is appropriate to grant McDuff's summary disposition motion.

Analysis of McDuff's motion and evidence

In considering McDuff's motion, the facts of the OIP are taken as true. 17 C.F.R. § 201.250(a). As discussed above, the OIP contains no explicit allegation that McDuff operated as a broker, but does contain a summary of his purportedly violative conduct. As before, I interpret this summary to include all the elements necessary to support a proceeding under Exchange Act Section 15(b), including alleged conduct that McDuff operated as a broker. McDuff must overcome such allegations with stipulations, admissions, uncontested affidavits, or officially noticed facts. 17 C.F.R. § 201.250(a)-(b).

McDuff's supplemental motion relies heavily on his own sworn declaration. McDuff Supp. Ex. A. McDuff's declaration is not a stipulation or admission, and is not an uncontested affidavit because the substance of its claims is heavily contested by the Division. Therefore, I cannot consider it to rebut the Division's claims. For the reasons described in the previous section, I also cannot consider or take official notice of Lancaster's declaration or his deposition testimony. McDuff Supp. Exs. B-D. I find that I am permitted to consider the affidavit of Shinder Gangar, but that its contentions, contained in a third-party affidavit from an individual with unknown ties to this proceeding, are unpersuasive. McDuff Supp. Ex. I. I do, however, take official notice under 17 C.F.R. § 201.323 of McDuff supplemental exhibit F, which establishes that Lancorp investor Jay Biles was referred by a person other than McDuff. McDuff Supp. Ex. F. That exhibit alone does not demonstrate McDuff's entitlement to summary disposition.

However, if I were to deem the Division's proffered evidence as undisputed, McDuff would be entitled to summary disposition as a matter of law on the broker issue. For the reasons already discussed, the Division's evidence does not establish that McDuff acted as a broker and is largely immaterial.

Order

The Division was on notice that failure to establish McDuff's broker status may result in a dismissal of the proceedings. The Division has failed to establish McDuff's broker status; moreover, its evidence and legal theory suffer from deficiencies that I am unsure could be fixed at a hearing. I also note that the Commission instructed me to "first determine[]" the broker issue, and to only consider evidence pertaining to the public interest after McDuff's status as a

broker was established. For these reasons, I conclude that a hearing in this proceeding is not warranted at this time.

Instead, I DENY the Division's motion for summary disposition and ORDER the Division to show cause by October 30, 2015, explaining why the proceeding should not be dismissed and what evidence and legal theory it would present on the broker issue at hearing. *See S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 SEC LEXIS 4691, at *10 (Dec. 5, 2014) ("parties should be provided notice and an opportunity to be heard" prior to a pre-hearing dismissal). If the Division's evidence and theory are still facially insufficient, I will grant McDuff's motion for summary disposition and dismiss this proceeding. *See Rita Villa*, 53 S.E.C. 399, 404 (1998) (permitting dismissal prior to completion of a hearing under "extraordinary circumstances"). I DEFER ruling on McDuff's summary disposition motion subject to the above procedure.

SO ORDERED.

Cameron Elliot
Administrative Law Judge