

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

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 3482/January 11, 2016

ADMINISTRATIVE PROCEEDING

File No. 3-15764

In the Matter of

GARY L. MCDUFF

ORDER DISCHARGING ORDER TO SHOW
CAUSE AND DENYING MCDUFF'S SUMMARY
DISPOSITION MOTION

On September 5, 2014, I issued an initial decision in this proceeding. *Gary L. McDuff*, Initial Decision Release No. 663, 2014 SEC LEXIS 3207. On April 23, 2015, the Securities and Exchange Commission vacated the initial decision and remanded the proceeding for further development of the record. *See Gary L. McDuff*, Exchange Act Release No. 74803, 2015 SEC LEXIS 1657. I instructed both parties to file briefing supplemental to their motions for summary disposition, and specifically warned the Division of Enforcement 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*, Admin. Proc. Rulings Release No. 2613, 2015 SEC LEXIS 1646, at *2 (Apr. 30, 2015).

On October 2, 2015, I denied the Division's summary disposition motion, determining that the Division's legal theory relied on facts that, even if true, failed to establish McDuff's broker status. *Gary L. McDuff*, Admin. Proc. Rulings Release No. 3190, 2015 SEC LEXIS 4040, at *16-22, *24-25. I also determined that McDuff's summary disposition motion, on its own, did not demonstrate his entitlement to summary disposition as a matter of law. *Id.* at *22-24. However, due to deficiencies in the Division's evidence and legal theory, I deferred ruling on McDuff's motion, instead ordering the Division to show cause why the proceeding should not be dismissed and what evidence and legal theory it would present on the broker issue at hearing. *Id.* at *24-25.

On November 6, 2015, the Division submitted its response to the show cause order and a second supplemental appendix of documents. The Division argues that these documents, along with previously submitted evidence, establish as a matter of law that McDuff acted as a broker. Response at 3-4, 8-14. I disagree. The Division's argument relies in large part on evidence that I have already concluded I may not consider at the summary disposition stage. Response at 8-9, 13-14; *see Gary L. McDuff*, 2015 SEC LEXIS 4040, at *14-15 & nn.4-5. This conclusion is buttressed by the Division's inconsistent treatment of the evidence it relies upon. *Compare* Response at 9 (asking me to give weight to an individual's deposition testimony as to McDuff's involvement in screening for investors' financial background) *with id.* (asking me to disregard that same deposition testimony regarding the number of investors McDuff recruited, because "at that stage of the [] investigation, [the deponent] likely had reason to try to minimize the number

of investors”). Construing the Division’s original motion and supplemental filings together as a renewed summary disposition motion, the Division has not carried its burden of showing the lack of a genuine issue of material fact.

In the alternative, the Division argues that its evidence “at the very least, raises a genuine issue as to the material fact, precluding dismissal of this matter.” Response at 4. I agree. Active solicitation of investors and recommending investments may support a finding that one operated as a broker. *See SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334-35 (M.D. Fla. 2011); *SEC v. Hansen*, No. 83-cv-3692, 1984 WL 2413, at *11 (S.D.N.Y. Apr. 6, 1984). The Division has submitted testimony from two witnesses in a related criminal case discussing McDuff’s involvement in their recruitment – potentially showing that McDuff actively solicited investors and advised them to purchase certain investments. Response at 10-12. The Division also cites to evidence that McDuff’s compensation, when “placed within the context of the fraudulent offering,” was potentially transaction-based, which would support a finding that McDuff operated as a broker. *Id.* at 12-14; *see Kramer*, 778 F. Supp. 2d at 1334. Although the record is insufficient to find for the Division at the summary disposition stage, it raises genuine issues of material fact that preclude dismissal of this proceeding.

I previously determined that if, upon receipt of the Division’s response to the show cause order, additional briefing was necessary, I would give McDuff the opportunity to file a reply. *Gary L. McDuff*, Admin. Proc. Rulings Release No. 3267, 2015 SEC LEXIS 4447 (Oct. 29, 2015). A reply is not necessary. The Division has demonstrated that genuine issues of material fact exist that preclude granting McDuff’s motion for summary disposition. Given the presumption in favor of the non-moving party in motions for summary disposition, and the extensive briefing that has already occurred, further submissions from McDuff would not alter my decision. Accordingly, the order to show cause is DISCHARGED and McDuff’s motion for summary disposition is DENIED. This matter will proceed to a hearing.

McDuff is currently incarcerated at FCI Beaumont Low; I ORDER the Division to confer with McDuff and the staff at his facility regarding the logistics of holding a hearing, including matters such as obtaining live witness testimony, if necessary. By February 12, 2016, the Division shall file a letter describing its discussions with McDuff and facility staff and its proposed dates and procedures for holding a hearing. Although I encourage the parties to agree on such dates and procedures, McDuff may also file a letter with his proposed dates and procedures, due the same day. A telephonic prehearing conference will then be scheduled.

IT IS SO ORDERED.

Cameron Elliot
Administrative Law Judge