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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15764

In the Matter of **GARY L. MCDUFF,** **Respondent.**	**DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT'S POST-HEARING BRIEF**

DATED: September 23, 2016.

Respectfully submitted,

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The Division of Enforcement ("DOE" or the "Division") responds to Respondent's Post-Hearing Brief, respectfully showing the following:

I.
INTRODUCTION

Rather than focus on the only issues relevant to this proceeding -- (1) whether he acted as a broker; and (2) whether it is in the public interest to bar him from the securities industry -- McDuff devotes the majority of his Post-Hearing Brief ("Resp. PHB") to impermissibly re-litigating his criminal conviction[1] and attacking the character and motives of witnesses, Division counsel,[2] and even the Bureau of Prisons. On the rare occasion that he does touch on the central issues, McDuff misconstrues or ignores unfavorable law, testimony, and evidence. It is clear from McDuff's brief that he takes no responsibility for his actions and blames others for his own wrongdoing. It is equally clear that McDuff will immediately return to his deceitful ways if ever given the chance to do so, which is why barring him from ever again working in the securities industry is necessary and crucial, not only specifically to deter McDuff, but in order to protect the investing public.[3]

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[1] McDuff's brief is more than 100 pages long and addresses numerous issues well outside the scope of these proceedings. While the Division attempts in this Response to address the salient issues and respond fully and meaningfully to McDuff, it respectfully requests an opportunity to submit supplemental briefing should the Court determine that a particular issue raised by McDuff warrants further comment.

[2] For instance, McDuff accuses the Division's trial counsel, the head of the Fort Worth Regional Office (Shamoil Shipchandler), and other lawyers of perjury, suborning perjury, and altering documents. He offers no evidence to support these scurrilous allegations, and they do not merit response. The Division will not waste the Court's time discussing them.

[3] The Division incorporates by reference herein its underlying Post-Hearing Brief, dated August 12, 2016.

II.
ARGUMENTS AND AUTHORITIES

A. Overwhelming Evidence Establishes that McDuff Acted as a Broker.

While McDuff ignores the volume of evidence establishing several well-settled factors for identifying broker conduct, the Division has clearly demonstrated that he acted as a broker during the relevant period. (DOE PHB, at 27-29).

1. McDuff fails to address the factors that weigh against him and focuses unpersuasively on those he contends weigh in his favor.

McDuff agrees that *SEC v. Hansen*, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984), is a leading authority on factors to consider in determining whether someone acts as a broker. The non-exclusive *Hansen* factors that show that "a person is engaged in the business of effecting transactions in securities" include: (1) being an employee of the issuer; (2) receiving commissions as opposed to a salary; (3) selling or previously sold securities of other issuers; (4) is involved in negotiations between the issuer and the investor; (5) makes valuations as to the merits of the investment or gives advice; and (6) is an active rather than passive finder of investors.[4] *Id.*

[4] It is undisputed that the *Hansen* factors and other factors identified in cases cited by the Division *and McDuff* are not exclusive. *David F. Bandimere*, 2015 WL 6575665, at *8-9 (Oct. 29, 2015) (not all of the factors that have been identified as relevant need be present in order for the Commission to find that someone acted as a broker and "no one factor is dispositive;" because "the underlying facts vary widely from case to case, and there is no requirement that all the factors that have been recognized as relevant be present in any given case"); *SEC v. Corporate Relations Grp. Inc.*, 2003 WL 25570113, at *18 (Mar. 28, 2003) (recognizing seven factors that may be relevant, but basing a finding on only three); *SEC v. Benger*, 697 F. Supp. 2d 932, 945 (N.D. Ill. 2010) (factors are not exclusive); *see generally Frederick W. Wall*, 2005 WL 2291407, at *3 (Sept. 19, 2005) (lists of factors identified in other cases not discussed, but held that Wall acted as a broker for recruiting others to solicit sales, for playing a significant role in furthering the scheme's success, and receiving a share of the scheme's profits).

In his brief, McDuff ignores evidence satisfying five of the six *Hansen* factors and instead wrongly claims "it is undisputed" that there is no evidence of those hallmark factors establishing that he acted as a Lancorp broker.[5] (Resp. PHB, at 27-30). For example:

- **McDuff sold securities of other issuers:**
    - McDuff ignores Benyo's testimony that he sold her an investment in Overseas Development Bank & Trust, earning her $1,500 per month for several months before the investment failed. (*See* Tr. 125:11-126:23; 130:4-131:4).
    - McDuff also ignores the testimony of Loecker, who stated that McDuff sold MexBank interests to investors. (Tr. 321:19-324:10).
- **McDuff participated in investment negotiations:**
    - McDuff ignores Benyo's testimony that he assisted her in determining how to transfer her husband's retirement savings into an appropriate custodial account that would allow her to purchase Lancorp securities. (Tr. 32:4-17).
    - Likewise, McDuff ignores Loecker's testimony that he assisted Robert Reese in closing Lancorp sales by providing additional information to investors, especially about the insurance coverage and even falsely posing as an attorney to at least one investor. (Tr. 290:18-294:21).
    - McDuff restrictively interprets the term "negotiations," implying that it refers only to the terms of the investment, which he self-servingly and without corroborating evidence declares were non-negotiable and stated in the PPM. (Resp. PHB, at 29).
    - "Negotiations" includes further explaining PPM terms, such as the insurance protection, that an investor would want to understand better before agreeing to purchase shares. *David F. Bandimere*, 2015 WL 6575665, at *8 (Oct. 29, 2015). Benyo and Biles testified that McDuff explained the investment and its terms to them. (Tr. 27:3-32:20; 244:11-248:20; *see also* RX 47).
- **McDuff offered valuations on the merits of the Lancorp investment:**
    - McDuff denies making "valuations" of Lancorp, relying on a dictionary definition of "valuation" that limits it to "market value." (Resp. PHB, at 29). The express language in *Hansen*, however, states a broker "makes valuations

[5] The fact that McDuff was not an employee of Lancorp is the only undisputed *Hansen* factor.

as to the merits of the investment *or gives advice.*" *Hansen*, 1984 WL 2413, at *10 (S.D.N.Y. 1984) (emphasis added).

- Benyo and Biles both testified that McDuff discussed the merits of Lancorp, telling them they would not lose their principal, and testified that McDuff explicitly recommended the investment. (Tr. 27:3-18; 244:11-250:12).

- **McDuff actively recruited investors:**

  - Benyo and Biles clearly and convincingly testified that McDuff actively sold them their Lancorp investments, that he introduced the investment opportunity, explained its terms, and recommended it. (Tr. 26:5-33:3; 243:5-250:14).

  - Benyo testified that McDuff made a presentation at a meeting, where other people were present, twice, such that McDuff was actively seeking investors in a public forum. (Tr. 22:9-23:21; 26:2-23).

  - Neither Benyo nor Biles had any family or pre-existing business or personal relationship with McDuff prior to his sales pitches to them. (Tr. 22:9-23:10; 243:9-11).

  - Quilling and Loecker interviewed other investors whom McDuff solicited – with a call "out of the blue" – to invest in Lancorp. (Tr. 126:3-19; 292:8-13).[6]

  - At least three other investors identified McDuff as the referring party on the referral page of their subscription booklets. (DX 39, at 15 of 21; DX 40, at 8 of 10; DX 41, at 12 of 15).

  - McDuff does not discuss, distinguish, or disavow his March 17, 2005 letter to Lancaster, in which he admitted that Secured Clearing Corporation ("SCC") was responsible for directing investors for Lancorp. (DX 45). Quilling and testified he never found anyone who acted on behalf of SCC (or any of the other corporate entities) other than McDuff. (Tr. 141:14-142:11).[7] Because the credible evidence shows that McDuff alone acted on behalf of SCC, this

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[6] While the exact number of prospective Lancorp investors McDuff personally solicited is unknown, it is beyond reasonable debate that he solicited numerous investors individually, including posing as a lawyer. (Tr. 291:6-25; 294:5-21). The Division has been unable to find any authority requiring that a threshold number of individuals must be solicited in order to prove someone acted as a broker. Even viewing the evidence restrictively, that he solicited Benyo and Biles alone is sufficient to conclude that McDuff was a broker.

[7] Gary Lancaster also testified to this in his investigative testimony. (*See* DX 36 [64:7-14; 74:22-75:25]; DX 37 [185:5-16; 209:1-16]).

letter should be construed as McDuff's admission that he was responsible for recruiting investors to Lancorp through SCC.[8]

- **McDuff received transaction based compensation:**

  - Lancaster testified that he knew McDuff and his company, SCC, would need to be compensated for bringing clients to Lancorp, possibly in some form of profit-sharing arrangement. (DX 37 205:20-206:5).

  - Lancaster also testified that he made an arrangement with McDuff to split purported Lancorp profits with McDuff 50/50, initially, to compensate McDuff for his efforts in steering investors to Lancorp. (DX 36 [139:23-140:12]).

  - As described above, McDuff's March 17, 2005 letter (DX 45), along with the Joint Venture Agreement (DX 44) confirm that McDuff was responsible for soliciting investors for Lancorp and received a portion of Lancorp's Megafund "profits" in exchange.

  - Quilling concluded that McDuff initiated Lancorp (it was his "brain child"), played a key role in its success, and ultimately received a portion of the alleged profits for his efforts. (Tr. 120:2-122:4; 124:4-6).

  - Loecker and Quilling traced the two $500,000 purported profit payments, which Megafund paid to Lancorp for investing $5 million in Megafund, back into Lancorp and MexBank, and into CCI accounts controlled by McDuff. (Tr. 135:4-150:19; 299:19-318:9). The portion McDuff received was $304,272.58. (DX 30, at A-3; DX 65, at 3).

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[8] McDuff tries to avoid responsibility for his actions through SCC by claiming that someone else owned it and that he was merely an employee doing the owner's bidding. (*E.g.*, Resp. PHB, at 52-53; Tr. 401:10-24; 420:1-6). He repeatedly mentions Terrance de'Ath as the owner of SCC and as directing his actions, but no documents corroborate this. The only evidence of those facts comes from McDuff and non-specific declarations from a handful of his former associates, some of whom are incarcerated and all of whom the Court correctly determined had no relevant information. (Tr. 480:16-481:14; April 11th PHC Tr. 50:21-89:22; 98:18-99:10).

Nevertheless, even if McDuff were an SCC employee, that status would not absolve McDuff of his liability for violating the federal securities laws. A defendant may be liable in connection with a scheme "even if that defendant is merely following orders, or the scheme is masterminded by someone else." *In re Galena Biopharma, Inc. Sec. Litig.*, 117 F. Supp. 3d 1145, 1197 (D. Or. 2015); *see also SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 112 (2d Cir. 1998) ("Like lawyers, accountants, and banks who engage in fraudulent or deceptive practices at their clients' direction, [defendant] is a primary violator despite the fact that someone else directed the market manipulation scheme."). It matters not whether McDuff was acting for SCC or at the direction of someone within SCC. The March 17, 2005 letter, in which McDuff claims credit for SCC's solicitation of investors for Lancorp, is a telling admission that McDuff fails to address.

- Loecker testified that the CCI accounts into which the Lancorp profits were deposited were McDuff's CCI accounts, not the MexBank portal, which was confirmed by CCI owner Steve Renner. (Tr. 312:13-316:10; RX 31 [20:23-25; 37:18-38:5]).

- Additional evidence that these were McDuff's CCI accounts is found in the multiple withdrawals McDuff's wife Shannon and son Shiloh made from those accounts. (DX 67-DX 70).

2. McDuff's cases are irrelevant and unavailing.

McDuff cites a handful of cases distinguishing brokers from "finders," while failing to acknowledge the important point that there is no "finder exception" to the broker-registration requirement of the federal securities laws.[9] In addition, the cases on which McDuff relies explain that a "finder" *becomes* a broker when his activities include – as many of McDuff's did – analyzing the financial needs of an issuer, recommending or designing financing methods, involvement in negotiations, discussion of details of securities transactions, making investment recommendations, and prior involvement in the sale of securities.[10] *See Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, 2006 WL 2620985, at *6 (D. Neb. 2006).

McDuff relies on *SEC v. M&A West, Inc.*, 2005 WL 1514101 (N.D. Cal. 2005) (Resp. PHB, at 14), which bears no relation to the facts of this case. The defendant in *M&A West* helped effectuate reverse mergers of shell companies, in which privately held businesses were merged into publicly registered "shell" companies, which were previously registered and

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[9] Congress has never enacted a finder exception to the broker definition and the Commission has never used its exemptive authority to create one. Courts relying on a supposed finder exception have often referred to no-action letters issued by Commission staff. Such letters are statements that the staff "won't recommend prosecution *just now*, and *just so long as conditions are satisfied.*" *Bd. of Trade of City of Chicago v. SEC,* 883 F.2d 525, 529 (7th Cir. 1989) (emphasis in original). Such statements "constitute neither agency rule-making nor adjudication." *Gryl ex rel. Shire Pharm. Grp. PLC v. Shire Pharm. Grp. PLC,* 298 F.3d 136, 145 (2d Cir. 2002).

[10] As discussed above, McDuff engaged in at least four of those activities—involvement in negotiations, discussion of details of securities transactions, making investment recommendations, and prior involvement in the sale of securities.

tradeable, but which had no business or operations of their own. *Id.*, at 2. Unlike McDuff, the *M&A West* defendant was not offering or selling shares in an unregistered private placement to members of the public. *Id.* The *M&A West* defendant's activities included working with shareholders of private companies to execute reverse mergers by identifying suitable public shell companies, preparing documents for the reverse mergers, and coordinating among the various parties. *Id.*, at *3. The court held that these activities were more in the nature of the work performed by lawyers and paralegals orchestrating business transactions. *Id.*, at *9. In addition, there was no discussion in that case of the traditional factors of broker activity discussed in *Hansen* and numerous other cases. Hence McDuff's simple declaration that the *M&A West* defendant's activities were "exactly" like his is patently incorrect.

McDuff also relies on *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334-1335 (M.D. Fla. 2011), claiming that it to reflects circumstances similar to his. But unlike McDuff, Kramer sold securities to a small group of people, each of whom was "either a friend or an intimate," including his lawyer, his doctor, and his son. *Id.*, at 1339-1340. While McDuff claims this is similar to him because "his family, mother, father, uncle, and prior associates from Dobb-White in England [supposedly] provided funds to Lancorp Trust Fund," he disregards Benyo and Biles's testimonies about their first-hand experiences of McDuff soliciting them directly, and Loecker's testimony that McDuff solicited investors that he called "out of the blue" to buy Lancorp. (Tr. 292:6-13); (Resp. PHB, at 15).

McDuff's actions also went far beyond those of the *Kramer* defendant. *Kramer* held that:

> The full measure of Kramer's "advice" to, or "solicitation" of, this array of Kramer's intimate friends and family consisted of Kramer's (1) sharing his opinion that Skyway was a good company and a good investment and (2) directing attention to Skyway's web site and press releases.

Id., at 1340. There was no evidence that Kramer sold a share of Skyway, participated in the purchase and sale of a Skyway security, provided advice or other information about the investment, advertised or distributed promotion material for Skyway, sponsored a seminar or social event at which Kramer promoted Skyway, sold the security of another issuer, hired employees to contact potential investors about Skyway, called a potential investor other than one of his intimate friends, or encouraged a broker to sell Skyway securities. *Id.* In contrast, McDuff sold shares in Lancorp; solicited investors and provided advice and other information about the Lancorp shares, its insurance, and its activities; appeared at a meeting and promoted Lancorp to potential investors; sold securities of another issuer; recruited others to contact potential investors; and called potential investors "out of the blue" who were not intimate friends. McDuff's actions far exceeded those described in *Kramer*.

McDuff further relies on *Kramer* for the selective quote that one of the "hallmark" factors of broker activity is transaction-based compensation and argues that he did not receive a traditional commission, or a salary, from Lancorp. (Resp. PHB, at 27). But because transaction-based compensation is indicative *though not dispositive* of broker activity, McDuff's argument fails. *David F. Bandimere*, at *9.

In *SEC v. George*, 426 F.3d 786 (6th Cir. 2005), the respondent received "transaction-*related* compensation," which consisted of investors' proceeds deposited into the respondent's commingled bank account which he took to pay himself. *Id.*, at 793. In *Frederick W. Wall*, 2005 WL 2291407 (Sept. 19, 2005), the respondent shared in the scheme's profits. *Id.*, at *3. In *David F. Bandimere*, the respondent received compensation that was calculated either as a percentage of the transaction or a percentage of "returns." *David F. Bandimere*, 2015 WL

6575665, at *8. Yet in each of these cases the courts found that defendants acted as brokers notwithstanding an absence of strictly transaction-based compensation. Hence, while McDuff argues that he never received commissions, the cases are clear that transaction-based compensation is but one of several non-dispositive factors for determining broker activity and broadly includes transaction-*related* compensation such as misappropriated investor funds, as recognized in *SEC v. George*, or a share of the scheme's purported profits, as in *Frederick W. Wall.* In this case, reliable evidence proves McDuff was compensated. (*E.g.*, DX 67-DX 70; Tr. 313:8-317:6).

To be sure, some of the most damning evidence against McDuff in this action proves that he was compensated *in exchange for* his efforts to identify and recruit investors to Lancorp.[11] (DX 37 [213:2-215:10]). McDuff controlled the CCI accounts into which Quilling and Loecker testified Lancorp's supposed profits were deposited. (Tr. 312:3-313:20). The unrebutted evidence establishes that $304,272.58 that rightly belonged to Lancorp investors ended up in the CCI accounts that McDuff controlled.[12] (Tr. 139:19-150:19). McDuff used these funds to buy a house next door to his residence and distributed portions to his wife and son.[13] (DX 65, at 3; DX 67-DX 70; *see also Quilling v. McDuff*, Case No. 3:06-cv-00959 (N.D. Tex.), Doc. 41

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[11] *Kramer* also considered many other factors of broker activity other than transaction-based compensation.

[12] McDuff paid Reese, the salesman he recruited and was responsible for, out of those funds. (DX 68, payment at April 6, 2005 to Excel Financial, Inc.).

[13] McDuff attempted to claim at the hearing that the Deer Park, Texas house belonged to another entity, Southern Trust, and suggested that perhaps Receiver Quilling's process server had wrongly served his son, Gary Shiloh McDuff, rather than him, in the Receiver's successful fraudulent transfer action. (Tr. 205:18-210:17; 393:24-394:24). That suggestion is an impermissible collateral attack on Quilling's fraudulent transfer case against him, which resolved the issue against McDuff that he received the Lancorp investor proceeds and that he had wrongly used them to purchase the Deer Park property. *Quilling v. McDuff*, Case No. 3:05-cv-00959, Doc. 41 ("Judgment"). McDuff has no basis for any collateral attack on that judgment, since he responded aggressively to the Receiver's lawsuit—and lost.

("Judgment") (Receiver awarded judgment of $304,272.58, and court expressly found that McDuff purchased property at 1318 Minchin Drive in Deer Park, Texas with investor proceeds obtained through an illegal *Ponzi* scheme).

3. Prior Commission decisions and the credible record evidence support a finding that McDuff acted as a broker.

Indeed, reliable evidence repeatedly illustrates how McDuff engaged in many of the same activities that the Commission found constituted broker activity in *David F. Bandimere*:

> In this matter, Bandimere's conduct is consistent with many of the factors recognized as important in the analysis of broker status. He solicited investors by informing them of the IVC and UCR investments, and talking about their merits, in a variety of contexts. Bandimere advised investors about the merits of the investments by emphasizing the rate and consistency of returns, the safety of principal, and the expertise of Parrish and Dalton, and by providing descriptions as to how the programs supposedly worked. He assisted investors with the paperwork involved in investing and obtained their signatures on documents, and he answered investors' questions. He handled both money to be invested and returns to be paid to investors, and he helped investors put IRA funds in IVC and UCR.

David F. Bandimere, at *8. *Bandimere* reiterates that "no one factor is dispositive." *Id.* As previously discussed, McDuff engaged in *all* activities described in *Bandimere* except handling money and obtaining signatures on subscription agreements.[14]

Concluding that McDuff acted as a broker also accords with the Commission's holding in *Frederick W. Wall*, 2005 WL 2291407, at *3. In *Wall,* the Commission found that the respondent acted as a broker when he helped set up an illegal boiler room operation to sell unregistered securities, recruited unregistered brokers to call prospective investors, and otherwise took actions that assisted in raising more than $2 million from investors. Wall contended he was

[14] McDuff did instruct Benyo as to whom to name as the referring party on her referral form that was part of her subscription booklet. (Tr. 33:23-36:3; DX 55, at 19 of 25).

not acting as a broker because he was not licensed, had not solicited any investors, was not supervising those who did solicit, and had not sold any securities. *Id.*, at *3. Rejecting his arguments, the Commission held that Wall acted as a broker because he played "a significant role in furthering the scheme's success," stating:

> Wall denies soliciting any sales or supervising those who did and claims that he "never acted as a stockbroker" in connection with the scheme. It is clear, however, that one need not be directly involved in securities sales to be deemed a person associated with a broker or dealer for purposes of Exchange Act Section 15(b)(6).
>
> Wall's status as an associated person *is established based upon the significant role he played in furthering the scheme's success, for which he shared in the scheme's profit.* Wall's role included efforts to incorporate and register as a broker-dealer one of the issuers involved, and to act as that issuer's president. He also attempted to acquire an existing registered broker-dealer, and was involved in recruitment of salespersons into the scheme.

Id., at *3 (emphasis added).

As demonstrated through the credible testimony during the hearing by Quilling, Loecker, Benyo, and Biles, as well as Lancaster's testimony during McDuff's criminal trial, McDuff's promotion of, and participation in, the Lancorp scheme resemble the conduct at issue in *Wall.* As in *Wall,* the Court should conclude that McDuff acted as a broker.

a. Quilling's and Loecker's testimonies demonstrate that McDuff played a "significant role in furthering the scheme's success."

Quilling and Loecker both testified that, based on their extensive investigations which included numerous interviews and reviews of voluminous records, McDuff unquestionably played a significant role in furthering the success of the fraudulent Lancorp scheme and that, in fact, McDuff was the one in charge of the scheme. (Tr. 120:19-122:4; 124:3-21; 290:18-291:5). McDuff's own conduct following the collapse of the scheme – his lack of cooperation and flight

from the country – serve as strong corroboration of their credible conclusions. *See U.S. v. Martinez*, 190 F.3d 673, 678 (5th Cir. 1999); *United States v. Williams*, 775 F. 2d 1295, 1300 (5th Cir. 1985) (evidence of an accused's flight is generally admissible as tending to establish guilt).

Quilling's testimony should be afforded considerable weight as his credibility is established insofar as he has served as a court-appointed receiver in multiple fraud cases, at both the federal and state levels, for more than 20 years. As the court-appointed receiver over Lancorp, Quilling owed a fiduciary duty to the district court that appointed him, as well as to investors, and McDuff has not questioned Quilling's experience or qualifications to serve in such a capacity. (Tr. 115:18-116:1; *see also* "Investor Bulletin: 10 Things to Know About Receivers," www.sec.gov/oiea/investor-alerts-bulletins (Aug. 27, 2015) ("A receiver has a fiduciary duty to stakeholders and the court....)). Nor did the appointing court ever question Quilling's methods, conduct, findings, or recommendations in discharging his numerous duties as the Lancorp receiver. (*See generally SEC v. Megafund*, Case No. 3:05-cv-01328) ("Megafund Case")).

At the hearing, Quilling described his work as Lancorp's receiver: he met extensively with Lancaster, reviewed Lancorp records and bank accounts, interviewed investors, identified Lancorp's assets, which he traced and recovered on behalf of Lancorp's investors; identified and pursued fraudulent transfers; and ultimately determined which investors were entitled to recover from the receivership estate and in what amounts. (Tr. 117:5-119:4; *see also* Megafund Case, Doc. 405 ("Receiver's Final Report and Proposed Distribution Plan (Lancorp Financial Receivership Estate)")). Quilling interviewed investors and other individuals, including Stan Leitner, who operated Megafund; Steve Renner, owner of Cash Cards International; and Norman

Reynolds, Lancorp's attorney. (Tr. 119:8-120:1; 144:24-145:1). In his work, Quilling learned that while McDuff recruited Reese to perform the bulk of Lancorp's investor solicitations, McDuff also solicited investors himself. (*See* Tr. 124:4-19; 126:3-13; *see also* DX 39, at 15 of 21; DX 40, at 8 of 10; DX 41, at 12 of 15). He traced Lancorp investors' money as it was transferred into Megafund and back out to Lancorp and MexBank as purported profit payments. (Tr. 135:4-150:19). He followed the money in the MexBank account further into the recesses of CCI and traced those funds to McDuff and his family members, who used some of the proceeds to buy the property next door to McDuff's personal residence. (Tr. 139:19-141:13; 144:8-145:1). Based on all of his work, Quilling concluded that McDuff initiated Lancorp (it was his "brain child"), played a key role in its success, and ultimately received a portion of the alleged profits. (Tr. 120:2-122:4; 124:4-6).

Loecker also interviewed numerous witnesses, including Lancaster, Reese, Reynolds, and others. (Tr. 341:11-343:6). He also interviewed all of the Lancorp investors, confirming that McDuff did in fact solicit a number of other investors beyond just Benyo and Biles, though he more frequently participated in solicitations by assisting Reese in closing sales by providing Reese or his investor prospects additional information about Lancorp. (Tr. 289:14-292:21-24). Loecker reviewed all of Lancorp's records (Tr. 340:15-19), including the Joint Venture Agreement between MexBank and Lancorp Group. (DX 44; Tr. 304:24-307:15). Loecker also reviewed bank records from multiple entities, and followed the money trail along the same path as Quilling. (Tr. 297:11-299:7). Contrary to McDuff's criticism, Loecker obtained 95% of the financial records he reviewed directly from the original sources, relying on only a handful of financial records obtained by Quilling from one or two sources. (Tr. 298:15-

299:7). Like Quilling, Loecker traced the Lancorp investors' funds into Megafund, confirming that Megafund was not an A+ rated debt security and had not purchased any A+ rated debt securities, as Lancorp had promised its investors in the PPM (Tr. 307:16-308:10) and as McDuff himself had represented it would. (Tr. 29:5-12). Loecker also traced Megafund's purported profits out of Megafund, back into Lancorp and MexBank accounts, and into McDuff-controlled CCI accounts where McDuff personally benefited from them. (Tr. 308:11-313:7).

Loecker's and Quilling's testimonies and conclusions are credible, unrebutted, and corroborate one another. While McDuff devotes considerable portions of his brief to accusing these witnesses of lying under oath and being "sophomoric" "morons," the evidence is that these witnesses are long-time professionals – a 34-year lawyer and an experienced criminal investigator, both of whom have investigated financial frauds for years – against whom there is not a scintilla of evidence suggesting any bias or incentive to mislead the Court. (Tr. 114:6-115:23; 288:19-289:13). Rather, it is clear that these witnesses each discharged their duties to investigate McDuff and Lancorp and arrived at substantially similar conclusions based on their diligent review of the evidence. Indeed, their testimonies and opinions prove that McDuff acted as a broker because he recruited and directed the efforts of Lancorp's primary solicitor of investors, personally solicited and assisted in the soliciting and closing of sales of Lancorp securities, and played a significant role in the scheme's overall success, for which he shared in

the profits.[15]

b. Lancaster's testimony also clearly demonstrates that McDuff played a significant role in furthering the Lancorp scheme's success, further establishing that McDuff acted as a broker.

McDuff complains that Quilling and Loecker's testimonies are contradicted by Lancaster's depositions[16] and sentencing hearing testimony, though he frequently does not provide page or line numbers to prove where, or even whether, Lancaster's testimony differs. (*E.g.*, McDuff's PHB, at 18, 29, 30, 52, 54-59, 63, 66, 72, 74). A comprehensive review of Lancaster's testimony, however, actually bolsters and corroborates Quilling's and Loecker's testimony.

For example, Lancaster supported Quilling's testimony that McDuff created the "blueprint" for the Lancorp investment, orchestrated the scheme, and acted as a broker while advancing the scheme. Lancaster testified:

- McDuff was the "instigator" of Lancorp. (DX 37 [198:4-16]). McDuff approached Lancaster to be a fund manager for a replacement fund for the Avenger Fund investors, whose fund had failed. (DX 37 [185:9-186:6]).

- McDuff and Lancaster agreed Lancaster would manage Lancorp and McDuff would bring all of the investors to the fund. (DX 37 [186:1-8; 192:19-25]). "His [McDuff's] whole role and what subsequently became our agreement [with respect to the profit

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[15] McDuff did not object at the hearing to Quilling or Loecker testifying about the opinions they formed from their investigations, and indeed their opinion testimonies were relevant and admissible under FED. R. EVID. 701. Their testimonies and lay opinions prove that McDuff satisfies the criteria from *Wall* that he acted as a broker because he recruited the primary solicitor of investors, assisted him in closing sales, and played a significant role in the scheme's success, for which he shared in the profits. Under Rule 701, their opinions were rationally based on their perception, helpful to a clear understanding of their testimony and in determining facts in issue (McDuff's actions as a broker, including that he played a significant role in furthering the Lancorp scheme's success), and were not based on scientific, technical, or other specialized knowledge within the scope of expert witness rule.

[16] It is fair to rely on the Lancaster investigative transcripts, even though they are hearsay and McDuff was not present to cross-examine Lancaster, because McDuff himself repeatedly refers to and relies on them. (*E.g.*, Resp. PHB, at 54-59). While McDuff refers to them as Lancaster's "depositions," they are in fact the transcripts of Lancaster's investigative testimony.

sharing of earnings] was predicated on investors that he was responsible for bringing to the fund." (DX 37 [196:12-21]). McDuff's responsibility was to bring the investors. (DX 37 [200:16-201:6]).

- Lancaster made an arrangement with McDuff to split Lancorp profits with McDuff 50/50, to compensate McDuff for his efforts in steering investors to Lancorp. (DX 36 [139:6-140:7]).

- McDuff, Reynolds, Reese, and Stan Leitner, the latter of whom ran Megafund, all appeared to know each other before Lancaster was brought in. (DX 36 [79:7-18]). Lancaster had limited knowledge of these people and entities. (DX 36 [80:2-14]).

- Nearly all of Lancorp's investors were referred by either McDuff or Reese. (DX 37 [192:19-25]).

- McDuff personally sold at least a dozen investors directly. (DX 36 [74:2-17]).

- Lancaster felt like he was stepping into an "existing situation" in talking to Reynolds, implying that McDuff had already organized the scheme. McDuff asked him to be the fund manager and then introduced him to Reynolds "who briefed [Lancaster] on all activity that had occurred up to that point." (DX 36 [76:18-77:6]).

- McDuff was Lancaster's liaison with Reynolds: "He [McDuff] talked to him [Reynolds] as much or more than I did." (DX 37 [194:4-10]). In fact, Lancaster believed that McDuff had been working with Reynolds for so long that Reynolds might have a conflict of interest in representing the Lancorp Fund. (DX 37 [189:4-12]).

- Lancaster had no input into the Lancorp Fund offering documents because they had already been created by the time McDuff brought Lancaster in. (DX 36 [107:3-23]).

- When asked what his plans for the Lancorp Fund were, Lancaster *had no plan* except to reach the goal of having 100 investors. (DX 37 [201:2-6]). Lancaster had no ideas at all about what Lancorp would invest in.

- McDuff introduced Lancaster to Leitner, with Megafund, in a phone call. (DX 37 [292:5-11]). McDuff also told Lancaster that his father had known Leitner for 15 years, or someone McDuff knew had known Leitner for 15 years. (DX 37 [288:10-289:4]).

- McDuff told Lancaster that Megafund was the kind of investment strategy that fit the Lancorp Fund and had been successful. (DX 37 [291:1-6]). McDuff also told

Lancaster that the expected returns from Megafund were as much as 10% per month. (DX 37 [291:21-25]).

- It was McDuff's idea to invest the Lancorp funds in Megafund. (DX 36 [49:8-50:12]).

Lancaster's testimony also shows that McDuff was responsible for developing the mechanism for funneling the scheme's profits back to him. Lancaster testified about McDuff's compensation:

- Lancaster knew that McDuff and his company, SCC, would need to be compensated in some fashion for bringing the clients to Lancorp, possibly in some form of profit-sharing arrangement. (DX 37 [205:20-206:5]).

- Before Lancorp "became effective," McDuff told Lancaster he wanted to figure out some means as to how SCC could be compensated for bringing the investors to Lancorp. (DX 37 [208:9-25]). Lancaster testified that he and McDuff began discussing that issue before March 2004, when the fund became effective. (DX 37 [208:22-25]).

- Lancaster and McDuff did not have an agreement to pay "commissions" for bringing in the investors because they "could never come to terms on how to do it legally until this agreement," the JVA. (DX 37 [211:13-21]).

- Lancaster told McDuff he could not pay commissions legally. (DX 37 [203:10-204:4]).

- It was McDuff who suggested to Lancaster that he should "assign" management of the Lancorp Fund to Lancaster's separate company, Lancorp Group, and to charge a fee of 78% of all earnings on investments to be paid to Lancorp Group as a management fee. (DX 37 [214:24-216:17; 314:16-315:14]). Lancaster took McDuff's advice, executing an agreement with himself, as the trustee of the Lancorp Fund and as the owner of Lancorp Group. (DX 36 [36:22-38:11]). The investors were not told of this change. (DX 36 [38:12-14]). That step was a necessary predicate for completing the joint venture agreement (DX 44), so that McDuff/SCC/MexBank could be paid. (DX 37 [314:25-315:14]).

- It was also McDuff's idea to create the joint venture agreement (DX 44) so Lancorp could compensate McDuff/SCC/MexBank for bringing investors to Lancorp. (DX 36 [217:21-218:10]). McDuff suggested the idea of creating a "profit-sharing

arrangement in order to compensate" SCC for bringing in the investors. (DX 37 [212:1-213:13]). SCC could execute the agreement with Lancorp Group, which now had the right to 78% of Lancorp Fund's profits. (SCC "assigned" its rights to MexBank on the same date the JVA was executed (DX 45)).

- Having SCC receive some compensation "was part of the verbal arrangement [with McDuff], that this [Lancorp] was going to be a joint venture." Lancaster was the manager and McDuff and his associates would bring in all the money through investors. That way, Lancaster testified, he would not have to do any solicitations. "They would bring all the investors." (DX 37 [213:2-13]).

- When asked why run the profit-sharing agreement through MexBank, Lancaster said he did not know, except, "That was the arrangement that McDuff wanted to make." (DX 37 [204:5-22]).

- McDuff was the one who sent the JVA to Lancaster to sign, and Lancaster returned it to McDuff. (DX 37 [225:23-226:3]).

- The JVA *was* the arrangement by which SCC was compensated for bringing in investors to Lancorp Fund. (DX 37 [208:22-210:9]).

This testimony connects McDuff's efforts to identify, recruit, and solicit Lancorp investors with the payments he ultimately received for those efforts; *i.e.*, they establish McDuff's receipt of transaction-based or transaction-related compensation, one of numerous indicators of broker conduct. *See David F. Bandimere*, at *8.

In addition, Lancaster's criminal trial testimony further corroborates Quilling and Loecker's hearing testimonies about McDuff's leading role in the Lancorp scheme.[17] He testified:

- The idea for Lancorp came from Gary McDuff. (DX 53 [197:7-12]).

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[17] In his 100-page brief, McDuff never refers to Lancaster's criminal trial testimony when he argues that Lancaster's "testimony" contradicts Quilling and Loecker, and has never objected to its admissibility here. He does argue that Lancaster's *sentencing* hearing transcript (DX 13) contradicts Quilling and Lancaster, but it does not. McDuff appears to believe, incorrectly, that Lancaster's assumption of responsibility for his own actions during his allocution somehow exonerates McDuff.

- McDuff set up the conference with the attorney and provided the attorney all the information for the PPM except for information about Lancaster's background. (*Id.* [198:4-25]).

- It was McDuff's idea to set up insurance on the Lancorp offering and that McDuff was responsible for negotiating with the insurance companies. (*Id.* [201:11-21]).

- Lancaster did not recruit Reese to sell Lancorp; instead, it was McDuff who introduced Reese to Lancaster. (*Id.* [207:16-21]).

- McDuff was the first one who told Lancaster about the Megafund investment and that it was McDuff's idea to invest Lancorp's funds in Megafund. (*Id.* [208:4-23]).

- Lancaster did not tell investors that McDuff was directing his actions or anything else about McDuff and his role. (*Id.* [213:11-16]).

This testimony further shows the falsity of McDuff's conclusory claims that Lancaster's investigative testimony somehow contradicts Quilling and Loecker's conclusions. Quilling and Loecker's testimony about the conclusions they reached from their respective investigations are, in fact, corroborated by Lancaster's investigative *and* trial testimony. Quilling, Loecker, and Lancaster testified consistently and their testimonies overwhelmingly establish that McDuff (1) was the mastermind of the Lancorp scheme; (2) was responsible for soliciting and participating in the solicitation of investors; and (3) played "a significant role in furthering the scheme's success," just as in *Wall.* McDuff, a known liar and forger, is the outlier, and his uncorroborated, self-serving, and highly suspect version of events should be rejected.

B. The Division Demonstrated That the Public Interest Factors Weigh in Favor of Barring McDuff from the Industry.

In its underlying brief, the Division established how the public interest factors outlined in *SEC v. Steadman* weigh clearly in favor of permanently barring McDuff from working in the securities industry. (DOE PHB, at 30-35). For his part, McDuff cursorily addresses just one

Steadman factor—the question of whether he is currently in a position to continue to cause harm to investors. Even this factor, however, weighs in favor of sanctioning McDuff.

1. Incarceration does not exempt McDuff from being sanctioned.

McDuff argues that he will be 77 years old when he is scheduled to be released from prison in March 2032, and is hence "*unlikely* to take up a career investing," the inference being he is not *likely to be* a danger to the investing public now or in the future – though even McDuff himself offers no definitive assurance. (Resp. PHB, at 86) (emphasis added).[18]

Importantly, the mere fact that a respondent is in prison does not negate the public's interest in barring him from the industry. *Conrad P. Seghers*, 2007 SEC LEXIS 2238, at *13. Another administrative law judge recently reached that conclusion in *Randal Kent Hansen*, 2015 WL 1222484 (Mar. 18, 2015) (Initial Dec.) (Grimes, J.) (finality order at 2015 WL 1939411 (Apr. 29, 2015)), stating:

> Hansen says that because he will be imprisoned until at least 2021, he is unlikely to engage in similar conduct in the future. There are three flaws with this argument. First, the simple fact that Hansen will be imprisoned for a term of years does not demonstrate that he will not engage in similar conduct when he is released. Second, a "criminal sentence [is not] mitigative of the appropriate sanction to be imposed in the public interest in [an] administrative proceeding." *Don Warner Reinhard*, Exchange Act Release No. 63720, 2011 SEC LEXIS 158, at *27 (Jan. 14, 2011). Third, even if Hansen's imprisonment lessens the likelihood that he will reoffend, this fact is not "dispositive" of whether to impose a permanent bar. *Conrad P. Seghers*, 2007 SEC LEXIS 2238, at *13. As a final matter, I find that a full collateral bar will serve as a general and specific deterrent. It will deter Hansen and will further the Commission's interest in

[18] McDuff argues that if he successfully overturns the criminal and civil judgments against him, the foundation for sanctioning him in these proceedings "falls apart." (Resp. PHB, at 86). First, that argument is wholly contingent on issues outside the scope of these proceedings and is inextricably intertwined with his efforts to impermissibly re-litigate the issue of his criminal guilt and the civil injunction in this matter. Nevertheless, the jurisdictional foundation for this proceeding is the Commission's underlying civil injunction; thus, theoretically, even if McDuff was successful in overturning his criminal conviction and was released from prison, the civil injunction would still be in place. In that scenario, with McDuff out of prison, the permanent bar, based on the still valid civil injunction, would be more essential than ever.

> deterring others from engaging in similar misconduct. Given the foregoing, I find that it is in the public interest to impose a permanent, direct and collateral bar against Hansen.

Id., at *8 (respondent serving a nine-year prison sentence permanently barred from the industry); *see also Don Warner Reinhard*, 2011 SEC LEXIS 158, at *27 (Jan. 14, 2011). To be sure, inmates have also been known to operate fraudulent schemes *from* prison. *See United States v. Carter*, 68 F. 3d 469 (5th Cir. 1995) (*per curiam*) (defendant committed wire fraud from prison); *United States v. Lashmett*, 963 F.2d 179, 180 (7th Cir. 1992) (defendant administered insurance fraud scam from prison); *Akers v. Watts*, 740 F. Supp. 2d 83, 87-89 (D.D.C. 2010) (plaintiff engaged in multiple fraudulent schemes while serving a 105-month sentence, which subsequently became a 327-month sentence).

2. The public interest factors addressing acknowledgement of wrongdoing and remorse are not unconstitutional.

McDuff has never offered any assurance against future violations or demonstrated that he recognizes the wrongfulness of his conduct. Quite to the contrary, he continues to challenge his conviction and underlying default judgment and argue that others are to blame while asserting he did nothing wrong. At best, McDuff makes the hardly reassuring statement that his return to a securities career is "unlikely." Presumably, McDuff believes there is some chance he will resume his securities-related activities when he is released from prison, and the Division posits that he certainly will, considering he was already a convicted felon when he engaged in the Lancorp scheme – all the more reason to impose a permanent bar.

McDuff errantly contends that "to seek punishment (sanctions, fines, etc.) based on [his] refusal to say he is guilty and sorry for something he did not do is frankly repugnant and abhorrent to the U.S. Constitution." (Resp. PHB, at 86). But courts have repeatedly recognized

the Commission's ability to weigh a respondent's "fail[ure] to recognize the wrongful nature of his conduct" as a factor to consider when determining appropriate sanctions. *Raymond J. Lucia Companies, Inc. v. SEC*, — F.3d —, 2016 WL 4191191, at *12 (D.C. Cir. Aug. 9, 2016); *see also Siris v. SEC*, 773 F.3d 89, 97 (D.C. Cir. 2014) ("the Commission justifiably concluded that Siris had not meaningfully recognized the wrongful nature of his conduct" by "continu[ing] to contest the factual bases for the securities law violations alleged in the complaint"); *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004) ("Kirby still thinks he did nothing wrong, which casts doubts on his promise that he will mend his ways."). Allowing a respondent to choose between "recogniz[ing] the wrongfulness of his conduct" and potentially "risk[ing] more severe remedial actions do[es] not unconstitutionally burden the respondent." *Seghers v. SEC*, 548 F.3d 129, 136-37 (D.C. Cir. 2008); *see also Gregory Bartko*, Exchange Act Release No. 71666, 2014 WL 896758, at *11 & n. 64 (Mar. 7, 2014). McDuff's argument to the contrary should be rejected.

3. McDuff fails to discuss the other public interest factors.

McDuff presents no arguments and identifies no evidence mitigating (1) the egregiousness of his actions; (2) their recurrent nature; or (3) the extreme degree of *scienter* with which he acted.

McDuff discusses two facts relevant to the recurrent nature of his wrongdoing – his prior felony conviction and admitted forgery of the Attorney General's signature in a court filing – although he does not discuss them in the context of *Steadman*. McDuff contends that because his 1993 conviction is more than 10 years old and it cannot be used against him. (Resp. PHB, at 92). McDuff seems to rely on an analogy to 15 U.S.C. § 78c(a)(39)(F), which provides that a conviction is a statutory disqualification for 10 years from membership in a self-regulatory

organization. (*Id.*). But no time limit exists on the consideration of convictions in connection with the public interest factors. *Robert G. Weeks,* 2002 WL 169185, at * 59 & n. 43 (Feb. 4, 2002) (Initial Dec.) (Kelly, J.) (Section 21B(c) of the Exchange Act does not limit the age of prior violations, and respondent's prior conviction makes him a greater danger to the investing public; the events at issue occurred more than ten years after respondent's prior conviction). Nor does McDuff cite any legal authority to that effect.

As to his admitted, intentional forgery, McDuff questions "what, if anything, does the Eric Holder fiasco have to do with 'broker' 'dealer' issue?" (Resp. PHB, at 90). McDuff's admitted forgery highlights his continued intent to defraud, mislead, and avoid responsibility for wrongdoing, and is also relevant to the *Steadman* analysis of the recurring nature of his violations, as well as to his credibility and the egregiousness of his conduct. McDuff filed the forged document on the eve of being sentenced in federal court *for the second time.* (DX 18; DX 13 [74:20-76:24]). His forgery indicates a total absence of any moral compass and an utter disregard for investors. McDuff's argument that the Division raises the forgery "fiasco" solely to make him look bad further shows that he believes that conduct was insignificant and not worth mentioning. McDuff's complete disregard of the truth makes him precisely the type of a person who needs to be permanently barred from the securities industry—whether he serves his entire 25-year sentence or succeeds in overturning his conviction on appeal and is released sooner.[19]

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[19] In new, extensive testimony McDuff submits in his declaration, which ought to be stricken because it is self-serving, untested in cross-examination, and because he failed to present it at the hearing, McDuff describes how he was allegedly victimized by Gordon Hall, who persuaded him to employ the bogus "contract-settlement" defense. (Aug. 12, 2016 McDuff Decl., at ¶ 36). It is a ludicrous story. McDuff states that, after the Commission sued him in March 2008, "I could see no way to present a clear and incontrovertible defense," and this eventually led him to Hall. That statement implies that McDuff *wanted* to present a defense, skipping over the events of 2006, when the Division subpoenaed McDuff and he could have presented his defense then. Instead, in 2006, he filed nonsensical responses to the subpoena, to the subpoena enforcement action, and to the show cause order, threatening to sue the

C. McDuff's Challenges to the Testimony of the Division's Witnesses Fail to Raise Any Valid Concerns.

McDuff repeatedly accuses the Division's four witnesses of being lying, biased, "sophomoric" "morons" who relied impermissibly on hearsay at the behest of dishonest, conspiring government attorneys who submitted falsified and altered documents. (*E.g.*, Resp. PHB, at 48-50, 56-57, 60, 74, 81, 83-85). Thus, McDuff posits, none of the testimony of the Division's witnesses should be accorded any weight. However, only one person has an incentive to lie in this matter and is, in fact, a proven liar: McDuff.

Benyo and Biles – two investors who took time away from work and family to travel to McDuff's Beaumont prison to testify about their experiences with him – had no incentive to lie. Nor has McDuff presented any evidence of their incentive or bias. Rather, they were clear and unequivocal that McDuff solicited them to invest in Lancorp, explained the Lancorp investment to them, made representations, answered questions, recommended the investment, and persuaded them to buy many shares. (Tr. 26:5-33:3; 242:10-250:14).

The other two witnesses, Loecker and Quilling, are, respectively, a 15-year special agent experienced at investigating financial frauds, and a 34-year attorney who served as the court-appointed receiver over Megafund and Lancorp, thereby acting as a fiduciary to the investors and the district court that appointed him, and who has served in that capacity in dozens of other

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investigative staff attorney and the Commissioners merely for issuing a subpoena. That was four years before he met Hall. In 2008, after he was sued, he filed multiple nonsensical, antigovernment documents in the civil case, two years before he met Hall. In March 2013, Hall's recommended plan of action had resulted in McDuff's conviction. By April 2014, when McDuff forged the Attorney General's signature, McDuff should have been on notice that Hall's defense was not working. McDuff has enough experience with the legal system to have recognized Hall's path was patently fraudulent. McDuff's story, yet another retroactive rationalization, is an attempt to make himself out to be the victim in his own forgery. McDuff knew that forging the Attorney General's signature was wrong, and his attempt to rewrite history should be given no credence but should, in fact, weigh against him.

receiverships. Again, McDuff presented no evidence of their bias or incentive to lie, and they both testified that, based on their respective investigations, forensic examination of the evidence, and related litigation, McDuff solicited, offered, and sold securities, recruited the salesmen, and played a significant role in designing and furthering the Lancorp scheme's success.

1. Lynn Benyo and Jay Biles.

McDuff challenges the strength of Benyo and Biles's memories, but his arguments are unavailing. With Benyo, he endeavors to persuade the Court that it was Levoy Dewey who introduced Benyo to Lancorp, not McDuff, but Benyo was clear and definitive in her testimony concerning McDuff and Dewey. (*E.g.*, Tr. 41:8-42:4; 66:13-22). In reality, it is McDuff who has consistently misrepresented Dewey's declaration, falsely claiming that Dewey states he referred Benyo to the Lancorp investment when he does not. (DOE's PHB, at 7 & n. 5; RX 41).

At the hearing and in his brief, McDuff also attempted to discredit Benyo by questioning her from two Forms 302, written summaries of interviews prepared by federal criminal investigators.[20] (RX 4-A, RX 4-B; Resp. PHB, at 44, 47-48). Post-hearing, McDuff offered the two Forms 302 of Benyo's investigative interviews as some of his additional 40 exhibits (along with other Forms 302). The Forms 302 were not part of the Division's investigative file, and, until McDuff offered them as exhibits, the Division had never before seen these documents.[21]

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[20] Forms 302 have been deemed inadmissible for impeaching witnesses on cross-examination because they represent the 'investigator's selections, interpretations and interpolations.'" *United States v. Brika*, 416 F. 3d 514, 529 (6th Cir. 2005). But they are hearsay, and as such could be admissible in an administrative proceeding assuming some indicia of reliability are present. The Court may rely on hearsay, so long as the Court evaluates its probative value and reliability and fairness of use. *Application of Joseph Abbondante*, 2006 WL 42393, at *7 (Jan. 6, 2006) (Comm'n Op.); *see also Application of Charles D. Tom*, 1992 WL 213845, at 3 (Aug. 24, 1992) (Comm'n Op.).

[21] At one point in his brief, McDuff claims he obtained a long list of documents, including the Form 302 for Reese, "mid-hearing," a reference to the copies of documents his family made from the Division's investigative file which he received on June 15th. (Resp. PHB, at 80). But the Division never had the Form 302s, which means

McDuff relies on those forms, but they do not contradict Benyo's live testimony in any material way, and her live testimony corroborates them.

Post-hearing McDuff also offered the Forms 302 summarizing two investigative interviews agents conducted with Biles. (RX 47). Again, the Division had never before seen these 302s until it received McDuff's additional 40 exhibits. (Supplemental Declaration of Janie L. Frank, filed this same date, at ¶ 114). Interestingly, Loecker's interview with Biles (RX 47, at 3-4) provides additional, *supporting* detail to Biles's live testimony, especially in regard to McDuff's misrepresentations to Biles. These misrepresentations reflect the type that the Commission stated in *David F. Bandimere* counted as broker activity, as discussed above in Section A.3., *supra*. *David F. Bandimere*, 2015 WL 6575665, at *8. According to Loecker's Form 302, Biles informed Loecker that McDuff claimed: (1) the Lancorp investment provided an 18% return; (2) that McDuff had personally negotiated the insurance policy for Lancorp with Lloyd's of London; (3) that the insurance covered all the invested funds, thereby implying the insurance was already in place; (4) that by 2003, Lancorp had been in business for five years, which it had not; (5) that Lancaster was a certified trader; (6) that Lancaster had been in the investment business for more than five years, which he had not; and (7) that the funds were already being actively traded. (RX 47, at 4). While McDuff's specific statements were false,[22]

McDuff had the Forms 302 well before the hearing. (Supp. Dec. of Janie L. Frank, at ¶ 114). The Division assumes McDuff obtained these documents during his criminal case, when the government produced its file to McDuff and his stand-by counsel. At McDuff's sentencing, Kyle Kemp, McDuff's court-appointed stand-by counsel, told the court that he McDuff wanted to take possession of the documents Kemp had copied for him from the government's file, that the government did not object, and that Kemp wanted it put on the record that the was turning over everything he had. (DX 13 [51:25-53:4]). The Division believes that is when McDuff acquired any Forms 302 in his possession.

[22] These statements are also evidence of two of the public interest factors--the degree of *scienter* and the egregiousness of McDuff's actions in connection with the underlying fraud.

they nonetheless represent the very sort of details about an investment that a *broker* would know and explain to a prospective investor, and not the details a social acquaintance passes along about his own investment (as McDuff described the conversation (Tr. 469:20-23)).

McDuff also misrepresents Biles's testimony. He states that Biles "does not remember what [documents] he got, if anything, from McDuff." (Resp. PHB, at 72). In fact, Biles testified that he believed McDuff gave him a prospectus at the 2003 meeting. (Tr. 247:10-24). On cross-examination, McDuff asked him if it was possible that McDuff showed him a copy of his own prospectus but did not give Biles one. While Biles agreed that was possible, his honest acknowledgement of that possibility does not transform his credible statement that he "believed" McDuff gave him the prospectus into "he does not remember what he got, if anything, from McDuff."

2. Michael Quilling.

McDuff fails to explain how any single exhibit supports his repeated claim that the evidence refutes Quilling's testimony. For instance, he challenges Quilling's conclusion that McDuff was responsible for creating the "blueprint" for the Lancorp scheme by listing a string of off-topic, irrelevant exhibits – mostly declarations (including some from his incarcerated former associates) – discussing the supposed ownership of SCC, a company McDuff claimed to be acting for. (Resp. PHB, at 52-53). But, as discussed in Section A.1., n. 8, *supra,* SCC's formal ownership is wholly irrelevant to whether McDuff acted as a broker in connection with the

Lancorp fraud scheme.[23]

3. Ron Loecker

McDuff criticizes Loecker's testimony principally by claiming that he offered opinion when he was not designated as an expert. Loecker is a seasoned professional criminal investigator who spent years investigating the Megafund, Lancorp, and MexBank fraud schemes, including McDuff's role in them. (Tr. 288:17-290:17). Loecker mastered a huge volume of information about Lancorp, McDuff, Reece, and Lancaster, along with information about the other entities and individuals involved in the fraud schemes. (*See* Tr. 290:18-299:7). Loecker's testimony was admissible and relevant under Rule 701 as lay opinion because it was rationally based on his perception, helpful to a clear understanding of his testimony and in determining fact issues, and was not based on scientific, technical, or other specialized knowledge. *See* FED. R. EVID. 701. In any event, McDuff waived any complaint to Loecker's lay opinion testimony because he failed to object to it at the hearing.

McDuff argues without explanation that 35 exhibits rebut Loecker's testimony, including declarations of Shinder Gangar (RX 32-33) and Alan White (RX 34), both former associates of McDuff who are currently in prison and whose credibility is suspect. (Resp. PHB, at 77-78; Tr.

[23] McDuff also contends that Quilling's testimony is contradicted by Lancaster's investigative testimony and the sentencing hearing transcript. (*E.g.*, Resp. PHB, at 54, ¶ 2; 55, ¶ 3; 58, ¶ 15). But, as with his exhibits, McDuff frequently does not identify where or how Lancaster's testimony contradicts or rebuts Quilling's. As discussed at Section A.3.b., *supra*, Lancaster's testimony *supports* Quilling's testimony that: (1) McDuff originated the "blueprint" for Lancorp; (2) that McDuff was in charge of soliciting the investors; (3) that McDuff did sell some investments directly; (4) that McDuff directed Lancaster to invest in Megafund; and (5) that McDuff received a portion of the purported Megafund profits. (*See supra,* at 15-19). Lancaster's testimony at McDuff's criminal trial also supports these facts.

480:16-481:14). McDuff fails to explain how any of his generally cited (at best) exhibits rebut Loecker's testimony, and in fact the Division contends that they do not. [24]

D. McDuff Asserts Numerous Incorrect, Irrelevant, or Immaterial Arguments.

McDuff advances numerous arguments which are legally incorrect, irrelevant, or immaterial and many more that do not warrant response.

1. The five-year limitations statute does not apply to equitable remedies like an industry bar.

McDuff is mistaken when he argues that the five-year statute of limitations contained in 28 U.S.C. § 2462 bars this proceeding because the fraudulent conduct at issue occurred more than five years before proceedings were instituted. (Resp. PHB, at 69-70). As the Commission has made clear, 28 U.S.C. § 2462 applies only to relief "'imposed in a punitive way,' *i.e.*, relief that is 'intended to punish' wrongdoers." *Timbervest, LLC*, 2015 WL 5472520, at *25 (Sept. 17, 2015)(quoting *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915), and *Gabelli v. SEC*, 133 S. Ct. 1216, 1223 (2013)). An industry bar "is not 'punishment' nor is it 'punitive' because such bars protect investors in the future from unfit professionals." *Id.*

2. The Division did not act with "unclean hands," and such a defense does not apply to the government.

McDuff alleges multiple issues under the general heading of "unclean hands," including accusing Division attorneys of lying, suborning perjury, and submitting altered documents to the Court. (Resp. PHB, at 84-85).

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[24] When McDuff does give a page and line number, it is frequently on an irrelevant point, such as when he refers to Lancaster's understanding (provided to him by McDuff) that Terrence de'Ath owned SCC (Resp. PHB, at 52). But McDuff sometimes offers a page and line number when he wants to selectively, and misleadingly, quote a statement he views as favorable. For example, he misleadingly quotes Lancaster as purportedly not knowing how many investors McDuff sold the Lancorp investment to (Resp. PHB, at 57), when Lancaster stated his estimate, on the next line, that McDuff had solicited a dozen investors. (DX 36 [74:12-17]).

"Unclean hands," traditionally an equitable defense to an injunction or other equitable remedy, derives from the maxim that "he who comes into equity must come with clean hands." *Shondel v. McDermott*, 775 F.2d 859, 868-69 (7th Cir. 1985). "[I]t is well settled," however, "that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Serv.*, 467 U.S. 51, 60 (1984). This proposition arises out of the concern that "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Id.* The "unclean hands" doctrine thus does not apply to a government agency, such as the Division, while it is pursuing an enforcement matter in the public interest. *See SEC v. Blavin*, 557 F. Supp. 1304, 1310 (E.D. Mich. 1983), *aff'd*, 760 F.2d 706 (6th Cir. 1985); *SEC v. Gulf & W. Indus., Inc.*, 502 F. Supp. 343, 348 (D.D.C. 1980). McDuff's argument thus fails at the threshold.

In any event, his claims of litigation misconduct are unfounded. McDuff alleged that the Division offered an "altered document" at the hearing. McDuff refers to Biles's copy of Lancaster's April 5, 2004 letter, on which Biles's wife wrote the word "Insurance" in the margin. (Resp. PHB, at 73-74, 85). The handwritten note, made by the letter's recipient on their own copy, was a simple marginal note that did not alter the document's substance, was not made to deceive anyone, and was explained at the hearing. (DX 62; Tr. 260:9-263:14; 286:1-287:2).

3. "The vast majority" of certain exhibits McDuff claimed he received "mid-hearing" were documents he had in his possession all along and were never part of the Division's investigative file.

McDuff misrepresents that the "vast majority" of 21 exhibits listed in a string cite were not provided to him until "mid-hearing," or after, referring to portions of the Division's

investigative file McDuff received on June 15, 2016. (Resp. PHB, at 80). Of those 21 exhibits though, 17 were documents the Division never had in its possession. One document, RX 31, is the 302 for Reese (*see supra,* n. 21), and the remainder are affidavits, declarations, or letters McDuff collected after his conviction.

McDuff also states that the Division "furnished 1000's of pages of evidence mid-hearing due to the BOP's continued obstruction of justice." (Resp. PHB, at 10). That statement misrepresents the facts. The Division did not "furnish" McDuff with thousands of pages of evidence in the middle of the hearing. The Division "furnished" its investigative file in July 2014 and again in May 2016. (Frank Dec., at ¶¶ 57-74). Delivery of those materials to McDuff was the responsibility of McDuff and his designated representatives, and his receipt of those documents mid-hearing (and after) was the result of their failure to comply with well-known BOP regulations on how inmates receive packages. (Frank Dec., at ¶ 49; ¶¶ 76-84).

4. McDuff argues that other, unrelated cases exonerate him, but they have no applicability here.

McDuff has repeatedly argued in this proceeding that several district court decisions involving O.N. Equity Sales Co. ("ONESCO"), where Lancaster was associated as a registered representative for nine months, decided certain issues conclusively in his favor. But those cases are factually and legally irrelevant because they deal with the arbitrability of investors' claims that ONESCO failed to supervise Lancaster in connection with the Lancorp investment. *See, e.g., O.N. Equity Sales Co. v. Pals*, 509 F. Supp. 2d 761, 765-766 (N.D. Iowa 2012). Those cases determined whether a valid agreement to arbitrate existed between ONESCO and the investors and whether the investors' allegations about ONESCO's supervision failures were encompassed within the arbitration agreement. The cases were not about – and never discussed – McDuff's

wrongdoing, and, because the sole issue was the procedural consideration of arbitrability, the courts did not decide the merits of the investors' supervision claims.

McDuff uses these cases to argue that Lancorp did not engage in the offer or sale of securities until it misappropriated investors' funds to Megafund. But that grossly mischaracterizes the law and the evidence, as it is beyond any reasonable debate that Lancorp offered and sold securities in 2003 when McDuff and Reese solicited investors for Lancorp and obtained their investment funds. *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). McDuff's attempt to undercut the jurisdictional basis for this proceeding is yet another impermissible collateral attack on the underlying civil judgment and must be disregarded.

5. Alleged venue issue is a relitigation of the civil case and does not affect the jurisdiction of this proceeding.

In another attack on the civil judgment, McDuff claims the Commission's civil case is invalid because the Commission sued him in the Northern District of Texas, but he was "found" in the Fannin County Detention Center in the Eastern District of Texas when it served him with process. McDuff jumbles venue with service of process. The district court has twice refused to vacate its judgment in response to McDuff's post-judgment challenges, and the statutory basis for this administrative proceeding remains intact.[25] If the statutory basis for the sanction in this proceeding is nullified, McDuff may petition the Commission for reconsideration. *See Michael D. Montgomery*, 2014 WL 5035370, at *3 n. 7 (Oct. 9, 2014) (Initial Dec.) (Murray, J.).

[25] On September 20, 2016, the Magistrate Judge in the civil case recommended that McDuff's third challenge to the civil judgment, his "Motion to Set Aside Void Judgment for Defective Service of Process" (Doc. 61 in the civil case file), be denied. "Findings, Conclusions, and Recommendation," *SEC v. McDuff*, Case No. 3:08-CV-0526 (Doc. 72) (Sept. 20, 2016). Objections to the Magistrate Judge's recommendation are due 14 days from the ruling.

E. McDuff's Declaration Contains Improper and Irrelevant Evidence That Should Be Stricken, or Alternatively, Accorded No Weight.

McDuff submitted a declaration on August 12, 2016, which in part addresses the issues the Court ordered the Division to address in its May 19, 2016 "Order on Motion to Dismiss" (AP-3855), as well as three issues the Court asked both parties to address in its June 22, 2016 "Post-Hearing Order and Protective Order" (AP-3934).[26] McDuff's declaration, however, inappropriately goes beyond what the Court solicited and, worse, misrepresents facts.

1. McDuff impermissibly introduced additional, irrelevant testimony.

Throughout paragraphs 1-40 and 45 of his declaration, McDuff provides additional unsolicited testimony on substantive issues, improperly supplementing his direct testimony. While McDuff covers some of the issues he testified about at length during the hearing, he adds further details. (*Compare* Tr. 489:3-20 *and* McDuff Dec., at ¶ 36). McDuff's additional testimony should be stricken, or, alternatively, given no weight because he is presenting additional direct testimony after the close of the hearing *and* after having had the benefit of reading the hearing transcript, in which he could determine at his leisure where he wanted to provide additional details. It is an improper attempt to augment what he has already presented. To be sure, McDuff testified during the hearing for more than two and a half hours – longer than any other witness – and had sufficient time and opportunity to offer whatever personal testimony or evidence he desired. (Tr. 401-480). In fact, the Division was only allowed approximately five minutes to cross-examine McDuff. (Tr. 480:6-489:20). To permit him to unilaterally and self-

[26] Paragraphs 56-58 of McDuff's Declaration presents McDuff's version of how the prison responded to his requests for accommodations to prepare for the hearing.

supplement his testimony at this late stage, and without being subject to cross-examination, would unfairly prejudice the Division.

2. McDuff presents collateral and irrelevant information about his life in prison.

Declaration paragraphs 48-51, and 54 (a), (e)-(o), (u), (z), (cc), (dd), and (hh) describe events related to the alleged difficulties McDuff functions under in prison and how he believes prison employees have mistreated him, thereby handicapping his defense.

Those paragraphs are irrelevant to the issues in this matter. They reflect issues existing – if taken as true – solely between McDuff and the Bureau of Prisons. Moreover, the Division and the Court have no way to ascertain the truthfulness of McDuff's contentions, and attempting to do so now would open up these proceedings to irrelevant and needless collateral litigation. With no check on McDuff's facts, this credibility-challenged respondent can say whatever he wants in an effort to generate sympathy, confuse the issues, and avoid liability. These portions of his declaration should be stricken or afforded no weight.

3. McDuff addresses only three issues from the Court's June 22, 2016 Order.

Of the topics listed in the Court's June 22, 2016 Order, McDuff addresses only three.

a. The Investigative File.

Paragraphs 42-44, 46, 52-53, 54 (the main portion), 54(q), 54(r), 54(t), 54(v), and 55 in McDuff's declaration discuss the production of the Division's investigative file. Most of these paragraphs present McDuff's uncorroborated and misstated version of events. The Division rebuts portions of these paragraphs in the Supplemental Declaration of Janie L. Frank, filed in conjunction with this Reply Brief. (Supp. Frank Dec., at ¶¶ 107-114).

b. Public Hearing.

Paragraphs 54 (p), (s), (w), and (x) of McDuff's declaration deal with public access to the hearing and McDuff's efforts to have others present to assist him at the hearing. Again, these paragraphs present McDuff's unsupported version of events, which the Division does not wholly agree with. The Division rebuts portions of these paragraphs in supplemental declaration. (Supp. Frank Dec., at ¶¶ 115-119).

c. Weight Accorded to Investigative Transcripts.

The Court asked the parties to address the weight to be given to testimonial transcripts where McDuff either chose not to cross-examine witnesses (his criminal trial), or was not present to cross-examine witnesses (investigative testimony of various witnesses). McDuff does not address the Court's question, but unquestionably he repeatedly cites and relies on the investigative testimony transcripts at which he was not present to cross-examine the witnesses. Hence, through his conduct, it is clear that McDuff tacitly concedes that such testimonies are admissible and should be accorded weight.[27]

4. *After* the hearing, McDuff reurges an amended witness list.

In Paragraph 54 of his declaration, McDuff re-urges an amended witness list, identifying newly proposed witnesses,[28] allegedly because the Division explored "non-broker-dealer issues"

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[27] McDuff never mentions the criminal trial transcript, in his brief or his declaration. If McDuff accepts and relies on transcripts where he was not present to cross-examine the witnesses, then clearly the same weight accorded to those transcripts, where he was not present, should be accorded to transcripts where he *was* present but simply chose not to cross-examine the witnesses.

[28] McDuff identifies 24 witnesses in his declaration, but eight are new and not previously identified at the April 11, 2016 prehearing conference at which proposed witnesses were discussed and decided on. The eight new witnesses are Gary Lancaster, Rev. John McDuff, David Taylor, Alan White, David Deaton, Lynn Hodge, Gregg Harris, and Gordon Brown, most of whom he has submitted declarations for. (April 11th PHC Tr. 50:21-89:22; 93:18-24). He omits from his new list Eduardo Trejo, Adolfo Noriego, Jessica Magee, and Kenneth Humphries.

which "created the need for [him] to call [his] (anticipated but denied) witnesses in rebuttal." If McDuff believed that the Division explored "non-broker-dealer issues" at the hearing – which the Division disputes – he had a duty and opportunity to object. But he did not, and he has therefore waived any complaint.[29]

In his brief, he claims these witnesses "would have testified in part to the public interest factors (*i.e., that McDuff broke no law, did not deceive them*, etc...)." (Resp. PHB, at 86) (emphasis added). That description, however, confirms exactly why the Court declined to permit McDuff to call those witnesses: they possess no relevant or probative information concerning whether McDuff acted as a broker or on any of the public interest factors, and McDuff sought to call them purely in an effort to re-litigate his guilt. (McDuff Dec., at ¶ 54(ff)). Their irrelevance is confirmed by McDuff's summaries of their proposed testimony, as most descriptions indicate he would have them testify about irrelevant background information or his adjudicated criminal conduct.

The Court has the authority and discretion to control the conduct of the administrative hearing. *See* ROP Rule 111(d) (hearing officer has authority to do all things necessary and appropriate to discharge his duties, including "regulating the course of a proceeding and the conduct of the parties and their counsel"); ROP Rule 232 (hearing officer may deny request for subpoena if he determines, after consideration of all the circumstances, that the subpoena is unreasonable, oppressive, excessive in scope, or unduly burdensome); ROP Rule 326 (the parties' presentation of evidence, rebuttal evidence, and conduct of cross-examination is within

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[29] In any event, his remedy is not to reopen testimony and call 24 witnesses, but to argue now what specific testimony or exhibits allegedly addressed irrelevant issues and ask the Court to disregard such evidence.

the discretion of the Commission or hearing officer, as may be required for a full and true disclosure of facts.)

This Court's rulings prior to the June 15th-16th hearing restricting McDuff's witnesses were within the Court's sound discretion. As this is a "follow-on" administrative proceeding, the issues are simple: whether McDuff acted as a broker and whether the public interest factors justify sanctions. The Court repeatedly explained this to McDuff (with considerable patience). (*E.g.*, Mar. 27, 2014 PHC Tr. 13:16-17; 17:24-19:20; 22:21-23:17; 37:1-38:22; April 11th PHC Tr. 56:5-58:2; 58:21-60:6; 79:11-81:3). The Court's rulings were appropriate to prevent McDuff from needlessly lengthening the hearing and delving into impermissible topics outside the scope of this action. (April 11th PHC Tr. 57:7-17). McDuff's newest efforts to identify and call, or complain about not being permitted to call, witnesses should be rejected.

III.
CONCLUSION

McDuff has not submitted any evidence, or presented any arguments, that refute the Division's overwhelming evidence that he acted as a broker in connection with the Lancorp scheme. He directly sold Lancorp shares to investors, two of whom testified live during the hearing. As Quilling and Loecker established, McDuff personally solicited investors and recruited Reese to perform the bulk of the soliciting, and supervised, assisted, and paid him for his solicitations. McDuff negotiated with Lancaster over how he would be paid for bringing in investors, and while Lancaster refused to pay him an *express* commission because he knew that was illegal, at McDuff's suggestion Lancorp paid him a portion of Lancorp's supposed profits--which the Commission nevertheless considers to be broker compensation insofar as the funds were paid in exchange for McDuff bringing in investors. Unrebutted evidence proves McDuff

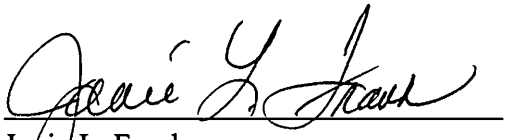
received a portion of Lancorp's purported profits from its ill-fated, and undisclosed, Megafund investment, from which he paid Reese for his solicitations, and which McDuff and his family members used for their benefit. McDuff acted as a broker because, among other things, he unquestionably played a significant role in furthering the scheme's success.

McDuff has also failed to submit any evidence or credible argument overcoming a conclusion that the public interest factors weigh heavily against him. He is unquestionably someone that needs to be barred from the industry. He was enjoined from violating the antifraud provisions of the federal securities laws, which alone is enough to support the bar. *See Geiger v. SEC*, 363 F. 3d 481, 489 (D.C. Cir. 2004) (mere existence of a violation of the antifraud provisions of the federal securities laws raises inference that the wrongful acts in question will recur, in which case the bar is appropriate). In addition, he is a twice-convicted felon who, during the course of the underlying litigation, refused to cooperate with investigations, fled the country to avoid prosecution, sought to obstruct proceedings with anti-government pleadings not cognizable under the law, and then forged the Attorney General's signature to a pleading in which he impersonated the government asking to dismiss his indictment. McDuff takes *no responsibility* for his actions, and continues to lay blame on others, including the very investors he solicited and defrauded.

For all of these reasons, the Division respectfully requests an Initial Decision concluding that McDuff acted as a broker during the relevant period and that the public interest factors warrant an order permanently barring him from further association with any broker, dealer, investment advisor, or other financial industry professional identified in Section 15(d)(6).

Dated September 23, 2016.

Respectfully submitted,



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SERVICE LIST

In accordance with Rule 150 of the Commission's Rules of Practice, I hereby certify that a true and correct copy of the foregoing *Division of Enforcement's Response to Respondent's Post-Hearing Brief* was served on the persons listed below on the 23rd day of September, 2016, via certified mail, return-receipt requested:

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