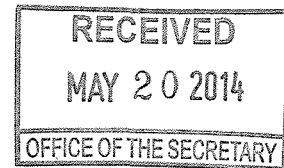


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



In the Matter of

GARY L. McDUFF,

Respondent.

ADMINISTRATIVE PROCEEDING
File No. 3-15764

**DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT'S
MOTION FOR SUMMARY DISPOSITION**

The Division of Enforcement of the Securities and Exchange Commission files this Response to Respondent Gary L. McDuff's Motion for Summary Disposition in the above-referenced matter. Respondent's motion is based on the idea that this Court should disregard the civil judgment, including the issuance of an injunction, entered against him on February 22, 2013, by the United States District Court for the Northern District of Texas ("the Injunction"). His argument appears to be that the Injunction should be disregarded because he allegedly obtained a prior judgment against the Division from an administrative court in Arizona that predates and therefore supersedes the Injunction. There are multiple reasons why this Court should deny Respondent's motion for summary disposition.

A. Respondent's Motion is Premised on a Collateral Attack of a Federal Court Judgment.

1. The essence of Respondent's motion is a collateral attack on the Injunction. Collateral attacks on judgments are not permissible in Commission administrative proceedings. *See, e.g., In the Matter of Peter Siris*, 2013 WL 6528874 at *11, SEC Release No. 3736 (Dec. 13, 2013) (follow-on proceedings are not an appropriate forum to revisit the factual basis for or make legal challenges to an order issued by a federal court); *In the Matter of James E. Franklin*, 2007

WL 2974200 at *4, SEC Release No. 56649 (Oct. 12, 2007) (“it is well established that Franklin is collaterally estopped from challenging in this administrative proceeding the decisions of the district court in the injunctive proceeding”); *In the Matter of Joseph P. Galluzzi*, 2002 WL 1941502 at *3, SEC Exchange Act Release No. 46405 (August 23, 2002) (respondent is collaterally estopped from challenging his injunction or criminal conviction in a subsequent administrative proceeding).

2. The only inquiry for this Court is whether the federal court injunction was entered. Its validity is not subject to question. The Injunction against Respondent was indeed entered; a copy is attached as Exhibit “L” to the Division’s Motion for Summary Disposition. Therefore, Respondent may not be heard to challenge its validity.

3. In fact, Respondent concedes that the Injunction was entered against him. In his Answer, he “conditionally” admitted that the judgment was entered, before proceeding for another 17 pages with an explanation as to why this Court should disregard it. (Respondent’s Answer, at 3-4.)

4. Respondent also admits in his Motion for Summary Disposition that the Division obtained the Injunction against him. He claims that his alleged Arizona judgment against the Commission predates, and therefore supersedes, the Division’s judgment against him. The foundation of that argument, however, is the acknowledgement that the Division did obtain a judgment against him.

B. In fact, Respondent Never Even Obtained a Judgment Against the Division.

5. Setting aside the fact that Respondent’s argument is an improper collateral attack, Respondent claims that he obtained a judgment against the Division in a proceeding filed in an

Arizona administrative court, in a case with the cause number PR-2011-1216-AJ. The problem with this argument is that Respondent's alleged prior judgment against the Division does not appear to exist. Indeed, Respondent has not even attached a copy of the alleged judgment from the alleged Arizona proceeding to his motion or answer in this administrative proceeding.

6. Respondent does include in his materials filed with this Court a document titled "Petitioner's Motion for Summary Judgment", which reflects an alleged court case number. That pleading, which is Attachment No. 10 to his answer in this matter, shows it was purportedly filed in "In the Office of the Secretary of State for Arizona State Northeast Regional Court District, Maricopa County".

7. As best as the Division can tell from independent research, Arizona does not have "administrative courts". Nor does Arizona's Office of Secretary of State have a mechanism for filing a lawsuit or administrative case or other judicial process. A call to the Office of Secretary of State for Arizona confirmed that.

8. Respondent's pleading (Attachment 10 to his answer) also mentions the "Arizona State Northeast Regional Court District Maricopa County". The Division has been unable to locate any reference to such a court. In the Arizona judicial system, Maricopa County has multiple justice districts but there is not one identified as the "Northeast" Regional Court in Maricopa County.

9. In addition, the Division searched the Maricopa County case locator online. The Division was unable to find any case with a party named "McDuff" filed in Maricopa County. Nor could the Division find a case with the number PR-2011-1216-AJ, PR-2011-1216, or 2011-1216.

10. Thus, even if somehow this mystery judgment could be used to collaterally attack the Injunction (which it could not be), his argument is frivolous, given that the alleged judgment does not even appear to exist.

C. Respondent's Non-Existent Judgment Derives from a Non-Existent Process.

11. Respondent stated that he “discovered” a state “administrative settlement process,” which he then used to obtain his non-existent judgment against the Division. (Motion, at p. 2.) As with the non-existent court, the Division has been unable to locate any such procedure on Lexis or Westlaw, or on the Arizona government website. Respondent has failed to provide any legal citation to said process. Respondent understands how to cite to legal authority, as he sprinkles such citations throughout his pleadings. But when it comes to the one process on which he is relying, he fails to provide any legal citation to it. That is because such process does not exist.

D. Respondent Fails to Address Sovereign Immunity.

12. In addition to his motion's other legal deficiencies, Respondent fails to address how he is legally entitled to sue the Division. The doctrine of sovereign immunity normally precludes suits against the United States government and its agencies, although there are statutorily provided exceptions. *See, e.g.*, 28 U.S.C. § 2671 *et seq.* (Federal Tort Claims Act); 28 U.S.C. § 1491(a)(1) (Tucker Act, for breaches of contract). Such statutory exceptions, however, are strictly construed, and Respondent's alleged Arizona “administrative settlement process”, in which Respondent claims he is allowed to “settle” the Division's lawsuit against him, does not qualify as one of the exceptions to sovereign immunity. Moreover, Respondent again fails to cite any legal authority that his administrative procedure takes priority over federal law.

E. Conclusion.

McDuff's motion for summary disposition is nothing more than a collateral attack on the existing February 22, 2013 judgment obtained by the Division against him in the Northern District of Texas. His motion must be denied.¹

Dated: May 16, 2014.

Respectfully submitted,



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¹ As the Court is aware, Respondent was also criminally convicted in the United States District Court for the Eastern District of Texas. This conviction, which could also serve as the basis for administrative claims against Respondent, should also preclude summary disposition in McDuff's favor.