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 REPLY TO RESPONDENT GARY MCDUFF'S RESPONSE TO DIVISION'S MOTION FOR SUMMARY DISPOSITION

The Division of Enforcement files this Reply to Respondent Gary McDuff's Response to the Division's Motion for Summary Disposition in the above-referenced matter. Respondent has not successfully countered the Division's motion that there is no genuine issue as to any material fact in this matter. Nor has he refuted the Division's entitlement to summary disposition as a matter of law.

A. Respondent's Defense Is An Impermissible Collateral Attack On The Judgment.

Respondent's defense to the Division's motion for summary disposition tracks his answer in this proceeding: he collaterally attacks the civil injunction entered against him on February 22, 2013 by the United States District Court for the Northern District of Texas ("the February 22, 2013 Judgment"). His collateral attack essentially confirms the basis for the Division's motion: that the Division obtained a civil injunctive judgment against him, permanently enjoining him from violating the federal securities laws.[1] Respondent does not (and indeed cannot) refute that fact.

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1 A copy of the February 22, 2013 Judgment was attached to the Division's motion, as Exhibit "L."

Collateral attacks on the judgments on which follow on administrative proceedings are predicated are not permitted. As this is Respondent's only argument, the Division's motion must be granted. *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 [respondent] 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).

Therefore, this Court should grant the Division's motion for summary disposition.

B. Respondent Continues to Proffer a Non-Existent Judgment.

Respondent's collateral attack consists of the argument that he obtained a prior judgment against the Division; therefore, his judgment assumes priority and pre-empts the February 22, 2013 Judgment. As the Division stated in its response to Respondent's cross-motion for summary disposition (filed by the Division on May 17, 2014), the judgment that Respondent seeks to rely on does not even appear to exist. Indeed, he has not included any such judgment in any of his pleadings in this proceeding.

Respondent claims in his Response that he has "produced" a copy of the judgment. (Response, at p. 6.) He has not. The only document he could be referring to is titled

"Certificate of Administrative Judgment."[2] That document is not a judgment. It does not state it is a judgment, it does not identify the court that allegedly entered the judgment or a docket number, and it is not signed by a judge.

While Respondent focuses his alleged judgment, he actually never denies the facts established in the Division's motion, namely that he was permanently enjoined from violating the federal securities laws. The facts established by the February 22, 2013 Judgment (Exhibit "L" to the Division's Motion), and the other pleadings filed in the Division's civil federal lawsuit, namely the Division's Motion for Default Judgment (Exhibit "J" to the Division's Motion for Summary Disposition) and the Order granting the default judgment (Exhibit "K" to the Division's Motion) demonstrate that Respondent should be subjected to the significant remedies outlined in the Division's motion for summary disposition. Indeed, the various misrepresentations Respondent continues to make regarding the fabricated "judgment" he relies on only confirm that significant sanctions are warranted.

C. Respondent's Newly Discovered Evidence Also Does Not Provide a Defense.

Respondent begins his Response with the announcement that he has been granted leave to file a motion for new trial in his criminal case. He claims that he has newly discovered evidence not available during his criminal trial that will change the outcome of his criminal case. He then argues that because the Division's civil case against him was based on the identical evidence as his criminal conviction, that the civil judgment against him is thereby invalidated.

Respondent is getting ahead of himself. First, while he has been granted leave to file a motion for new trial, his motion has not been granted. Merely because Respondent claims to have

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2 The "Certificate" is the last document attached to Respondent's own motion for summary disposition, which he filed in this matter on April 25, 2014.

newly discovered evidence that exonerates him does not mean his conviction will be set aside. The judge will determine whether Respondent has met the legal burden for setting aside a criminal conviction based on newly discovered evidence. A district court may grant a new trial to a convicted defendant if, in the court's discretion, the defendant shows four things: (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the failure to discover the evidence was not due to the defendant's lack of diligence[3]; (3) that the evidence is not merely cumulative, but is material; and (4) that the evidence would probably produce an acquittal. *United States v. McRae*, 702 F.3d 806, 841 (5th Cir. 2012).

Moreover, even if he is successful in having his criminal conviction set aside, that does not mean, as he assumes, that his civil judgment is automatically set aside. He would have a similar hurdle to overcome in the civil case. He would have to file a motion to set aside a civil judgment—in a different court from where his criminal case is pending—and prove that the evidence was previously not available to him and why he has only just now come forward.

In civil cases, a party may obtain relief from a final judgment under Rule 60(b) of the Federal Rules of Civil Procedure on one of the following grounds: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, is based on an earlier judgment that has been reversed or

[3] Respondent's motion is not likely to be granted. The government filed its response on May 20, 2014, and pointed out that the alleged "newly discovered evidence" was in materials made available to Respondent prior to his criminal trial, but which he refused to examine. (*See* PACER Docket, *United States v. Gary Lynn McDuff*, 4:09-cr-00090-RAS-DDB, Document No. 168, a copy of which is attached hereto as Exhibit "M".)

vacated, or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. FED. R. CIV. PROC. R. 60(b). *See also Jenkens & Gilchrist v. Groia & Co.*, 542 F.3d 114, 119-120 (5th Cir. 2008). A motion under Rule 60(b) must be made "within a reasonable time", but for the first three reasons listed above, it cannot be made more than one year after the entry of the judgment. Since the civil judgment was entered February 22, 2013, Respondent's deadline to file such a motion for relief has already passed. Moreover, Rule 60(c)(2) states that such a motion for relief does not affect the judgment's finality or suspend its operation. Thus, even the timely filing such a motion would not suspend the effect of the February 22, 2013 Judgment.

In any event, these theoretical possibilities have no effect on this proceeding. The Commission has repeatedly held that the pendency of an appeal (and presumably also the pendency of a motion to vacate a judgment) is not grounds to defer decision in an administrative proceeding. *See Jose P. Zollino*, Exchange Act Release No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2601 n.4; *Joseph P. Galluzzi*, 55 SEC 1110, 1116, n.2 (2002); *Ira William Scott*, 53 S.E.C. 862, 865 n.8 (1998); *Charles Phillip Elliott*, 50 S.E.C. 1273, 1277, n.17 (1992), *aff'd*, 36 F.3d 86 (11th Cir. 1994). Thus, Respondent's motion for new trial in his criminal case is no reason to defer decision here. Instead, if an underlying civil judgment or criminal conviction is vacated, such that the statutory basis for the administrative remedy is no longer present, Respondent's remedy is to petition the Commission for reconsideration of this action. *See Jon Edelman*, 52 S.E.C. 789, 790 (1996); *Charles Phillip Elliott*, 50 S.E.C. at 1277, n.17.

D. Conclusion.

For all the reasons outlined above and in the Division's motion for summary disposition, the Division asks the Court to grant summary disposition against the Respondent.

Dated: May 23, 2014.

Respectfully submitted,

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[redacted]

EXHIBIT M

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO. 4:09CR90
v.	§	Judge Schell
	§	
GARY LYNN MCDUFF	§	

GOVERNMENT'S RESPONSE TO MOTION FOR RECONSIDERATION AND PETITION FOR REHEARING, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

The United States respectfully files this response to the Motion for Reconsideration and Petition for Rehearing, or in the Alternative, Motion for New Trial.

I.

Defendant Gary Lynn McDuff bases his requests for relief entirely upon his allegation that newly discovered exculpatory evidence justifies it. But, evidence that McDuff characterizes as "newly discovered" was made available to him during discovery before his case was tried. McDuff made a strategic decision to refuse to review that evidence before trial. And, McDuff cannot show that the outcome of a new trial would be different. Accordingly, his motion should be denied in its entirety.

II.

BACKGROUND

After a two-day trial, a jury found McDuff guilty of Conspiracy to Commit Wire Fraud, in violation of 18 U.S.C. § 1349, and of Money Laundering, in violation of 18

U.S.C. §§ 1956(a)(1)(B)(i) and 2. Doc. 106. [1] During the trial, McDuff exercised his right not to present evidence or cross examine witnesses. *Id.*

The final presentence report was filed on January 13, 2014. Afterward, McDuff filed a document entitled "Government's Motion to Dismiss Superseding Indictment."[2] *Compare* Doc. 124 *with* Doc. 132. On the same day, he also filed a "Notice" requesting a presentencing hearing and asserting that there were errors in the PSR. *Id.* at i; Doc. 136. The government responded to McDuff's motion and notice and pointed out that because McDuff could produce evidence disputing the PSR during the sentencing hearing, no presentencing hearing was necessary. Doc. 150.

On the day before McDuff was scheduled to be sentenced, he notified the Court that he had "newly discovered evidence" and demanded that the Court produce four witnesses. Doc. 151. During McDuff's April 16 sentencing hearing, the Court granted a motion to quash McDuff's subpoena. Docket Sheet. The Court also considered and denied McDuff's objections to the PSR and heard testimony from McDuff's witnesses and his allocution. Doc. 153. After considering all of the evidence and arguments submitted, the Court sentenced McDuff to 240 months' imprisonment on count one and 240 months' imprisonment on count two. Doc. 158. The Court ordered that 180 months' of count two run consecutively to count one, resulting a total term of 300 months'

[1] Documents filed in the public records of this case are referred to as "Doc." followed by their document numbers.

[2] Without authorization to do so, McDuff signed the name of "Eric H. Holder," the United States Attorney General, to his motion and requested a presentence hearing to enable him to present evidence demonstrating that the PSR was inaccurate. Doc. 132. In its response, the government affirmed that neither the Attorney General, nor the United States Attorney's Office desired that the charges be dismissed.

imprisonment. *Id.* The Court filed its written judgment on April 17. Doc. 158.

On April 30, McDuff filed a motion to reconsider and for rehearing based upon newly discovered exculpatory evidence. Doc. 163. Alternatively, McDuff moves for a new trial based upon newly discovered evidence. *Id.* On May 2, the Court granted McDuff leave to file the motion. Doc. 164.

III.

THE MOTION FOR RECONSIDERATION AND PETITION FOR REHEARING

While "a petition for rehearing of a district court order affecting final judgment is nowhere explicitly authorized in the Federal Rules of Criminal Procedure it is undoubtedly a legitimate procedural device." *United States v. Cook*, 670 F.2d 46, 48 (5th Cir. 1982). But, such petitions are timely filed only if they are made within the period of time allotted for noticing an appeal. *Id.* Under Fed. R. App. Proc. 4(b)(1)(a), a defendant in a criminal case must file a notice of appeal within 10 days after entry of the judgment. The 10-day limit is "mandatory and jurisdictional." *United States v. Alvarez*, 210 F.3d 309, 310 (5th Cir. 2000) (internal quotation omitted). Hence, to be timely, McDuff should have filed his petition not later than April 28, 2014. *Id.* His failure to do so was fatal and caused his motion to be procedurally barred. *See*, *id.* at 48-49; *see also*, *United States v. Campbell*, 116 F.3d 478, *1 (5th Cir. 1997) (unpublished) (notice of appeal was untimely when filed more than 10 days after the court could have ruled on defendant's motion to reconsider). McDuff has shown no reason for his delay in filing his motion and has not moved for an extension of time to file either an appeal or the motion.

Accordingly, McDuff's motion is arguably procedurally barred.

Substantively, McDuff's motion for reconsideration and petition for rehearing fails because his characterization of the evidence as being "newly discovered" is inaccurate. "Newly discovered evidence is evidence that could not have been discovered with due diligence at the time of trial." *United States v. Beasley*, 582 F.2d 337, 339 (5th Cir. 1978). Prior to trial of this case, the government provided between 17 and 30 boxes of evidence in discovery. And, although McDuff's court appointed counsel, Daniel Kyle Kemp, reviewed the evidence, McDuff declined to do so. The records that McDuff characterizes as newly discovered were in the possession of the SEC-appointed receiver, as the government indicated in its pretrial discovery conference, made available to McDuff in discovery, and part of Kemp's review.[3] McDuff's declination to review them was part of his strategic decision to contest the authority of the government to bring the indictment against him and this Court's authority to conduct proceedings ancillary to it. And, while McDuff implicitly assets that he did not understand the charges against him, *e.g.* Motion ¶ 33, the Court reviewed the indictment with McDuff and conducted a *Garcia* hearing twice to ensure that McDuff's waiver of his Sixth Amendment right to counsel was valid. Consequently, because the motion was untimely and the evidence in question is not newly discovered, the government urges the Court to deny McDuff's motion for reconsideration and petition for rehearing.

[3] For instance, McDuff complains in paragraph 30 of his motion that two attorneys will testify they did not create Government's Exhibits 22 and 29 and do not comply with federal securities law. However, McDuff had the opportunity to subpoena and call the attorneys to testify on his behalf during his trial and sentencing hearing but declined to do so. Similarly, in paragraphs 30 and 31, McDuff complains about questions that the government did not ask witnesses it called to testify. McDuff, however, refused to cross examine any government witnesses during trial.

IV.

THE MOTION FOR NEW TRIAL

"Motions for new trial based on newly discovered evidence are generally disfavored by the courts and therefore are viewed cautiously." *United States v. Adi*, 759 F.2d 404, 407 (5th Cir. 1985). The "primary purpose of the newly discovered evidence rule is to afford relief when, 'despite the fair conduct of the trial, . . . facts unknown at the trial' make clear that 'substantial justice was not done.'" *United States v. Medina*, 118 F.3d 371, 373 (5th Cir. 1997) (quoting *United States v. Ugalde*, 861 F.2d 802, 807 (5th Cir. 1988)). To be successful on a motion for new trial based on newly discovered evidence, a defendant must show that: (1) the evidence was discovered after his trial; (2) his failure to learn of the evidence was not due to a lack of due diligence on his part; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material, and (5) the evidence will probably result in his acquittal if a new trial is held. *E.g.*, *United States v. Villareal*, 324 F.3d 319, 325 (5th Cir. 2003) (citations omitted).

McDuff summarily asserts, but has not established, that the evidence he details in his motion was newly discovered and unknown to him at the time of trial. But, as set forth above, the evidence that McDuff contends is newly discovered was made available to him and his stand-by counsel by the government before the trial. Moreover, none of the evidence would have remained unknown to him had he diligently sought such information. And while McDuff implicitly attempts to justify his strategic decision not review the evidence by explaining that he now realizes that the advice given him by International Adjudicators Association representatives was flawed, Motion ¶ 51, the

evidence he lists in his motion was not "newly discovered." His belated conclusions that he should have accepted the appointment of an attorney, should have cooperated in his defense, and should have presented evidence at trial — conclusions that post-date his 300-month sentence — do not support his requested relief.

Taken as a whole, the proffered evidence presents, at best, a defense that McDuff could have presented to rebut the allegation that he knew that the false representations made to investors was false. But McDuff offers nothing to rebut the government's proof that he and his coconspirators falsely represented that the investments were risk-free and only made in A-rated bonds, and did not disclose to investors the material facts that McDuff had been previously convicted of a felony and therefore could not solicit investments, or even that Reese had been barred from soliciting investments under an order from the state of California. Accordingly, McDuff cannot show that the evidence he calls "newly discovered" would have result in his acquittal. Hence, McDuff fails to meet his burden of proof, and the government urges the Court to deny his motion.

V.

CONCLUSION

For the reasons discussed herein, the United States respectfully urges the Court to deny the motion to reconsider and petition for rehearing, and the alternative motion for a new trial.

Respectfully submitted,

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