

HARD COPY

**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 RULE 400 PETITION FOR
INTERLOCUTORY REVIEW**

Dated: May 2, 2016.

Respectfully submitted,

Janie L. Frank
Counsel for the Division of Enforcement
Texas Bar No. 07363050

Securities and Exchange Commission
Fort Worth Regional Office
801 Cherry Street, Suite 1900
Fort Worth, TX 76102-6882
E-mail: frankj@sec.gov
Telephone: (817) 978-6478
Facsimile: (817) 978-4927

The Division of Enforcement (“Division”) files this Response to Respondent’s Rule 400 Petition for Interlocutory Review,¹ filed on or about April 21, 2016, and respectfully shows the Commission the following:²

I.
INTRODUCTION

Respondent Gary L. McDuff (“Respondent”) seeks interlocutory review of four rulings the Administrative Law Judge (“Law Judge”) made at an April 11, 2016 prehearing conference. The rulings are within the Law Judge’s discretion as to how the administrative hearing should be conducted. *See, e.g.*, Rule of Practice 232(b) [17 C.F.R. §201.232(b)] (standards for issuance of subpoenas); Rule of Practice 235(a) [17 C.F.R. §201.235(a)] (circumstances in which prior sworn statements of witnesses may be introduced). Respondent seeks interlocutory review of these discretionary rulings even though the Law Judge declined to certify his rulings, a necessary prerequisite to obtaining interlocutory review. Rule of Practice 400(c) [17 C.F.R. §201.400(c)]. Because the rulings at issue were not certified and do not involve the sort of “extraordinary circumstances” necessary to warrant interlocutory review, Respondent’s petition must be denied.

II.
FACTUAL BACKGROUND

A. Procedural Background.

On February 21, 2014, the Commission issued the Order Instituting Administrative Proceedings (“OIP”) against Respondent, pursuant to Section 15(b) of the Exchange Act. The OIP

¹ Respondent also filed “Respondent’s Declaration for Rule 400 Petition for Interlocutory Review” (“Respondent’s Declaration”) and “Memorandum of Points and Authorities on Rule 400 Petition for Interlocutory Review” (“Respondent’s Memorandum”) in support.

² The Division received Respondent’s petition on April 25, 2016.

alleged that a federal district court enjoined Respondent from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act, and Rule 10b-5 thereunder, in *SEC v. Gary L. McDuff*, Civil Action No. 3:08-CV-526-L, in the United States District Court for the Northern District of Texas. Respondent answered the OIP. The Division and Respondent each filed motions for summary disposition.

On September 5, 2014, the Law Judge issued his Initial Decision, granting the Division's motion for summary disposition and denying Respondent's. The Law Judge found that Respondent had been enjoined by a federal court and further found that it was in the public interest to permanently bar Respondent from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. On November 13, 2014, Respondent filed a petition for review of the Initial Decision.

On April 23, 2015, the Commission remanded the case for further proceedings. *Gary L. McDuff*, Release No. 34-74803, 2015 WL 1873119 (Apr. 23, 2015). The Commission held that the Law Judge could not rely on the civil court judgment as evidence that Respondent acted as an unregistered broker because the judgment, obtained by default, had no preclusive effect. The Commission also held that the Law Judge could not rely on the superseding indictment against Respondent in the parallel criminal case against him as evidence to support a sanctions analysis. *Id.*, at *2-3. The Commission remanded the matter so that the Law Judge could take further evidence.

On April 30, 2015, the Law Judge requested supplemental evidence and briefing, which the parties submitted. Ultimately, the Law Judge determined that genuine issues of material fact remain in dispute such that summary disposition was not appropriate for either party. Order Denying

Division of Enforcement's Motion for Summary Judgment and Order to Show Cause, Release No. AP-3190 (Oct. 2, 2015); Order Discharging Order to Show Cause and Denying McDuff's Summary Disposition Motion, Release No. 3482 (Jan. 11, 2016).

On April 11, 2016, the Law Judge convened a prehearing conference to discuss the logistical challenges related to conducting the administrative hearing in this matter at the Bureau of Prisons facility where Respondent is currently incarcerated, as well as other prehearing issues. During the prehearing conference, the Law Judge made pretrial rulings related to the parties' proposed witnesses and exhibits. At the end of the hearing, Respondent asked the Law Judge to certify his rulings. The Law Judge considered the request, but ultimately denied it after determining that, based on the explicit requirements of Rule of Practice 400(c), the rulings did not meet the standards for certification. Rule of Practice 400 (c) [17 C.F.R. § 201.400(c)(1), (2)]. *See* Transcript of April 11, 2016 Prehearing Conference (hereinafter "Transcript"), attached hereto as Exhibit A, at 111-112. On April 12, 2016, the Law Judge issued the Scheduling Order, Release No. AP-3777 (Apr. 12, 2016), summarizing his rulings.

B. Respondent's Petition for Review.

Respondent's petition for interlocutory review asks the Commission to review the Law Judge's rulings:

- (1) That the hearing will be limited to the issue of whether Respondent acted as a broker-dealer during the relevant period;
- (2) That affidavits and declarations previously submitted by both parties will be admitted into evidence without a witness availability showing;
- (3) That transcripts from Respondent's criminal trial will be admitted into evidence without affording Respondent an opportunity to call and cross-examine witnesses therefrom; and

(4) Issues already litigated at the criminal trial will not be retried at the hearing.

Respondent does not claim that the Law Judge incorrectly declined to certify his rulings. Instead, he claims, in conclusory fashion, that “extraordinary circumstances justify interlocutory review because the public hearing and confrontation rights extinguished by said rulings are issues of Constitutional importance to the undersigned and the public.” Petition, at 1. However, Respondent does not explain why these circumstances are “extraordinary,” how his Constitutional rights are being extinguished, or why the rulings cannot be addressed by the Commission upon the filing of a post-hearing petition for review.

III. **ARGUMENTS AND AUTHORITIES**

A. Pretrial rulings in administrative proceedings must be certified as meeting certain criteria before the Commission conducts an interlocutory review.

Rule of Practice 400(a) explicitly states that petitions for interlocutory review are “disfavored” and will be granted only in “extraordinary circumstances.” Rule of Practice 400(a) [17 C.F.R. § 201.400(a)]; *see John Thomas Capital Management Group LLC, et al.*, 2013 WL 6384275, at *2 (Dec. 6, 2013) (Order Denying Petition for Interlocutory Review). Subpart (c) of that rule explicitly states that, as a condition precedent, any ruling “submitted to the Commission for interlocutory review *must* be certified in writing” by the law judge as satisfying certain criteria. Rule of Practice 400(c) [17 C.F.R. § 201.400(c)] (emphasis added). The rule does not permit a party to petition the Commission directly for interlocutory review without first obtaining certification. *See Jean-Paul Bolduc*, 1999 WL 1048643, at *2 (Nov. 4, 1999). The Commission generally does not consider petitions for interlocutory review where the law judge has declined to certify the rulings. *Eric David Wagner*, 2012 WL 1037682, at *2 (Mar. 29, 2012).

In this case, the Law Judge declined to certify his rulings. Scheduling Order, Release No. AP-3777 (Apr. 12, 2016). That denial of certification was entirely appropriate insofar as certification requires that the challenged ruling be one that either (1) compels testimony of Commission members, officers, or employees or production of documentary evidence in their custody; or (2) involves a controlling question of law as to which there is substantial ground for difference of opinion *and* an immediate review of the order may materially advance the completion of the proceeding. Rule of Practice 400(c) [17 C.F.R. § 201.400(c)] (emphasis added). None of these conditions were implicated in any of the Law Judge’s rulings.

Because the conditions precedent for interlocutory review are lacking, Respondent’s petition must be denied.

B. The Law Judge’s rulings also do not warrant interlocutory review on the Commission’s own motion.

Even without certification, the Commission may decide on its own motion to conduct an interlocutory review. *See* Rule of Practice 400(a) [17 C.F.R. § 201.400(a)]. But the Commission rarely exercises that discretion because it disfavors interlocutory appeals and only grants them in extraordinary circumstances. *Id.* Recently, the Commission held:

The Commission’s “*emphatic preference*—which embodies the ‘general rule’ disfavoring piecemeal, interlocutory appeals—is that claims should be presented in a single petition for review *after* ‘the entire record [has been] developed’ and ‘after issuance by the law judge of an initial decision.’”

Sands Brothers Asset Management, LLC, 2015 WL 2229281, at *4 (May 13, 2015) (Comm’n Order Denying Petition for Interlocutory Review) (quoting *John Thomas Capital Mgmt. Group*, 2013 WL 6384275, at *2 (Dec. 6, 2013)) (emphasis added). Interlocutory appeals are disfavored because the petitioner’s claims of an improper ruling can be effectively reviewed following the issuance of an

initial decision. *John Thomas Capital Mgmt. Group, LLC, et al.*, 2014 WL 5282156, at *1 (Oct. 16, 2014).

Respondent's cursory petition and memorandum fail to explain why the Commission should deviate from its "emphatic preference" against granting interlocutory review. Rather, Respondent's petition reflects nothing more than his personal disagreement with the rulings. *See Montford & Co.*, 2011 WL 5434023, at *3 (Nov. 9, 2011) (disagreement with the law judge's ruling does not make a ruling appropriate for interlocutory review).

1. Limitation of hearing to the broker-dealer issue.

Respondent complains that the Law Judge is improperly limiting the hearing to the issue of whether he acted as an unregistered broker. In fact, the Law Judge did not make such a ruling and has stated (more than once) that he will also consider evidence on what remedial sanctions, if any, are appropriate in light of the public interest factors in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). *E.g.*, Transcript, at 113; 89-90.

Respondent's complaint is based on his misunderstanding of the limited issues in this follow-on proceeding, where there are only three issues to be considered: (1) whether Respondent acted as a broker, whether registered or unregistered; (2) whether he was enjoined from violating the federal securities laws; (3) and, if so, whether remedies are in the public interest and to what extent. 15 U.S.C. § 15(b)(6).

The Law Judge repeatedly clarified that the facts on which Respondent's underlying injunction and criminal conviction were based are not an appropriate topic of inquiry in this proceeding. Respondent seems to believe that because the OIP recites the civil court complaint's allegations that those allegations are "at issue" and must be proven or disproven. But he is

incorrect. *See Daniel Imperato*, 2015 WL 1389046, at *4 (Mar. 27, 2015) (statutory predicates of (1) the *existence* of a permanent injunction and (2) actions as an unregistered broker were met); *Jose P. Zollino*, 2007 WL 98919, at *4 (Jan. 16, 2007) (purpose of administrative proceeding is not to revisit the factual basis for the injunction but to determine what remedial sanctions, if any, are in the public interest). The allegations underlying the injunction that were recited in the OIP were included only demonstrate that the injunction is of the type on which industry-wide associational bars are authorized. *See* 15 U.S.C. § 15(b)(6). Respondent's desire to litigate the underlying facts on which the injunction was based comes from his misunderstanding of the process. Indeed, as the Law Judge has reiterated "[i]t's already established that you committed wire fraud. So it's already been established that you made misrepresentations to at least some investors." Transcript, at 56. The Law Judge also stated:

[T]he remand order is about – whether or not you were acting as a broker-dealer that engaged in the misconduct that gave rise to the injunction issued against you in the civil proceeding.... So the only issues that I need to address are were you acting as a broker-dealer at the time of your misconduct and does the public interest weigh in favor of sanctioning you. And if so, what should the sanction be.

Transcript, at 59.

2. *Admission of prior affidavits and declarations.*

Respondent also objects to the Law Judge's decision to allow the introduction of prior sworn statements that both sides filed in support of their motions for summary disposition.

Respondent's only explanation as to why he is opposed to this ruling is that it violates his Sixth Amendment Confrontation Clause right to cross-examine witnesses.

A pretrial ruling based on a Sixth Amendment constitutional right is not one considered to raise extraordinary circumstances that justify interlocutory review. In *Sands Brothers Asset Mgmt., LLC*, 2015 WL 2229281, at *5 & n. 24 (May 13, 2015), the Commission noted that pretrial objections based on Fourth, Fifth, and Sixth Amendment claims were not amenable to interlocutory appellate review, citing, *inter alia*, *Flanagan v. United States*, 465 U.S. 259, 266-67 (1984), and *United States v. Wampler*, 624 F.3d 1330, 1338 (10th Cir. 2010).

Respondent will actually benefit from this ruling. He is the party who submitted the vast majority of the affidavits and declarations filed in this matter, and this ruling means he will be permitted to rely on those as evidence. Moreover, at least one of the Division's witnesses for whom a declaration was submitted will be testifying live at the hearing.³ Respondent fails to identify any valid reason that would justify interlocutory review of this ruling.

3. Admission of the criminal trial transcript.

Respondent also objects to the admission of the trial transcript from his criminal trial on the disingenuous basis that he “was not represented by counsel at his criminal trial.”⁴ Respondent's Declaration, at ¶6; Respondent's Memorandum, at 3. Respondent misleadingly fails to explain that he was “not represented by counsel” at his criminal trial because he insisted

³ The Division submitted a declaration from Michael Quilling, the Court-appointed Receiver from the related *SEC v. Megafund* case—during the briefing, but plans to call him to testify live at the hearing.

⁴ Respondent is attempting to align his circumstances to those of the defendant in *Pointer v. Texas*, 380 U.S. 400, 407-08 (1965), which he cites. Respondent's Memorandum, at 3. But *Pointer* is not on point. In *Pointer*, the prosecutor wanted to admit a pretrial hearing transcript at the defendant's criminal trial, when a witness who testified at the pretrial hearing was not available for the final trial. At the pretrial hearing, the defendant was not yet represented by counsel. The Supreme Court held that, in light of its recent decision of *Gideon v. Wainwright*, 372 U.S. 335 (1963), requiring counsel to be provided to indigent defendants, the defendant should have been represented by counsel at the pretrial hearing and the prosecutor could not use that hearing transcript against him at his final criminal trial. Here, Respondent was “not represented by counsel” because he was representing himself.

on representing himself.⁵ Further, Respondent admits he *chose* not to cross-examine any witnesses at his criminal trial, thereby confirming that he had an opportunity to do so. Respondent's Petition, at ¶ 6. He argues, though, that the broker-dealer issue in this proceeding was not present in the criminal case and, therefore the criminal trial transcript is irrelevant. Respondent's Memorandum, at 4. To the contrary, issues attendant to Respondent's conduct in transacting sales of securities and other relevant matters were taken up in the criminal trial. *See, e.g.,* Transcript, at 39 ("I don't think it's unfair to allow in the prior statements of the witnesses who testified, that is the entire trial transcript, as evidence against Mr. McDuff or in some instances maybe in favor of Mr. McDuff."); 89-90 ("I have already indicated that the sentencing court in the transcript of the sentencing hearing made some findings about at least some of the public interest factors.").

In any event, some of the witnesses from Respondent's criminal trial *will* be testifying live at the administrative hearing, and Respondent will have the opportunity to cross-examine them at that time.

4. *Criminal issues will not be retried.*

Finally, Respondent challenges the Law Judge's decision that issues from the underlying criminal case will not be retried. Respondent articulates no reason as to why the ruling is incorrect. In fact, the ruling is entirely appropriate: an administrative hearing is not the appropriate forum in which to review whether mistakes were made in a district court criminal trial. *Gary M. Kornman*, 2009 WL 367635, at *8 (Feb. 13, 2009) (doctrine of collateral estoppel

⁵ This was after the district judge conducted the required *Faretta* hearing to determine whether Respondent knowingly and intelligently was foregoing his right to counsel, *see, e.g., United States v. Long*, 597 F. 3d 720, 724 (5th Cir. 2010)).

prevents relitigation of fact findings or legal conclusions of an underlying criminal proceeding in a follow-on administrative proceeding; validity of Kornman's criminal conviction is not at issue here); *Jose P. Zollino*, 2007 WL 98919 (Jan. 16, 2007) (basis for follow-on proceeding "is the action of district court—in convicting and enjoining him—and its purpose is not to revisit the factual basis for that action"); see also *Montana v. United States*, 440 U.S. 147, 153-54 (1979) (collateral estoppel "preclude[s] parties from contesting matters that they have had a full and fair opportunity to litigate" and thereby "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions"). Here, the Law Judge plainly concluded that:

We're not here to re-litigate whether or not you actually engaged in the misconduct because the findings in the criminal case establish that conclusively. So I am not going to let you re-litigate the criminal case. You were given an opportunity to litigate the criminal case, and you – you lost. . . . You made no objections to any evidence. You did not present any witnesses. You did not cross-examine any witnesses. You were given an opportunity to. The judge consistently asked you if you objected or wanted to ask any questions at cross-examination and you didn't.

Transcript, at 60. Indeed, the Law Judge's ruling that none of the issues from Respondent's criminal case should or will be re-litigated is entirely appropriate.

IV. **CONCLUSION**

None of the rulings to which Respondent objects were certified, nor do they present extraordinary circumstances requiring the Commission's interlocutory review. Rather, they all relate to how the hearing will be conducted. They are all issues best addressed after the hearing, when the Commission can evaluate the Law Judge's handling of the proceeding on a fully

developed record and determine whether any prejudice resulted from the rulings. *See, e.g., Kevin Hall*, 2007 WL 1892136, at *2 (June 29, 2007). Respondent's petition should be denied.

Dated: May 2, 2016.

Respectfully submitted,



Jamie L. Frank
Counsel for the Division of Enforcement
Texas Bar No. 07363050

Securities and Exchange Commission
Fort Worth Regional Office
801 Cherry Street, Suite 1900
Fort Worth, TX 76102-6882
E-mail: frankj@sec.gov
Telephone: (817) 978-6478
Facsimile: (817) 978-4927

SERVICE LIST

In accordance with Rule 150 and 151 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 Rule 400 Petition for Interlocutory Review* was served on the persons listed below on the 2nd day of May 2016, *via* certified mail, return-receipt requested:

Honorable Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

Mr. Gary L. McDuff

[REDACTED]
[REDACTED] Beaumont [REDACTED]
[REDACTED]
[REDACTED]

Beaumont, Texas [REDACTED]
Pro Se Respondent


JANIE L. FRANK

3-15764

Prehearing_conference_20160411

4/11/2016 1:00 PM

Condensed Transcript

Prepared by:

Janie Frank
3-15764

Wednesday, April 27, 2016



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1 UNITED STATES SECURITIES AND EXCHANGE COMMISSION
 2
 3 In the Matter of:)
 4) File No. 3-15764
 5 GARY L. MCDUFF)
 6
 7 ADMINISTRATIVE PROCEEDINGS - PRE-HEARING CONFERENCE
 8 PAGES: 35 through 118
 9 PLACE: Securities and Exchange Commission
 10 801 Cherry Street, 19th Floor
 11 Fort Worth, Texas 76102
 12 DATE: Monday, April 11, 2016
 13
 14 The above-entitled matter came on for hearing,
 15 pursuant to notice, at 1:00 p.m.
 16
 17
 18
 19 BEFORE (via telephone):
 20 CAMERON ELLIOT, ADMINISTRATIVE LAW JUDGE
 21
 22
 23
 24 Diversified Reporting Services, Inc.
 25 (202) 467-9200

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1 APPEARANCES:
 2
 3 On behalf of the Securities and Exchange Commission:
 4 JANIE FRANK, ESQ.
 5 Securities and Exchange Commission
 6 Division of Enforcement
 7 801 Cherry Street
 8 Fort Worth, Texas 76102
 9 (817) 900-2638
 10
 11 On behalf of the Respondent (via telephone):
 12 GARY MCDUFF, PRO SE
 13
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1 PROCEEDINGS
 2 JUDGE ELLIOT: Let's go on the record then.
 3 We're here in the matter of Gary L. McDuff.
 4 The Securities and Exchange Commission administered a
 5 proceeding File Number 3-15764. My name is Cameron
 6 Elliott, presiding administrative law judge.
 7 I'm sorry. Someone is calling me. My name is
 8 Cameron Elliott, presiding administrative law judge.
 9 MS. FRANK: Okay.
 10 JUDGE ELLIOT: Okay. Go ahead.
 11 MS. FRANK: All right. My name is Janie Frank.
 12 I am an attorney representing the Division of
 13 Enforcement.
 14 MR. MCDUFF: And I am Gary McDuff, Respondent
 15 and pro se.
 16 JUDGE ELLIOT: All right. So let me make a
 17 couple of remarks. First of all, we are here to talk
 18 once again about the hearing, logistics for the hearing
 19 and some of the legal issues that I expect to come up
 20 during the hearing. I have, I think, three comments I
 21 want to make before I start talking to the parties about
 22 this.
 23 First of all, a few minutes ago I had a
 24 conversation with Mr. McDuff and Mr. McDuff's counselor,
 25 Ms. Roberts, I believe her name was. And this was just

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1 to convey the -- essentially the phone number and the
 2 password number to get on to the current call. We didn't
 3 talk about any of the merits of the case. Mr. McDuff, do
 4 you agree with that?
 5 MR. MCDUFF: I agree with that, yes, sir.
 6 JUDGE ELLIOT: All right. So I just want to
 7 let the Division know that. Secondly, the -- I have
 8 looked over, of course, all the materials that the
 9 parties have sent me in connection with the summary
 10 disposition briefing. And I think what I am inclined to
 11 do, and I will hear from the parties about this before I
 12 make a final decision, but what I am inclined to do is
 13 just admit all of the materials that were offered as
 14 evidence in connection with the summary disposition
 15 briefing.
 16 So, for example, all of the documents that the
 17 parties submitted, as well as all of the statements from
 18 the various witnesses. Now, in other words, you don't
 19 need to include on your exhibit list if we end up having
 20 exhibit lists what has already been submitted. I can
 21 already consider that because it's already in the record.
 22 There is one aspect of this which is a little unusual
 23 which is that much of what is already in the record are
 24 prior statements of witnesses.
 25 I am -- I am inclined mainly because of the

1 logistical difficulties of holding a hearing in prison, I
 2 am inclined just to allow in all these prior statements
 3 even though they would not necessarily be considered
 4 admissible because I think it would be in the interest of
 5 justice to do so specifically with -- with respect to the
 6 trial transcript that was submitted by the Division; the
 7 trial transcript referring to the criminal trial.

8 Because the trial took place in Mr. McDuff's
 9 presence and Mr. McDuff was given an opportunity to
 10 cross-examine the witnesses, I don't think it's unfair to
 11 allow in the prior statements of the witnesses who
 12 testified, that is the entire trial transcript as
 13 evidence against Mr. McDuff or in some instances maybe
 14 even in favor of Mr. McDuff.

15 Similarly, I think given the nature of the
 16 issues that Mr. McDuff's witness statements pertain to, I
 17 don't think it's unfair to admit those in because
 18 generally speaking I don't think they're really all that
 19 helpful to resolving the issues that remain open in this
 20 case. So the parties do not need to call any witnesses
 21 to ask them questions that have already been answered by
 22 any of the witness statements that are already in the
 23 record.

24 The third thing that I want to say is that I
 25 have taken official notice of all of the filings in Mr.

1 McDuff's-criminal case. This includes matters or
 2 includes items which are not already in the record. For
 3 example, and this is the most important one, the
 4 sentencing transcript, the transcript of the sentencing
 5 hearing at which Mr. McDuff was sentenced by the District
 6 Court, I think, is a very helpful document in resolving
 7 certain issues in the case pertaining to the public
 8 interest factors.

9 The District Court made a number of findings
 10 during the sentencing hearing which are directly relevant
 11 to the public interest factors, particularly regarding
 12 egregiousness and recurrence. Hence, I enter and I think
 13 that that sentencing transcript is probably -- I am very
 14 sorry. I apologize. I can't figure out how to get out
 15 of my voicemail in the middle of another phone call. So
 16 I intend to rely upon the sentencing transcript quite
 17 heavily and address -- Okay. Can everyone still hear me?

18 MS. FRANK: Yes, sir.

19 JUDGE ELLIOT: Let me just call back in. I
 20 will hang up and call right back in. I'm sorry. Give me
 21 a moment.

22 (A brief recess was taken.)

23 JUDGE ELLIOT: All right. I'm back. Okay. So
 24 those are the -- the three things I wanted to say from
 25 the very beginning, just that I had a conversation with

1 Mr. McDuff. The parties do not need to put in any -- any
 2 evidence that's already in the record when we do go to
 3 trial. And I intend to rely upon the entirety of Mr.
 4 McDuff's criminal record transcript. So with that, let
 5 me first turn to the Division any objections to that, Ms.
 6 Frank?

7 MS. FRANK: No, sir. I do not object to any of
 8 that.

9 JUDGE ELLIOT: All right. Mr. McDuff, any
 10 objections?

11 MR. MCDUFF: Well, I want to reserve the right
 12 to call witnesses that will go to the allegations that
 13 are in the OIP, as well as the complaint which is what
 14 the OIP is founded upon.

15 JUDGE ELLIOT: All right. Well, we will get to
 16 that in a moment.

17 MR. MCDUFF: Okay. As far as the -- the
 18 evidence being submitted in, I don't have any objection
 19 to the evidence that you're talking about producing other
 20 than relying on the sentencing transcript or even the
 21 trial transcript for any value as it opposes to -- as it
 22 relates to a defense since there was no defense presented
 23 under the false presumption that the matter had been
 24 settled. And this would be the opportunity to be able to
 25 actually cross-examine the witnesses that were not able

1 to be cross-examined based on that false presumption.
 2 JUDGE ELLIOT: Okay. All right. Well, let
 3 me -- let me first turn it over to the Division then, and
 4 let me just ask the -- I did receive a notice that
 5 apparently the warden has allowed for a hearing at
 6 Beaumont. Ms. Frank, can you explain a little bit more
 7 about that and what the logistics are.

8 MS. FRANK: Yes, Your Honor. The -- what --
 9 what I found out after our last hearing was that the
 10 warden -- and I have not spoken with her directly, but
 11 what I was told by an attorney who works at the Beaumont
 12 facility that the warden was, in fact, willing to let us
 13 coming in if the hearing wasn't going to last more than
 14 say a couple of days. And I believe -- and I'm not -- I
 15 don't know if a couple of days was specifically meant to
 16 be only two and no more or if there was the ability if it
 17 runs over to a third day, that we could do that or if we
 18 needed to leave and come back for a short period of time,
 19 that that was not also available.

20 The -- I believe that the previous
 21 conversations I had with people at the prison still apply
 22 to the extent that there are special procedures to be
 23 used. There -- there will be some logistical issues.
 24 Anybody who's a witness is going to have to fill out a
 25 form so they can go through a security check before the

1 prison will let them in.
 2 If we're going to bring in exhibits and boxes
 3 of records which I don't think -- I know that we don't
 4 have an extensive amount, then those would have to be
 5 screened in advance. We would have to, you know,
 6 obviously make arrangements for those kinds of things in
 7 advance, in other words, getting there in plenty of time
 8 to get screened before we get started.

9 We would probably have to go from 8:30 until
 10 3:30 because the prison usually runs people out by 3:30
 11 in the afternoon so that they can have their -- one of
 12 their head counts and take care of other issues, I
 13 believe. I believe there's a shift change also that
 14 comes up about mid-afternoon.

15 So there -- there would be some limitations,
 16 but they were willing to let us use their facility for
 17 that. They -- they have -- they do from time to time
 18 allow people in to give depositions. And -- and I
 19 believe they remembered having an SEC hearing at their
 20 facility a long time ago, but they -- they had some
 21 recollection that one of these types of hearings had been
 22 done in the past.

23 So -- and so with respect to the court
 24 reporters, they -- they have people that have already
 25 been screened in Beaumont who are, you know, people that

1 should not basically tie up the other -- the Marshals or
 2 the U.S. Attorney's office or the Court with trying to
 3 arrange for a hearing at the Beaumont federal courthouse
 4 and get a writ and so forth if we were not necessarily
 5 going to need that. So I believe that's still like an
 6 option we can keep in our back pocket, but I think we
 7 can -- we can handle this at the hearing -- I mean at the
 8 prison.

9 JUDGE ELLIOT: All right. Let -- let me ask,
 10 you say that the -- there are court reporters available
 11 presumably in the Beaumont area who have been to the
 12 prison before for various proceedings. I assume that the
 13 prison allows their -- their electronic recording
 14 equipment to come into the prison. Is that right?

15 MS. FRANK: Yes, Your Honor. And -- and as far
 16 as the equipment goes, what I had learned before was that
 17 equipment can be brought in like -- I think they do not
 18 allow any cell phones whatsoever, but laptops and
 19 other -- certainly the stenographic equipment can come
 20 in, but you have to list any equipment that you want to
 21 bring in and -- and identify it so that the warden can
 22 approve it in advance of it coming in.

23 And so, again, I believe it's local court
 24 reporters there that have come in that they have worked
 25 with before. And I believe the attorney at the prison

1 they're familiar with who have come in to transcribe, and
 2 their machines are cleared and -- and they know the
 3 process. And so it sounded to me like this was the best
 4 option. I still do not believe that our part of our
 5 case, at least with respect to my questioning of our
 6 witnesses, without regard to whether or not we're going
 7 to actually call any given the Court's decision or
 8 inclination on witnesses, I do not think that it would
 9 take me more than half a day to question the people that
 10 I want to bring in. And I may reconsider who I bring in
 11 if there is already testimony in the record with respect
 12 to those that covers the points that we need to have
 13 covered.

14 So I still believe that this is the best
 15 option. I do not believe that there is -- there are
 16 issues that are going to take 35 witnesses. To the
 17 extent that there -- there -- the Court does decide that
 18 there is a need to have a longer hearing, the option of
 19 getting a writ to have Mr. McDuff taken by the U.S.
 20 Marshals to potentially a federal courthouse for a
 21 hearing, that is still a possibility. I have not filed
 22 any paperwork at this point because it seemed to me that
 23 if we could -- if we had a two day hearing at the prison,
 24 that that would take care of the issue.

25 So I -- I did not -- I made a decision that I

1 gave me the name of the firm. So presumably we can -- we
 2 can contact the same people. And they're familiar with
 3 these procedures, and -- and their equipment can come in.
 4 It just has to be approved in advance.

5 JUDGE ELLIOT: Okay. And with respect to that,
 6 that advance approval and also the -- doing the
 7 background checks on individuals who are going to go into
 8 the prison, do we know how long that would take?

9 MS. FRANK: Yes, Your Honor. Before when I was
 10 having those discussions they -- they indicated, I kind
 11 of got two different answers. One was that it might only
 12 take about a week or two on the equipment and probably
 13 maybe four weeks for a background check, but then
 14 somebody told me it wouldn't really take that long. So I
 15 don't -- I am not sure exactly, but if we had -- One of
 16 the things I was thinking is if we -- if we started early
 17 enough, we can certainly get all of this done well in
 18 advance of the hearing.

19 JUDGE ELLIOT: And do we know where the hearing
 20 would be held? I -- I had the impression from the last
 21 time we talked that it would be essential are held
 22 essentially in the visitor room.

23 MS. FRANK: Yes, Your Honor. I didn't get any
 24 different information in the -- in the next round of
 25 phone calls that it would be any different. It would

1 still probably be there.

2 JUDGE ELLIOT: Okay. Were there any week --
3 any days of the week that would be off limits? For
4 example, there might -- I have -- I think what I went on
5 the Bureau of Prison's website visiting I read that they
6 have visiting hours on the weekends and maybe at least
7 one or two days during the week. Do you know if there
8 are day of the week restrictions?

9 MS. FRANK: I -- I don't think there are. I
10 know the attorney suggested that it might be a good idea
11 to start on a Tuesday so that we would have Tuesday and
12 Wednesday blocked off. I do know that if we request the
13 room early enough in advance, there -- there were -- some
14 information I got said sometimes they use the visitors
15 room for like graduation ceremonies for inmates who have
16 taken some kind of classes and -- and are graduating from
17 whatever educational program they're in. They will use
18 the visitors room for something like that, but if we --
19 if we reserve the room far enough in advance, we wouldn't
20 have that to worry about.

21 JUDGE ELLIOT: Okay. Mr. McDuff, do you have
22 anything to add to this?

23 MR. MCDUFF: Your Honor, I believe, first of
24 all, I don't understand how the requirement for it to be
25 a public hearing can be met by it being conducted here.

1 evidence and so forth and -- and fully attend without the
2 impediments of and the trappings of incarceration that
3 goes along with that.

4 JUDGE ELLIOT: Okay. Well, I think that I am
5 going to go along with what Ms. Frank is suggesting
6 because, although I hear you when it comes to the
7 difficulties of actually trying a case when you're
8 incarcerated, I understand, yes, you do have some
9 difficulties. I don't think it's realistic to expect
10 that you would be released on some sort of a bond so that
11 you can try this case. I -- I am not familiar with that
12 ever happening before.

13 I am satisfied by Ms. Frank's explanation for
14 what happened to you 20 some odd years ago when you were
15 released on bond. That's entirely different and not a
16 comparable situation at all. And I think that what Ms.
17 Frank -- what Ms. Frank has described is a plan A.

18 And plan B would be the alternative that she
19 described where we attempt to transport you to Houston
20 where the facilities might be better for everybody, but
21 it would -- we may not be able to do that at all. I
22 think plan A should be what Ms. Frank is describing. If
23 it turns out that I am dissatisfied with it, if I think
24 that actually this isn't adequate for everyone to present
25 their cases, then I may just order that, the plan B that

1 That's issue number one because when the public wants to
2 attend, them being denied would -- would be denying their
3 right for it to be a public hearing. The -- the other
4 issue is there are so many things that can take place
5 to -- to thwart any sort of a schedule that one is on
6 here, recalls for fights or any kind of thing that could
7 come up, not just at this institution, but any other ones
8 that require staff to have to leave and go over there
9 which would require problems there. There's just any
10 number of things that makes it so impractical, especially
11 over a longer duration which is, of course, what my
12 position is I believe is going to take much longer
13 than -- than what the Commission is or the Division is
14 proposing.

15 JUDGE ELLIOT: Well, what are you proposing we
16 do instead then, Mr. McDuff?

17 MR. MCDUFF: Well, having it at a proper
18 facility where I am able to prepare and to present a full
19 and complete and fair defense without having all the
20 impediments that goes along with incarceration by being
21 ridden on some sort of custodial bond into, for example,
22 the federal agent who has agreed that he would be
23 responsible for making sure I was wherever the Court
24 ordered me to be and which would allow me then access to
25 be able to prepare the witnesses and gather the necessary

1 is. But in the meantime I think we should try what Ms.
2 Frank is suggesting.

3 Your point about the lack of public seating, I
4 hear you, but the truth is that we used to do this quite
5 a bit. We used to have hearings in prisons quite a bit up
6 until about 20 years ago, and the Commission has never
7 found them to be inadequate, even from the point of view
8 of publicity. And in any event, the right to a public
9 proceeding is a qualified right. There are certain
10 things that can justify closing the courtroom and sealing
11 a proceedings. And I, in fact, do that routinely in some
12 of my cases. So I think we should go ahead with what Ms.
13 Frank has described, and we will come up with a schedule
14 here in a moment. But the next issue I want to
15 address --

16 MR. MCDUFF: I would just like to go on the
17 record --

18 JUDGE ELLIOT: Go ahead.

19 MR. MCDUFF: Yes, sir. I would just like to
20 oppose for the -- for reasons stated.

21 JUDGE ELLIOT: Very well. Understood. So the
22 next thing I want to talk about is who are the witnesses,
23 who do you want to call as your witnesses. So, Ms.
24 Frank, let -- let's just assume I had not said what I
25 said at the very beginning, which is that you don't need

1 to re-call any witnesses to say that what they have
2 already said and that's in the record. Assume that I did
3 not say that, who would you call as witnesses at the
4 hearing?

5 MS. FRANK: Your Honor, I would call two
6 investors, the receiver Court -- appointed for receiver
7 Lancorp and the investigator who investigated the -- it's
8 a -- it's -- he was the investigator for the prosecutor
9 in the criminal case.

10 JUDGE ELLIOT: Oh. You're referring to the
11 special agent?

12 MS. FRANK: Yes, sir.

13 JUDGE ELLIOT: All right. And --

14 MS. FRANK: So just those four people.

15 JUDGE ELLIOT: Okay. The -- Let me ask you
16 this, the -- it is possible legally speaking for someone
17 to be a broker but doesn't necessarily act as a broker
18 for any particular investors. It's much more common, I
19 think, for someone to be identified as a broker for
20 particular investors, so someone engaged in brokering
21 activity or didn't with respect to some particular
22 investor or some other particular investor, but I have
23 had cases where it was -- someone was acting as a broker
24 but who didn't really have a lot of contact with
25 individual investors.

1 JUDGE ELLIOT: Okay.

2 MS. FRANK: And there's -- and I guess the
3 Court has seen this. There's -- there's a letter between
4 Mr. McDuff and Mr. Lancaster in which they agree how
5 they're going to divide up the profits which turned out
6 not to really be profits at all from the monies that the
7 investors were putting in that were going to go into
8 Megafund. And so to the extent that he is helping also
9 to decide what the investment should be, contrary to
10 what's in the prospectus, then -- then that's the
11 activity that I am talking about.

12 JUDGE ELLIOT: All right. And can you give me
13 in a general sense what you expect the testimony of the
14 special agent would be?

15 MS. FRANK: The special agent went through a
16 lot of banking transactions, financial transactions and
17 can trace the monies and show that there was -- that
18 basically the money from Lancorp that went into Megafund
19 just made a round trip back to the -- it wasn't any
20 investment return that Megafund sent back out to Lancorp
21 to be divided up between Mr. Lancaster and Mr. McDuff.

22 And so it was basically, as you would imagine
23 any Ponzi scheme is, that they -- the money just goes
24 back out. It was -- it was not any kind of investment
25 return at all. And he was able to trace that and trace

1 It was not -- those activities were not
2 confined to any particular individual investors. Is it
3 your position that Mr. McDuff acted as a broker only for
4 particular investors or that he did other things as well
5 which were not confined to just identifying with
6 particular investors. Do you understand the question?

7 MS. FRANK: Yes, Your Honor. And -- and our
8 contention is that he did both. There are particular
9 investors that he was the primary contact for, and then
10 there were other activities he was engaged in that I
11 think still qualifies as -- as acting as a broker, but
12 without necessarily specific contact with individual
13 investors.

14 JUDGE ELLIOT: Okay. Can you give me an idea
15 of what that would be? So, for example, I am guessing
16 you are going to say that he supervised the drafting of
17 the private placement memorandum. Is that the kind of
18 thing you're talking about?

19 MS. FRANK: Yes, Your Honor.

20 JUDGE ELLIOT: Okay. Anything else? Any other
21 activities?

22 MS. FRANK: He was involved in helping to
23 decide which -- what the investment would be and in
24 negotiating a payment for himself based on bringing
25 investors into the Lancorp fund.

1 the money into other accounts that Mr. McDuff had control
2 over. And he can -- he -- he tracked all those
3 transactions. So he can testify about that.

4 JUDGE ELLIOT: Okay. So I am not going to hold
5 you to this, but -- because I know I just sprang this on
6 you, but given the fact that I ruled you don't need to
7 put on any testimony that's already in the record, what
8 do you think right now would be your list of witnesses.

9 MS. FRANK: Well, I have thought about this,
10 and I think there are a couple of points about proving up
11 the activity of broker that were not asked of -- of the
12 investors. And I apologize. I can't recall this off the
13 top of my head. But I -- I think that there -- and there
14 may be, you know, some very additional kind of clean-up
15 type questions of the other two witnesses that -- that --
16 I do recognize that a good bit of what we would want to
17 have them testify about is already in the criminal trial
18 transcript, but I think there is some very minor -- well,
19 I won't say minor.

20 I think there are some additional points that
21 are not included in that testimony because obviously they
22 were not at the criminal trial focusing on the legal
23 definition of a broker whether he was acting as a broker,
24 but it's not much. And hopefully the Court won't hold me
25 to that.

1 JUDGE ELLIOT: Okay. But essentially you are
2 saying the investors is who you want to call now.

3 MS. FRANK: I -- I believe so, but I -- I am
4 not 100 percent sure if everything that I would want to
5 ask Mr. Loecker or Mr. Quilling is -- is in the criminal
6 record. Probably, but -- so I am not -- I am not sure,
7 but yes, basically the investors.

8 JUDGE ELLIOT: Okay. Understood. Okay. Let
9 me turn to Mr. McDuff then. Can you tell me who you
10 would want to call as witnesses?

11 MR. MCDUFF: Yes, sir. Pardon me just a
12 moment. Let me turn to that list. The -- the
13 allegations, of course, and the way that they have been
14 made, it would be myself, my son, my mother, Special
15 Agent Mr. Kaufman. Then there is an expert by the name
16 of Michael Boyd.

17 JUDGE ELLIOT: Okay. Let me stop you right
18 there. Okay. What would your son and your mother testify
19 to?

20 MR. MCDUFF: The -- the fact that the
21 allegation made was that -- and pardon me just one
22 moment. I have got a bit of a cough.

23 JUDGE ELLIOT: Take your time.

24 MR. MCDUFF: The allegation made by the special
25 agent was that the money was used to purchase a home for

1 they agree to an amendment and sign that amendment. That
2 was not presented at trial. And it is very relevant to
3 the defense of this issues because that takes away the
4 primary misrepresentation factor that was presented. None
5 of those documents were provided to me to be able to
6 present in a defense.

7 JUDGE ELLIOT: Okay. No. That's not -- No,
8 no. Wait. Let me say this again. It has been
9 established that you made misrepresentations. Okay.
10 This is established conclusively. You cannot re-litigate
11 that here. This is the effective collateral estoppel.
12 And that's even assuming that you're right about the
13 insurance being at one of the -- being the only
14 misrepresentation. The fact is there were other
15 misrepresentations made, but in any event you made
16 misrepresentations. This has already been established.
17 You can't re-litigate this.

18 MR. MCDUFF: Well, that's not re-litigating it,
19 Your Honor, because the -- the Commission when they
20 remanded us back was on the issues and not being able to
21 rely on the findings of either one of the other courts,
22 the civil court or that, because the issues raised by the
23 Commission in this have not been litigated in a
24 proceeding attached to the Commission's actions here
25 which was the civil action. It's an allegation made that

1 my son. And he can give testimony that that is not true.

2 JUDGE ELLIOT: Okay. That's not relevant. So
3 you won't be calling your -- your mother and your son.
4 Anything else you want to call them for?

5 MR. MCDUFF: My mother was an investor with the
6 Lancorp fund. And she will invest as to what
7 representations were made by Mr. Lancaster or even
8 myself, and especially has to do with the safety of the
9 investment and what was or was not insured.

10 JUDGE ELLIOT: Okay. I don't see that that is
11 relevant. That's already been determined against you.
12 We're -- Right now we're focused on the issues that
13 are -- are in the order instituting proceedings. It's
14 already established that you committed wire fraud. So
15 it's already been established that you made
16 misrepresentations to at least some investors. The fact
17 that you maybe made -- maybe did not make
18 misrepresentations to your mother or to other investors
19 is simply not relevant.

20 MR. MCDUFF: Well, what was unknown, Your
21 Honor, and provided was the fact that each investor
22 signed documentation prior to their money being taken out
23 of escrow and used by Mr. Lancaster which specifically
24 said there was no insurance, there would not be any
25 insurance, and only if they wanted to go forward would

1 has not been -- been determined by any finding related to
2 securities matters.

3 JUDGE ELLIOT: Okay. Let me turn to Ms. Frank.
4 Ms. Frank, do you contend that the findings in the
5 criminal case have collateral estoppel effect in this
6 proceeding?

7 MS. FRANK: Your Honor, what my understanding
8 was was that the -- the judgment could not be used as a
9 basis for findings, but I think everything else in the
10 criminal trial can be used particularly because Mr.
11 McDuff was present and had the opportunity to speak up
12 and say whatever he wanted during that process. So all
13 of the testimony, exhibits and -- and the sentencing
14 hearing and everything else can be used. And -- and
15 those are findings, and I think the collateral estoppel
16 principals apply to all of that material.

17 JUDGE ELLIOT: All right. I -- I agree. I
18 think that the --

19 MR. MCDUFF: And, Your Honor --

20 JUDGE ELLIOT: Yes. Go ahead.

21 MR. MCDUFF: May I just finish the -- what I
22 was -- where I was headed with this, in the Commission's
23 remand order they quote the Arizona versus California
24 case which it specifically says in there that the Supreme
25 Court in a case of judgment entered by default which is

1 the summary disposition or the default claim that was
2 made in the civil underlying case here, that none of the
3 issues is actually litigated. Therefore, preclusion or
4 collateral estoppel does not apply with respect to any
5 issues in a subsequent action which is what this is.

6 JUDGE ELLIOT: No. I don't agree with that.
7 Okay. I don't think that's what they say. And I don't
8 think that's the implication of the remand order. The
9 remand order --

10 MR. MCDUFF: That's at page three, by the way.

11 JUDGE ELLIOT: Okay. But the remand order is
12 about the -- whether or not you were acting as a
13 broker-dealer that engaged in the misconduct that gave
14 rise to the injunction issued against you in the civil
15 proceeding. That's one issue. The other issue is what
16 are the public interest factors. And the -- there's only
17 one other factor. There's only one other finding that is
18 at issue, and that's already been established. And it was
19 not remanded for further findings by the Commission. And
20 that's the question of whether you were enjoined, and you
21 were enjoined.

22 So the only issues that I need to address are
23 were you acting as a broker-dealer at the time of your
24 misconduct and does the public interest weigh in favor of
25 sanctioning you. And if so, what should the sanction be.

1 Those are the only issues. We're not here to re-litigate
2 whether or not you actually engaged in the misconduct
3 because the findings in the criminal case establish that
4 conclusively. So I am not going to let you re-litigate
5 the criminal case. You were given an opportunity to
6 litigate the criminal case, and you -- you lost.

7 MR. MCDUFF: Based on the objections that I
8 made, which I claimed as Brady violations at sentencing
9 is the reason that there was no opportunity to properly
10 present a defense because it was denied me. I did not
11 have access to the information.

12 JUDGE ELLIOT: I read the transcript. We sat
13 through the entire trial. You made no objections to any
14 evidence. You did not present any witnesses. You did
15 not cross-examine any witnesses. You were given an
16 opportunity to. The judge consistently asked you if you
17 objected or wanted to ask any questions at
18 cross-examination, and you didn't.

19 MR. MCDUFF: I had no documents to support
20 anything that I would present to the witnesses.
21 That's -- that's the important factors here. And it was
22 unable to be found. It still wasn't located. For
23 example, one of the things that we haven't gotten to this
24 yet that I would like for you to require the Commission
25 to produce or the Division to produce is the actual

1 agreement between Megafund. It has never been disclosed.
2 It has never been shown.

3 Only the signature page is. And it is
4 exhibited -- It just shows here as App 10, A-p-p 10. And
5 it's between the Lancorp fund and -- I'm sorry, the
6 Lancorp group and Megafund which I believe the document
7 itself will exonerate me and show what the transaction
8 was about, who was to be paid and not paid. And it has
9 not been shown. And I think it's very germane and
10 relevant.

11 JUDGE ELLIOT: All right. Well, let's deal
12 with that discrete issue. Hold on. Hold on, Mr. McDuff.
13 So Ms. Frank, are you -- do you know what Mr. McDuff is
14 talking about?

15 MS. FRANK: No, sir, I don't. I mean I
16 understand what he is saying, but I don't think I have --
17 I know I haven't seen that particular document. I don't
18 know that there's any -- I mean I don't know whether it
19 exists or not. I have not seen it in my review of the
20 file, but I wasn't -- I will admit I wasn't necessarily
21 looking for that particular document.

22 However, Mr. McDuff's mother came to our
23 offices and went through all of the boxes that we had
24 pulled that relate to this matter, and she had access to
25 look through the documents and try and find it herself,

1 but I don't know -- I certainly don't think that that
2 document exonerates Mr. McDuff, even if it says what he
3 says because the issue here was all about whether or not
4 the Lancorp fund invested the investors' funds in the
5 manner in which they were supposed to be invested as
6 stated in the prospectus which was in A plus rated debt
7 securities which, of course, they weren't because that's
8 not what Megafund was.

9 So it doesn't matter what Megafund made a deal
10 with Lancorp about who was going to be paid what. It
11 doesn't make any differences because the fraud was
12 investing any of the money into Megafund in the first
13 place. And -- and, in fact, the other -- the other side
14 of it is as far as dividing up the money or how they were
15 going to pay themselves, you know, that got -- that was
16 tracked through financial records. And what the Megafund
17 people said with anybody at Lancorp doesn't relate to any
18 of these issues.

19 JUDGE ELLIOT: Okay. Mr. McDuff, do you have
20 any comments on that?

21 MR. MCDUFF: Well, I think it's very important,
22 Your Honor, because it determines whether or not the
23 investment was something that was allowed or not allowed.
24 And the document itself has to speak for itself because
25 we're going on assumptions right now. She has stated she

1 hasn't seen it, so she's unaware of what it says. And in
2 the depositions that were taken by the SEC of Mr.
3 Lancaster, they present it to him and show it to him and
4 ask him is this the agreement you signed with it. And
5 they specifically speak in that deposition of the
6 amendments that Mr. Lancaster required of the owner of
7 Megafund so that it would comply and be a permitted
8 investment according to the funds memorandum.

9 JUDGE ELLIOT: Okay. So you are saying that
10 then the agreement between Lancorp and Megafund suggests
11 that the -- there were no misstatements made by you or
12 Mr. Lancaster or Mr. Reese about what Mega -- what
13 Lancorp was going to be investing in.

14 MR. MCDUFF: That's my position, yes, Your
15 Honor.

16 JUDGE ELLIOT: Okay. Well, that's not -- you
17 are not going to be able to re-litigate that. That's
18 been found conclusively against you. So I don't see that
19 that's relevant. So I don't see any reason to pursue this
20 document that you referred to. And I don't see that it
21 would necessarily be admissible. I would probably
22 consider it if you were to offer it, but I don't see that
23 as being particularly relevant. Okay. So --

24 MR. MCDUFF: But I would like for the Division
25 to produce it, Your Honor.

1 And so my position is that must still be error
2 and -- meaning that the allegations that this Court is to
3 review are the ones made in the civil complaint which
4 were made by the SEC totally separate and complete from
5 the criminal case or the findings in a default judgment
6 which is no judgment at all on the merits.

7 And for there to be anything imposed in the way
8 of sanctions has to be based on some sort of meritorious
9 finding. And the allegations made in the OIP raise
10 multiple allegations and not single allegations. And the
11 public hearing purpose is so -- it says in these -- the
12 section two of the OIP that I would be able to present a
13 defense against the allegations which is plural. And as
14 you go through those, they're multiple.

15 And that's why I believe that the hearing
16 should allow those to take place. Otherwise I am not
17 able to present a full and fair defense because these
18 issues have never been properly litigated. They have
19 never had the ability to be tested with evidence that I
20 was deprived of, which I got post trial in the criminal
21 trial through external parties that I did not even know
22 existed who came forward after they found out and through
23 private investigators.

24 And even the law firm who had the documents
25 that we discovered said before trial they didn't have

1 JUDGE ELLIOT: No. I don't think so. That
2 does not strike me as -- as material at all. So I don't
3 think the Division should be required to produce it.

4 MR. MCDUFF: I object, Your Honor.

5 JUDGE ELLIOT: Actually, in fact, based on what
6 Ms. Frank just said there's a pretty strong likelihood
7 they don't even have it. So in any event -- so let's go
8 with the rest of your witnesses. Now, I want you to keep
9 in mind that I am not going to let you re-litigate the
10 issues that have already been decided against you.
11 Keeping that in mind, who would you want to call as
12 witnesses?

13 MR. MCDUFF: Your Honor, I would just like
14 to -- to re-urge the motion that I have filed with you
15 earlier just, you know, earlier this month and the
16 memorandum in support of the motion getting the
17 clarification on it because it is -- in reading the
18 original OIP and reading what the commissioners stated on
19 remand is that nothing was decided.

20 And, of course, they quote the Supreme Court
21 case that I just talked about that there's no issues that
22 have been decided. And the primary reason that they said
23 it was remanded was because of reliance on the civil and
24 the criminal litigation that had taken place already
25 which was error.

1 anything that they could find, but one of the lawyers
2 found something months later on a different issue and
3 said, oh, we did find it, but we didn't think we had it
4 or we were mistaken.

5 So all of those issues are very germane because
6 it means I was deprived of the ability to put forward a
7 full and fair defense to the allegations at that time.
8 And irrespective of whether I did or did not have a
9 guilty finding in those, the Commission said relying on
10 that is -- is not the proper procedure. And that's why I
11 object to not being able to call the witnesses to put
12 forth a full and fair defense. It goes directly towards
13 the heart of this matter presently which is the
14 broker-dealer issue because it goes to conduct,
15 agreements and representations. And every one of these
16 has to do with what was the representation, what was the
17 agreement. And extremely important is what did the PPM
18 allow and what did it not allow, which was never properly
19 presented.

20 JUDGE ELLIOT: Okay. Understood. So I don't
21 agree with you on that last point. The -- the PPM, the
22 contents of the PPM it seems to me are not especially
23 relevant. I would admit the PPM if it were offered into
24 evidence in this proceeding, but the contents themselves
25 are not especially important. What is important as Ms.

1 Frank has already indicated is how the PPM was prepared,
2 who did the preparing, who decided what to put in and
3 things like that, but the PPM itself is not particularly
4 relevant as far as its contents go. And --

5 MR. MCDUFF: What it admits is not relevant?
6 Is that your position?

7 JUDGE ELLIOT: That's right. It's generally
8 not relevant. The -- the actual permitted investments
9 are not particularly relevant. Now, let me -- let me
10 mention one thing before I go back to asking you about
11 your witnesses, the Respondent has moved for a motion for
12 decision on the scope of the hearing. And I am going to
13 grant that because, of course, that's what we're doing
14 right now is we're resolving what the scope of the
15 hearing is all about.

16 So to that extent I will grant Mr. McDuff's
17 motion. So let's continue. So again, keeping in mind
18 that you are not going to re-litigate whether or not you
19 committed wire fraud and money laundering, who else do
20 you want to call as witnesses?

21 MR. MCDUFF: Michael Boyd as an expert. He --
22 he is the one that can actually speak as he has done on
23 behalf of the Government in the past. He's been called
24 as a Government witness -- witness in past proceedings
25 unrelated as to what is and is not permitted and whether

1 only issues -- the only two issues that I think remain
2 are were you acting as a broker and what do the public
3 interest factors say that I should do, who would you want
4 to call as witnesses? And you will be given an
5 opportunity based on Ms. Frank's representations to
6 cross-examine -- I'm sorry, Ms. Frank, is it Ms. Benyo
7 and Mr. Biles? Do I have that right?

8 MS. FRANK: Yes, sir.

9 JUDGE ELLIOT: All right.

10 MR. MCDUFF: Okay. As far as transaction based
11 compensation, is that or is that not part of the
12 broker-dealer issue in your summation?

13 JUDGE ELLIOT: Yes. So if you -- if there is
14 some witness who can testify about whether or not you
15 received transaction based compensation, I will -- I'll
16 hear testimony from that.

17 MR. MCDUFF: That -- that would be Adolfo
18 Noriega, Eduardo Trejo, Shen Ganger. It would be Stanley
19 Leitner. It would be --

20 JUDGE ELLIOT: Okay. Hold on. Hold on. Let
21 me -- Let's just pause here. So the first two witnesses,
22 do they live in Mexico?

23 MR. MCDUFF: Two of them do, yes.

24 JUDGE ELLIOT: Okay. And I'm sorry. The next
25 one was Shen something?

1 or not the actions were a violation or were not a
2 violation.

3 JUDGE ELLIOT: Okay. Okay. Hold on. Hold on.
4 Hold on. I think we're -- Do you still have another 30
5 witnesses or so to go on your list?

6 MR. MCDUFF: No, sir. I have got about 20 more
7 to go.

8 JUDGE ELLIOT: Okay. Well, I think this will
9 probably take too long. So let's do this, you may enter
10 an objection at the hearing or before the hearing. I
11 will give you an opportunity to do that about who you
12 would want to call as witnesses. And you may describe --
13 It might be a good idea when you do that to describe what
14 they would testify to. But so far not a single witness
15 that you have talked about has had, according to you, any
16 sort of relevant evidence to offer. So why don't we just
17 put aside the question of who you would want to call if
18 you were given an opportunity to call everyone you wanted
19 to.

20 MR. MCDUFF: Yes, sir.

21 JUDGE ELLIOT: Put those people on a separate
22 list and make sure you list them and then you can file an
23 objection that says basically I was prevented from
24 calling these witnesses. Okay. What I want to know is
25 given the fact that the only issue that I think -- the

1 MR. MCDUFF: Yes. In the United Kingdom.

2 JUDGE ELLIOT: And then Mr. Leitner, is he in
3 jail?

4 MR. MCDUFF: He is, yes, Your Honor.

5 JUDGE ELLIOT: Okay. And so I don't -- I
6 mean -- we're not going to be able to get any of those
7 witnesses. So I think you are going to have to put them
8 on the list of people you were prevented from calling as
9 well. I'm sorry. So go on. Keep going. Who else?

10 MR. MCDUFF: There would be Stephen Renner
11 which handled the institution where the funds were
12 actually paid into.

13 JUDGE ELLIOT: When you say institution, are
14 you talking about Mex Bank or are you talking about --

15 MR. MCDUFF: I am talking about the -- the
16 accounts. Again, I am talking about the accounts that
17 were established for Mex Bank. This is internet banking
18 that was provided by an entity known as Cash Cards
19 International. And he is the owner who negotiated the
20 opening of that -- what's called an on-line portal which
21 is white labeled out to anyone who wants to have internet
22 banking available to them.

23 JUDGE ELLIOT: Okay. And what would -- what
24 would he say? Would he -- would he describe how much
25 money you received or what would he say?

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1 MR. MCDUFF: He would establish that the
2 account was not my account. I did not control the
3 account. And that all of the account records and files
4 know your customer requirements were based on the owners
5 of Mex Bank and not myself. And that I had no authority
6 over it to direct anything.

7 JUDGE ELLIOT: Okay. I am not -- I don't think
8 that that's relevant. The question is whether or not the
9 money you did receive, if any, was connected in some way
10 with a transaction whether it was transaction based. And
11 the fact that you -- your name did not appear on any of
12 the documents associated with Mex Bank or for that matter
13 with Lancorp or any other companies I think is not really
14 relevant. The question is how much money did you get and
15 was it transaction based. I am not sure that Mr. -- I'm
16 sorry. Did you say his name was Mr. Renner?

17 MR. MCDUFF: Yes. That's correct.

18 JUDGE ELLIOT: I don't -- I am not seeing how
19 Mr. Renner's testimony would be relevant to that.

20 MR. MCDUFF: The -- the Commission alleges that
21 it went into an entity that I controlled, not an account
22 that I controlled, but an entity that I controlled which
23 I think is very substantial differentiation.

24 JUDGE ELLIOT: Well, okay. Okay. So your
25 position is that you didn't receive any transaction based

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1 compensation at all. Is that what you are saying?

2 MR. MCDUFF: That is correct, Your Honor.

3 JUDGE ELLIOT: Okay. Well, let me hear from
4 Ms. Frank. Ms. Frank, do you have any comments on that?

5 MS. FRANK: Well, obviously we -- we do believe
6 he received it or he directed that the money go to other
7 people on his behalf. In other words, the whole business
8 about -- I mean the -- For example, the receiver was able
9 to trace funds that were supposedly being paid to Mr.
10 McDuff that ended up in a house that is owned by his son
11 and titled in the name of his son.

12 And so to the extent that is -- that is
13 compensation that he may be claiming didn't pass through
14 his hands but it was for him or his benefit. And the
15 same is true for all of those funds that were -- that
16 there's already been testimony in the record about. And
17 I believe Mr. McDuff -- I'm sorry. I can't remember the
18 exact details at this point, but I don't know how the
19 person who opens an account at Cash Cards International
20 is going to know the purpose of the funds that are
21 passing through those accounts. And so from that
22 standpoint I am not sure that I would see how Mr.
23 Renner's testimony would be relevant as far as that goes.

24 JUDGE ELLIOT: Okay. Go ahead, Mr. McDuff.

25 MR. MCDUFF: But, Your Honor, again, I don't

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1 want to say anything negative, but I do want to point out
2 something. One of the problems that we have in all of
3 this evidence presented is just what you at this moment
4 heard Ms. Frank tell you that the records show that the
5 house was in the name of my son. They have the records.
6 It's a matter of public record. They're
7 self-authenticating.

8 So that's not even contestable. It's not in
9 the name of my son. That's an easy thing to show, but it
10 requires putting the person forward to show that. If the
11 Court accepts an allegation that's unsupported, which --
12 which I am contesting all of these are, they are
13 conclusionary findings of the -- the SEC making these
14 representations without properly supporting them. They
15 tell the Court one thing, but the documents tell a
16 different story. And that is the story which is the true
17 story that I think needs to be shown to the Court so the
18 Court can make a fully informed decision and not rely on
19 so much erroneous misinformation.

20 JUDGE ELLIOT: Okay. Let me go back to Ms.
21 Frank. So explain this to me, if you can remember, your
22 contention is that money went from Megafund to Lancorp
23 and then from Lancorp through, I guess, an intermediary,
24 perhaps Mr. Renner to Mex Bank and then from Mex Bank to
25 Mr. McDuff's son.

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1 MS. FRANK: I think, and I apologize for not
2 remembering the -- the transaction and how it actually
3 flowed. I know that there were two sets of payments from
4 Megafund back that ended up for the benefit of Mr. McDuff
5 either in an account that he controlled or for his
6 benefit. And I believe monies that went to, you know, a
7 family member counts as something that -- that he gets
8 the benefit of.

9 The -- there was a -- there was a payment that
10 went to Lancorp that Mr. Lancaster then parceled out to
11 places that Mr. McDuff directed that the money should go
12 to. And I believe those documents are in the record.
13 And again, I apologize for not remembering the details.
14 The second time that Megafund sent money back, Mr. McDuff
15 had had Mr. Leitner send it directly to certain places
16 directly without it passing through Lancorp's bank
17 account.

18 And -- and I believe that was evidence that was
19 presented at the criminal trial and -- I apologize. I
20 don't know that -- that the money -- I think some of
21 those accounts were Cash Cards International. Maybe all
22 of them were. I don't know how -- I mean perhaps Mr.
23 Renner can authenticate documents related to these
24 accounts, but he's certainly not going to know the
25 purpose of the funds. And --

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1 JUDGE ELLIOT: Okay.

2 MS. FRANK: I apologize. I can't remember the
3 sequence, the details of those transactions, but there
4 were two batches of money that basically came out of
5 Megafund that the evidence has shown Mr. McDuff received
6 the benefit of.

7 JUDGE ELLIOT: All right. Well, I -- I am
8 still inclined not to allow Mr. Renner to testify, but
9 I'm not sort of inclined to allow Mr. McDuff's son to
10 testify. In any event, Mr. McDuff why don't you put Mr.
11 Renner on the list of people I am not allowing you to
12 call. And I'm sorry, what -- Mr. McDuff, what's your
13 son's name?

14 MR. MCDUFF: Shiloh.

15 JUDGE ELLIOT: Shiloh, is it Shiloh McDuff.

16 MR. MCDUFF: That's correct.

17 JUDGE ELLIOT: All right. So I will allow
18 him -- I will put him on the list so far. Okay. Who
19 else?

20 MR. MCDUFF: Then it would be Kevin and Selina
21 Herring who are the ones who introduced Jay Biles to the
22 Lancorp fund.

23 JUDGE ELLIOT: Okay. And can you give me an
24 idea of what they would say? Like how did they learn
25 about Lancorp?

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1 MR. MCDUFF: That I did not solicit -- They
2 learned about Lancorp originally speaking to my son who
3 ran a business next-door to their business. They had a
4 tanning salon, and my wife had an anti-aging clinic. And
5 they were next-door, and they asked what his father did.
6 And he just said he's working with a law firm that is
7 funding -- a fund is being put together in the United
8 States, and the funders are over in the United Kingdom
9 and it will be taking investors' money. And so to find
10 out who the owner is talk to my dad. So they asked to
11 come speak to me if I knew how to get in touch with the
12 people who had this fund.

13 JUDGE ELLIOT: Okay.

14 MS. FRANK: Your Honor --

15 MR. MCDUFF: They -- they then are the ones who
16 told their -- In fact, they were an investor in the fund.
17 They contacted Mr. Lancaster and became an investor and
18 had to get out for family matters of some sort and got
19 all their money back and then recommended to their own
20 relative, who is Mr. Biles would he consider doing it.
21 And that would explain how Mr. Biles found out about the
22 Lancorp fund as opposed to myself.

23 MS. FRANK: Your Honor, the testimony will
24 show, and I think it should at the criminal trial that
25 Mr. Biles may have heard about the fund from the

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1 hearings, but he actually met with Mr. McDuff, and Mr.
2 McDuff made the pitch to him directly in-person. And so
3 the fact that -- that Mr. Biles may have heard about the
4 fund initially from somebody else is technically
5 irrelevant when it was Mr. McDuff who actually made the
6 presentation and the representations.

7 JUDGE ELLIOT: All right. Yes. I -- I am
8 inclined to agree with that. So I'm sorry. Were they
9 Mr. and Mrs. Herring? Is that what you said, Mr. McDuff?

10 MR. MCDUFF: That's correct.

11 JUDGE ELLIOT: All right. So let's put them on
12 the list of people that won't be allowed to be called.
13 Who else?

14 MR. MCDUFF: Michael Quilling and Jessica
15 McGee.

16 JUDGE ELLIOT: And, Ms. Frank, is Jessica
17 McGee -- is she a staff attorney in the Fort Worth
18 regional office?

19 MS. FRANK: Yes, Your Honor, she is. And she
20 would not have any firsthand information that would be
21 admissible.

22 JUDGE ELLIOT: Mr. McDuff, what if -- if
23 Special Agent -- I guess it's Loecker, if Mr. -- Special
24 Agent Loecker were called, I think he -- it sounds to me
25 like he would know more about this whole case than Ms.

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1 McGee would. Would you be satisfied with just Special
2 Agent Loecker?

3 MR. MCDUFF: Well, no, Your Honor, because it's
4 very germane because she represented the fund, the
5 Lancorp fund, the fund that we were aware of had not been
6 filed and that Mr. Lancaster was not licensed. And that
7 is critical. And the other thing that I think is very
8 relevant is that the -- the fund did not qualify as a Reg
9 D fund.

10 And that is what, you know, and hadn't been
11 filed with the -- the SEC which she's claimed that she
12 had checked the SEC records and saw no proof of that.
13 Through private investigation after trial all of those
14 things were proved to have happened. In fact, the
15 attorney who actually did it confirmed that he did do it,
16 and then the SEC records themselves in Washington DC
17 where you are clearly shows exactly when the fund was
18 filed.

19 The primary misunderstanding throughout the
20 trial was the total unawareness, nor the presentation,
21 for example, of Agent Loecker. He identified the Lancorp
22 Fund Number 2, which no investors who testify invested in
23 that were there were ever told anything about insurance.
24 And there was never any proof that that fund was created
25 in conjunction with myself.

1 It was never told to any Court, nor in any
2 disclosure that the Lancorp Fund Number 2 was created
3 after the Megafund investment had ended after the -- it
4 had been closed down by the SEC. He admitted in his
5 deposition, that is Mr. Lancaster, that he created the
6 Lancorp Fund Number 2 on his own without legal counsel
7 and did not disclose it to anyone including myself. And
8 there were inappropriate conduct, if you will, apparently
9 from the way that was not filed because he specifically
10 states he did not file it according to Reg D.

11 So it is very important that Jessica McGee be
12 called so she can testify to which fund she was making
13 that determination about because she was never asked if
14 it was fund one or fund two.

15 JUDGE ELLIOT: Okay. I am not sure I heard you
16 correctly. When you -- You're talking about the Reg --
17 Reg -- I thought you said Reg B as in boy.

18 MR. MCDUFF: No, no. D as in David.

19 JUDGE ELLIOT: As in dog?

20 MR. MCDUFF: 506 Reg D. Everything that was
21 involved was 506 Reg D, Your Honor.

22 JUDGE ELLIOT: Okay. Well, I don't see the
23 relevance of any of this. The -- You were -- you were
24 found by a jury to have engaged in wire fraud in
25 connection with the Lancorp fund. And whatever else Mr.

1 Lancaster may have done on his own is not relevant to
2 that. So --

3 MR. MCDUFF: But the testimony had to do with
4 that activity as opposed to mine is very relevant.

5 JUDGE ELLIOT: No, it's not. You were -- you
6 have -- you committed wire fraud. Okay. That is -- that
7 is the starting point for all analysis. So it really
8 doesn't matter what else Mr. Lancaster did. It doesn't
9 even matter if the jury got it wrong. As long as there
10 is a final judgment against you for wire fraud, that's
11 the starting point. So no, this is not relevant. Okay,
12 who else do you want to call as a witness, Mr. McDuff?

13 MR. MCDUFF: That would be Kenneth Humphries,
14 the one who made the representation in writing to Mr.
15 Lancaster of the Lancorp fund that all monies would be
16 protected.

17 JUDGE ELLIOT: Okay. That's not relevant.

18 MR. MCDUFF: He's -- he's the attorney who made
19 that representation. That's the genesis of that
20 representation.

21 JUDGE ELLIOT: Are you saying Humphries or
22 Reynolds?

23 MR. MCDUFF: Humphries.

24 JUDGE ELLIOT: No. No. That's not relevant.

25 The representations made to investors were false. That's

1 established conclusively. So who else?

2 MR. MCDUFF: It's -- it's important whether or
3 not there was any knowledge of it, the criminal.

4 JUDGE ELLIOT: You knew about it. I'll say it
5 again, Mr. McDuff. You committed wire fraud. This has
6 already been established. That means you acted with the
7 highest degree of scienter. You acted not only with the
8 intent to defraud but with the intent to violate a law of
9 which you were aware. Okay. There's no -- The question
10 of what misrepresentations were made is really not that
11 relevant. What's relevant is whether you were acting as
12 a broker when you did it. Okay. So no, Mr. Humphries
13 will not be called. You can put him on the list of not
14 being called. Who else?

15 MR. MCDUFF: Lavoy Dewey, which was the one who
16 definitely introduced Francis Linvenyo to the Landcorp
17 fund.

18 JUDGE ELLIOT: Okay. Same reason as the
19 Herrings, I don't think that that's -- I don't think
20 that's relevant. You can put her on the list or him on
21 the list. Is Lavoy a man or a woman?

22 MR. MCDUFF: It's a man. It's Reverend --
23 Reverend Lavoy Dewey.

24 JUDGE ELLIOT: Okay. No. He will not be
25 called. Who else?

1 MR. MCDUFF: Sandra Martin Hicks, which I
2 believe she sent you a letter stating that her signature
3 had been forged on a document. And since you are taking
4 into consideration all of the criminal trial activity on
5 a victim impact statement stating that I introduced her
6 to Megafund which she said that was not her handwriting,
7 nor her signature. She doesn't know who said that, and
8 she was very upset about that.

9 JUDGE ELLIOT: Okay. Now, hold on. Hold on.
10 Let me -- let me say if the Division were contending that
11 Ms. Hicks -- you were Ms. Hicks' broker, then I would be
12 inclined to allow you to call her, but they are not. So
13 I think the fact that even assuming that all that -- that
14 evidence from Ms. Hicks is completely true, I don't think
15 it's relevant.

16 MR. MCDUFF: Larry Frank would be next. He was
17 the chief financial officer for the entity that the
18 Megafund placed the money into management for that
19 originally -- originated from the Lancorp fund through
20 the Megafund.

21 JUDGE ELLIOT: I'm sorry. Hold on. Explain
22 that again. He was -- worked for Megafund or for
23 Lancorp.

24 MR. MCDUFF: For Megafund. No. He actually
25 worked for another gentleman by the name of James Rumpf.

1 And I believe they had two company names that were
2 interchangeable. One was CIG, and the other one was
3 Silack which was the entities that took the money from
4 the Megafund which the Megafund got from the Lancorp fund
5 through the Lancorp group. Now --

6 JUDGE ELLIOT: Okay. Now, his -- his testimony
7 isn't relevant. That -- that has nothing to do with
8 whether you were a broker. All right. Who else?

9 MR. MCDUFF: Okay. If the reason his is
10 relevant for these proceedings it has to do with whether
11 or not there was any belief by anyone from his level
12 downward that there was any protection in the fund's
13 investment because he's the one who actually paid the key
14 for the insurance and received back the insurance policy
15 which he believed was valid and which is what he
16 transmitted on down to Mr. Lancaster's through the
17 attorney that I mentioned before Mr. Humphries writing
18 the opinion letter that there was indeed insurance
19 protection covering the investment. And he believed it
20 was valid. And he can testify that it would be an
21 impossibility for me to think otherwise because even he
22 believed it was valid. And he was only one party removed
23 from the actual person who perpetrated this, and his name
24 is Bradley Stark.

25 JUDGE ELLIOT: Okay. No. I don't -- I don't

1 showing that it was clear that there had been a change in
2 any representation of security from an insurance
3 perspective removed from it before anyone's money was
4 used. Only after all of those were received by Mr.
5 Lancaster did he take the money out and begin transacting
6 business.

7 He confirms that in -- in his sentencing
8 hearing to Judge Shell. And Judge Shell stops the
9 prosecutor, and he asked the prosecutor then what is the
10 problem here if he said all the people can have their
11 money back if you want it because there is no insurance,
12 and he hadn't used their money yet, what's the problem,
13 where is the fraud. And the prosecutor incorrectly said,
14 Your Honor, we see no proof that he offered anyone their
15 money back and there was no insurance. When, in fact,
16 each and every investor had said I understand there's no
17 longer any insurance.

18 I acknowledge the amendment to the PPM
19 according to Article -- I think it's 9.5 which means that
20 it can be modified as long as it's done according to PPM
21 and everyone cast their vote to any material change and
22 the other 21 federal courts that we're dealing with the
23 broker issue on trying to seek some sort of recovery
24 through where Mr. Lancaster held his securities license,
25 during those hearings that were held all of those Courts

1 think that his testimony is relevant. I don't think Mr.
2 Stark's is relevant. I read about your comments about
3 Mr. Stark in your summary disposition motion, and I don't
4 think that his -- that Mr. Stark's testimony is going to
5 be relevant either. So we will strike those two off the
6 list. So who next?

7 MR. MCDUFF: The Government has represented
8 that Lance -- that the investment by Megafund was never
9 made in any valid permitted investment. And Lance
10 Rosenberg can testify that that was not true. He was
11 involved when the amendment to the Lancorp fund was made
12 while all investors' money was in escrow when everyone
13 was told, sorry, but the representations made to you, all
14 of you investors, if there was going to be separate
15 insurance policies available, that each one of you could
16 buy if you wanted protection is no longer going to be
17 available. And in place of it, I've negotiated with the
18 custodian bank that we will be transacting with to
19 provide a bank obligation assuring that if any security
20 is purchased with your money, it will have a higher value
21 than what we pay for it.

22 That was the only assurance that existed at
23 that time which every investor then signed. Those are
24 the documents I was prohibited from seeing or denied
25 seeing. So I was unable to present that -- that defense

1 found that the -- Mr. Lancaster relied on the
2 representations of Mr. Humphries, but no money and no
3 securities were sold until he took the money out of
4 escrow which is the date of the first transaction which
5 was after all insurance was removed.

6 And so the foundation upon which false
7 representations having to do with insurance as being an
8 item don't exist. They happened beforehand. And they
9 were cleansed from being a misrepresentation by the
10 notice and amendment and acceptance by each individual
11 investor. And there's no investors whatsoever after that
12 date which was April the 4th, 2005, I'm sorry, 2004 that
13 have provided any testimony whatsoever that they were
14 ever again told about insurance. There was no longer any
15 talk of insurance. No one's testimony says that. It all
16 pre-dates that. So any --

17 JUDGE ELLIOT: Mr. McDuff, Mr. McDuff, hold on.
18 Let me jump in here. Okay. None of this is relevant.
19 Okay. It has been established that you committed wire
20 fraud. Even assuming that -- that there was -- that it
21 was erroneous with respect to the insurance issue, there
22 are still misrepresentations that you were found to have
23 committed including failure to disclose your own felony
24 conviction, failure to disclose Mr. Reese's cease and
25 desist order, failure to tell the investors what the

1 money was going to be invested in, failure to tell the
2 investors what the proceeds of the investments were going
3 to be sent to.

4 All those things are misrepresentations. And
5 the insurance issue is just one of them. So I don't want
6 to hear anymore about insurance, okay, because that's not
7 relevant. Mr. Rosenberg, I think that's who you said it
8 was, he's not going to be allowed to testify. Who next?

9 MR. MCDUFF: Then what we have is other parties
10 which is going to be Mike Stepo -- Mike Stepto, Ian
11 McQuarter and Sue Digden who were all involved in the
12 transactions that took place initially before the Lancorp
13 fund was created that produced the original cash
14 management agreement which is the foundation that PPM is
15 built around. It's the business model it's built around,
16 which was working and productive business model. And its
17 content, its purpose was not only legal and valid but had
18 a track record. And --

19 JUDGE ELLIOT: Hold on. Hold on. Let me jump
20 in here. The cash management agreement between Lancorp
21 and Megafund?

22 MR. MCDUFF: No. The cash management agreement
23 was created by Mr. Lancaster to take money that was
24 originally placed in Lancorp Number 2, which no one knew
25 about. He put the money in there, and he then abandoned

1 JUDGE ELLIOT: Okay. So the original cash
2 management agreement that he plagiarized, what was
3 that -- what was that original cash management agreement
4 for? Who was that between?

5 MR. MCDUFF: That was -- that was between a
6 merged market securities, a broker-dealer in New York
7 City and multiple different clients that it had as
8 clients.

9 JUDGE ELLIOT: Okay. That is completely
10 irrelevant. I don't see any relevance whatsoever to
11 this. This has nothing even to do with your criminal
12 case. So those three witnesses you said they won't be
13 called. Who next?

14 MR. MCDUFF: The allegation was that a cash
15 management agreement was produced by Mr. Lancaster that
16 violated the securities laws. I mean it was -- it was
17 improper.

18 JUDGE ELLIOT: That doesn't have anything to do
19 with whether you were a broker. Okay. So those three
20 witnesses are not going to be called. Who next?

21 MR. MCDUFF: That's the last witness I have on
22 my list, Your Honor.

23 JUDGE ELLIOT: Okay. So the -- I have already
24 indicated that the sentencing court in the transcript of
25 the sentencing hearing made some findings about at least

1 Lancorp Number 2 according to his testimony in deposition
2 which I never saw until after trial. He abandoned the
3 Lancorp Number 2, and then he moved the money into cash
4 management agreements which he took from cash management
5 agreements that had been used by these parties and also
6 one that had been created early on when he first became
7 aware of the -- the whole -- well, what these people were
8 doing.

9 That's what he was originally made aware of
10 because he was the trust officer working at U.S. Bank out
11 in California for a client that was getting involved with
12 these people that I just mentioned to go into a cash
13 management agreement with them inside the trust
14 department of U.S. Bank which Mr. Lancaster was the
15 appointed officer, which is where he learned the
16 transaction, the details because he was involved in the
17 approval process. And there --

18 JUDGE ELLIOT: Hold on. Hold on. Hold on.
19 Okay. I -- You -- you lost me at some point. So they --
20 these three witnesses that you're talking about worked on
21 the cash management agreement between Lancorp 2 and
22 somebody else?

23 MR. MCDUFF: They created the agreement that
24 Mr. Lancaster plagiarized when he took the money out of
25 Lancorp 2 and put it in --

1 some of the public interest factors. There are other
2 public interest factors which are uniquely in the control
3 of Mr. McDuff. And these are whether Mr. McDuff
4 recognizes the wrongful nature of his misconduct, whether
5 he has provided sincere assurances against any future
6 violations and whether he is in a profession that would
7 give him opportunity for future violations. I am
8 inclined to allow Mr. McDuff to testify on his own
9 defense generally but also to testify specifically about
10 those three things.

11 And I -- I'm perfectly happy to hear testimony
12 on that. And in addition, the one witness that I seem to
13 think might merit testimony in Mr. McDuff's case is his
14 son Shiloh. And then on top of that we have got the
15 two -- the two investors, Ms. Benyo and Mr. Biles and
16 then Special Agent Loecker and Mr. Quilling, the
17 receiver. So we have got essentially five witnesses
18 other than Mr. McDuff who might be called as witnesses.

19 MR. MCDUFF: The -- the introducing parties to
20 those investors?

21 JUDGE ELLIOT: No. No. I don't -- I don't
22 need to hear the introducing parties. These are -- these
23 are the Herrings. And I forget the other -- the other
24 name, but Mr. -- Mr. Biles supposedly was introduced to
25 Lancorp by the Herrings, is that who you're talking

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1 about?

2 MR. MCDUFF: That's correct.

3 JUDGE ELLIOT: No. I don't want to hear from

4 them. So it's just -- it's just your son, just Shiloh

5 McDuff.

6 MR. MCDUFF: If the Government is able to call

7 two witnesses based on their representations, why -- that

8 were investors, why would I not be able to call my mother

9 as one of the investors who was similarly situated to

10 them.

11 JUDGE ELLIOT: Because she's not. You

12 didn't -- As far as I -- as far as I understand from the

13 Division, the Division is not contending that you were

14 your mother's broker. Right?

15 MR. MCDUFF: They're contending that I was for

16 virtually everybody involved.

17 JUDGE ELLIOT: Well, this is conduct that

18 might -- that might pertain to that, but if you had no

19 contact with your mother -- They're not saying that you

20 acted as a broker with respect to your mother. I mean

21 let me -- let me turn to Ms. Frank. Will you -- will you

22 stipulate that Mr. McDuff did not act as a broker with

23 are respect to his parents?

24 MS. FRANK: I -- I don't know that, Your Honor.

25 I mean I can look into it and see if we would stipulate

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1 to that, but my understanding is that in these types of

2 proceedings the fact that there are investors to whom a

3 respondent has -- they want to call because they want to

4 have the investor say that I did not misrepresent

5 anything to this investor is completely irrelevant as to

6 whether or not the respondent misrepresentation the facts

7 to other investors. And --

8 JUDGE ELLIOT: Yes. That's -- that's exactly

9 right. Yes. I mean there were -- According to the

10 sentencing court there were over 100 investors. The

11 Division is only contending that as far as your specific

12 activity directed to particular investors, you were only

13 a broker as to two of the 100 or more. I don't think --

14 I don't think your mother's testimony would be relevant.

15 MS. FRANK: Your Honor, there may be others,

16 but these are the only two that we intend to call.

17 JUDGE ELLIOT: Very well. Mr. McDuff, let me

18 just explain, if -- if that's all that the Division

19 intends to call as far as individual investors, they do

20 say that they have other evidence that you were acting as

21 a broker because of other kinds of conduct not directed

22 toward particular investors. And I will allow you to

23 examine Mr. Quilling and Special Agent Loecker who seem

24 to be the witnesses who would testify about that, but I

25 don't see anything that your mother could add to this.

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1 If she's going to come up and testify that my son was not

2 my broker and he didn't tell me any lies, then that's not

3 relevant.

4 MR. MCDUFF: It will be what Mr. Lancaster told

5 her as an investor.

6 JUDGE ELLIOT: Okay. And what -- what did --

7 can you give me an idea of what he said to her?

8 MR. MCDUFF: He told her originally that there

9 would be insurance available. And after there was no

10 insurance available he sent her two letters saying he

11 was -- The first one, I believe it was March the 12th,

12 2004. And she was one of the initial investors, as well

13 as my father was and saying that there was not going to

14 be any insurance available.

15 I am working on another possibility to get

16 another form of something that would replace the

17 insurance. It won't be insurance. It will be something

18 else. He wasn't sure what it would be yet because that

19 was being negotiated. When Mr. Lancaster with Tricon

20 came up with a Citi Bank guarantee of value being --

21 meaning they would sell it to them when they purchased

22 for resale any security, it would be at some basis points

23 below what market was at that time.

24 Then once that was available, then he went back

25 and told everyone that he had -- he had gotten the bank

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1 obligation that would assure that any security purchased

2 with their money would be at a higher value. So the

3 amendment that he sent to her and the request to sign

4 was, I want you to acknowledge that there's no longer any

5 insurance and there is going to now be -- we're going to

6 go forward without it.

7 JUDGE ELLIOT: Hold on. Let me jump in here.

8 So I'll say it again. This whole insurance issue, it's

9 just not relevant. Okay. There's no -- there -- this

10 has no bearing on this proceeding. So --

11 MR. MCDUFF: The criminal conviction was based

12 on the fact that insurance was the primary focus of the

13 entire trial when it was not an issue at all from a

14 standpoint it had been removed before their money had

15 been taken out of issue -- out of escrow and protected.

16 There was not one penny touched until everyone was told

17 there was no insurance, but they did not explain that to

18 the jury that that had taken place, that everyone had

19 said, okay, we agree to go forward without insurance.

20 Then if the jury would have known that, there would have

21 definitely been a different outcome.

22 JUDGE ELLIOT: And you know what, Mr. McDuff,

23 you may be right, but that doesn't matter. I will say it

24 again, the starting point is you were convicted of wire

25 fraud by the jury. And it simply doesn't matter even if

1 the jury made a mistake, it doesn't matter. You have
2 been convicted of wire fraud, and you cannot re-visit
3 that at this point. So --

4 MR. MCDUFF: I would just re-urge the objection
5 based on what the commissioners found when they remanded
6 it back saying they're relying on the underlying criminal
7 action is inappropriate for these proceedings and that I
8 should be able to defend according to all of the
9 allegations in the OIP.

10 JUDGE ELLIOT: All right. So we have five
11 witnesses other than Mr. McDuff himself who might
12 testify, Ms. Benyo, Mr. Biles, Special Agent Loecker, Mr.
13 Quilling and Shiloh McDuff. Ms. Frank, anybody else that
14 you think we might call?

15 MS. FRANK: No, sir.

16 JUDGE ELLIOT: Mr. McDuff, I have -- You have
17 objected. I have -- I have overruled your objections. I
18 understand you have got a long list of people you want to
19 call. On that understanding, anyone else that you have
20 not mentioned already who you might want to call as a
21 witness?

22 MR. MCDUFF: None that I can think of now, Your
23 Honor, if I -- if I do, I will put that in writing and
24 send it in with my written objection, as well as any --
25 any request for them to be included.

1 JUDGE ELLIOT: Yes. Very good. Okay. So just
2 for my own purposes do you spell Shiloh with an H on the
3 end?

4 MR. MCDUFF: Yes, I do. S-h-i-l-o-h.

5 JUDGE ELLIOT: Very good. Okay. So let's do
6 this, we have been at this now for about an hour and a
7 half, I -- I would like to try to set a -- at least a
8 tentative hearing date so that we can coordinate with the
9 prison. Let's try to set a hearing date of Tuesday, June
10 14th.

11 MS. FRANK: All right.

12 JUDGE ELLIOT: And -- and I'll make that --
13 Let's make it for two days. So it will be on the 14th
14 and the 15th of June at ██████ Beaumont. I will -- Mr.
15 McDuff, will you need a subpoena for your son or can you
16 get your son --

17 MR. MCDUFF: No. I can get him without one.

18 JUDGE ELLIOT: You -- I'm sorry. You say you
19 can or cannot?

20 MR. MCDUFF: I can, yes.

21 JUDGE ELLIOT: Oh, okay. Very good. Okay. So
22 I will let you take care of getting your son to the
23 prison. Ms. Frank, even if you do not actually wish to
24 call Agent Loecker and Mr. Quilling, I would like you to
25 get them to the prison. If you need a subpoena for that

1 or -- and, of course, for the investors, Ms. Benyo and
2 Mr. Biles, just submit subpoena -- blank subpoenas -- or
3 I'm sorry -- prepared subpoenas to me. And I will issue
4 subpoenas for all four of those people, if necessary.

5 MS. FRANK: Okay. I will take care of that,
6 Your Honor.

7 JUDGE ELLIOT: And, Ms. Frank, I will leave it
8 up mainly to you to coordinate with the prison to make
9 whatever arrangements are necessary. If you run into any
10 problems at all, please contact me so that I know in
11 advance if there are any snags or hurdles or anything
12 like that that might make it difficult to get this done.

13 MS. FRANK: I will, Your Honor. I think to
14 start with, if -- are you planning to issue an order that
15 states that the hearing will be held on these dates at
16 the prison?

17 JUDGE ELLIOT: Yes.

18 MS. FRANK: Okay.

19 JUDGE ELLIOT: So let me just -- let me just
20 ask you first, do you have any objection to doing it on
21 the 14th and 15th of June?

22 MS. FRANK: I do not, Your Honor. And I
23 believe -- I believe all the witnesses are probably
24 available on those dates.

25 MS. FRANK: All right. So yes, I will issue an

1 order. The order will say that the hearing will be held
2 at ██████ Beaumont on the 14th and 15th of June. The
3 witnesses will be these five people in addition to Mr.
4 McDuff himself. We need to come up with a plan for
5 exhibits.

6 MR. MCDUFF: May I just comment on that one?

7 JUDGE ELLIOT: Yes. Go ahead, Mr. McDuff. Go
8 ahead.

9 MR. MCDUFF: I would object to anything before
10 say the first Tuesday in August because of the additional
11 amount of time that I need from in here to get anything
12 accomplished. The other thing is I would need some sort
13 of a directive, you know, back to the counselors to
14 assist me in making calls in dealing and calling the
15 witnesses myself and issues and documents that I want
16 them to bring.

17 JUDGE ELLIOT: Okay. Well --

18 MR. MCDUFF: You know, the other witness
19 that -- that I wanted to make sure that we -- we covered,
20 of course, is Norman Reynolds who originally created this
21 and what documents he was provided in the entire Lancorp
22 creation, who gave him instructions to create everything.
23 That -- that creates the foundation upon which all else
24 is built.

25 JUDGE ELLIOT: Okay. Well, I don't agree with

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1 that. I think that that may be part of the Division's
2 case, but Mr. Reynolds did testify about this at your
3 criminal trial, and you did not cross-examine him. So
4 I -- I don't think we need to call Mr. Reynolds again.
5 Ms. Frank, do you have anything to say about that?
6 MS. FRANK: No. That's what I was going to
7 say. He did testify at the criminal trial and I think was
8 pretty clear about his -- his recollection. And I
9 wasn't -- I don't think we need to have him, especially
10 if the Court is going to rely on the transcript.
11 JUDGE ELLIOT: All right. I don't really -- I
12 really don't think we need to call Mr. Reynolds again.
13 MR. MCDUFF: Well, my proposal is that it be
14 moved at least into the first Tuesday of August.
15 JUDGE ELLIOT: I think that's too -- I think
16 that's too far out. The --
17 MR. MCDUFF: Well, no sooner than 90 days then.
18 Just --
19 JUDGE ELLIOT: We're talking about over two
20 months from right now. That should be enough time to
21 speak to whoever the parties need to speak to. I don't
22 really -- See, we're only talking about five witnesses.
23 One of them is Mr. McDuff's son. And there may be an
24 issue with exhibits, and I will get to that in a second,
25 but I don't -- That should be enough time, Mr. McDuff,

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1 for you to coordinate with your counselor in order to do
2 whatever it is you need to do.
3 MR. MCDUFF: Well, it's going to -- it's going
4 to take an order and instruction coming from the Court to
5 the counselor to assist in this matter or, you know, from
6 the SEC if you instruct them to do it however. Because I
7 can't do it on my own request. It won't be done that
8 way.
9 JUDGE ELLIOT: All right. If I were to put
10 such an order into whatever order I issue after this
11 pre-hearing conference is done, would that be sufficient?
12 MR. MCDUFF: Well, Your Honor, what I would
13 like for you to do is to do that, of course, but not
14 until you actually receive my written proposals of my
15 witnesses, the list what I say that they will -- in
16 writing proffer what they will say so that we can come up
17 with the list which would then further support the
18 possibility of getting it pushed into August as opposed
19 to that if -- if you are able to find that the
20 justification for calling other witnesses has a
21 foundation in law.
22 JUDGE ELLIOT: Okay. I am not sure I am
23 following you. There are going to be five witnesses
24 other than you. This has been decided. I decided that
25 just a few minutes ago. We're not going to -- I am not

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1 going to entertain any request for witnesses. Am I
2 misunderstanding you?
3 MR. MCDUFF: Well, I thought -- maybe I'm
4 misunderstanding you. My understanding was I could put
5 my objection and let you know, and then you would
6 reconsider possibly based on what my written submissions
7 were, not that you -- that you would possibly leave that
8 door open.
9 JUDGE ELLIOT: No, no, no, no. We -- I have
10 decided how many witnesses there are going to be. I have
11 identified them by name. You may object and you may put
12 on your list who you think ought to have been called, but
13 that's just so that you maintain your rights so that
14 if -- if occasion arises where you appeal whatever the
15 initial decision is, you can say, look, here all these
16 witnesses I would have called and what they would have
17 said and the judge didn't let me do it. That's all.
18 So no, we're not going to have -- we're not
19 going to have 20 witnesses. You are going to have five
20 witnesses other than Mr. McDuff. All right? With that
21 understanding, you tell me if you think I am wrong, Mr.
22 McDuff, it seems to me two months should be enough time
23 with the assistance of the counselor to coordinate to
24 make arrangements to figure out what you are going to ask
25 the witnesses.

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1 MR. MCDUFF: Well, I contend with the
2 objection. I feel like it should be in August and
3 certainly no sooner than in July.
4 JUDGE ELLIOT: All right. I am going to
5 overrule that objection. So we will keep it on the 14th
6 and 15th of June. Now, exhibits, I would like to try
7 just to keep things simple to minimize bringing in any
8 sort of electronics into the prison. Mr. McDuff, do you
9 have any ability to make photocopies of anything?
10 MR. MCDUFF: If instructed, they will.
11 JUDGE ELLIOT: Okay. And do you have --
12 MR. MCDUFF: Become part of the order of
13 whatever I need copies based on the Court's requirement
14 that they will do it for me, yes.
15 JUDGE ELLIOT: Okay. And --
16 MS. FRANK: Your Honor, I thought that -- I'm
17 sorry.
18 JUDGE ELLIOT: No. Go ahead.
19 MS. FRANK: I was going to ask a question. I
20 thought Mr. McDuff's family supported him from outside
21 the prison as far as making copies and getting things
22 reproduced and mailed.
23 JUDGE ELLIOT: Okay. Well, Mr. McDuff, are you
24 getting help from your family?
25 MR. MCDUFF: Well, if -- if I need something

1 file, what I do and it's more than a copy that I can make
2 here, then I send it out and then they make a copy and
3 then they mail it for me after that if it requires
4 multiple copies.

5 JUDGE ELLIOT: Okay.

6 MR. MCDUFF: That's one of the other reasons
7 there's time factors involved here when I have to do that
8 because I have to depend on that getting out and then
9 whatever coming back. And it usually, you know, adds a
10 week or so to the whole process.

11 JUDGE ELLIOT: Well, I don't expect that your
12 preparation will have to consist of communicating with a
13 lot of people. I think it would really be revealing the
14 files and determining what questions you want to ask
15 these witnesses. So I don't know that there really is a
16 lot of help that you are going to need from anybody
17 really as long as you have access to your -- to the
18 investigative file. Do you have access to the
19 investigative file?

20 MR. MCDUFF: I do not.

21 JUDGE ELLIOT: And where -- what -- whatever
22 copies of whatever you obtained or your parents obtained,
23 where are they -- where is your copy of the investigative
24 file maintained?

25 MR. MCDUFF: Well, what I have is what they --

1 of anything.

2 JUDGE ELLIOT: Okay. I understand. Hold on
3 just a second, Mr. McDuff. So, Ms. Frank, if someone
4 from Mr. McDuff's family came and asked to see the
5 investigative file again, would that be possible?

6 MS. FRANK: I -- I believe it is. We would
7 obviously need to know in advance when they were coming,
8 and we would set up a room. We would do it just like we
9 did last time for his mother.

10 JUDGE ELLIOT: Okay. Is there -- is all of
11 this on electronic media or is it all in paper or is it a
12 mix or how is it stored?

13 MS. FRANK: It's -- it's all on paper. It's
14 not electronic.

15 JUDGE ELLIOT: Okay. Okay. So, Mr. McDuff, if
16 you -- Well, let me start out asking you, do you -- Ms.
17 Frank mentioned 25 boxes of materials. Do you -- How
18 much do you have in there in prison with you?

19 MR. MCDUFF: It would be nine boxes.

20 JUDGE ELLIOT: Okay. If you feel the need to
21 obtain more documentation, then this is something that
22 you will definitely have to coordinate with your mother
23 or anyone else in your family and see if they can go
24 obtain from the SEC. But I expect --

25 MR. MCDUFF: Is it possible for them to bring

1 what she sent to you, and then I have what was involved
2 in the criminal case. So I have the transcripts and
3 those sorts of things here. Now whatever was sent by Ms.
4 Frank into the court, she sent me a copy of. So I have
5 that much of it, which are their exhibits that they are
6 referring to, but not necessarily the investigative file.

7 MS. FRANK: Your Honor.

8 JUDGE ELLIOT: Okay. Go ahead.

9 MS. FRANK: Excuse me. I -- I -- My
10 understanding is that Mr. McDuff has a large number of
11 boxes of -- of what they call legal material that's at
12 the prison. And I -- I don't know if this is correct or
13 not, but the number 25 boxes sticks in my head. I don't
14 know if that's right or not, but his mother came here and
15 reviewed the investigative file and copied whatever it
16 was that they wanted to get copies of.

17 JUDGE ELLIOT: All right. Will you allow Mr.
18 McDuff's mother to do that again if necessary? Because I
19 am expecting he may want to look at some things that
20 maybe he thinks he doesn't have or that -- that maybe he
21 didn't make copies of the first time around.

22 MR. MCDUFF: Your Honor, I have never been able
23 to look myself. It's so hard when somebody is looking at
24 something that they don't understand the relevancy to.
25 And I have never had the opportunity to look at any box

1 that here?

2 JUDGE ELLIOT: All of the boxes?

3 MR. MCDUFF: Yes.

4 MS. FRANK: No.

5 JUDGE ELLIOT: Yeah. I don't think that would
6 be practical. So I -- I would not order that. But I do
7 expect the Division to cooperate with Mr. McDuff's family
8 in allowing Mr. McDuff's family to review the file again.

9 MR. MCDUFF: And the other thing is since they
10 don't know what they're looking for sometime, they're
11 just going through it, for them to be able to go through
12 and find things that they think might be a relevance for
13 me to be able to be on a call like I am now with them, so
14 they can say, okay, we found this, this, this, so they
15 could actually identify which things they would need
16 copies of, but get me to be able to comment because just
17 guessing at which documents would be relevant and then
18 copying them and sending them to me could possibly be a
19 waste of time for everyone, where the other would
20 expedite it. If they could say, you know, would this
21 have a relevancy or this because they can have general
22 categories of what they may be looking for, but they
23 wouldn't know specifics without asking.

24 JUDGE ELLIOT: Well, it seems to me you can
25 coordinate with your family.

1 MR. MCDUFF: I can do that, but it's -- it's
2 the communication for me to be able to call, and that's
3 something that has to be established, you know, with the
4 Commission or -- or with the Court with the counselor
5 here so that they will set that call up at that time. So
6 whenever the Commission makes available for them to be
7 there and examine that, they would also schedule a call
8 like towards the end of the day after they finish that to
9 go over their findings -- I mean which documents they
10 have located and then ask me which ones should be copied.

11 MS. FRANK: Your Honor, I believe -- I don't
12 think I have to be involved in -- the Commission doesn't
13 have to be involved in that phone call. He can call --
14 He can have his family members call.

15 JUDGE ELLIOT: Yeah. Look, I don't want to
16 micromanage this. The parties can come up with -- Hold
17 on. Hold on just a second. I don't want to micromanage
18 this, but the parties can do it however they want to do
19 it, but it seems to me, Mr. McDuff, if you say to your
20 mother, let's say, you go -- you make arrangements to
21 visit the SEC on such and such a day, and she does that,
22 and then you make arrangements with your counselor to
23 have a call with your mother say in the late afternoon on
24 that date, then you and your mother can call -- can talk
25 to each other. And then your mother can communicate to

1 the Division when you're done with the call here's what I
2 want copies of, and then she gives the list to the
3 Division.

4 MR. MCDUFF: You're exactly correct, sir. The
5 only provision there is that for these people here, the
6 counselor here to know that that is not a personal call
7 but it is a litigation connected call. The Commission
8 would need to inform the counselor that there's going to
9 be a need for this call. And the Commission doesn't need
10 to be involved in the call, but they need to advise the
11 counselors here that that is going to be a need, then
12 would the counselors please accommodate that at whatever
13 time it is that, you know, they would be there. They
14 would be calling from the Commission here.

15 JUDGE ELLIOT: Okay. And --

16 MR. MCDUFF: Or these people would call the
17 Commission's office at a certain date, and they would
18 just transfer it to the extension of whatever phone is
19 wherever the room is where they're going to have the
20 examination going on.

21 JUDGE ELLIOT: All right. Well, Ms. Frank, I
22 hope that you will cooperate in this, and if -- if it
23 becomes unmanageable in the sense that there's a whole
24 lot of these calls, then I will be unhappy. But, Mr.
25 McDuff, as long as you do not wear out your welcome with

1 the SEC, then I think that Ms. Frank will probably agree
2 to make such a call on the day when your mother comes to
3 visit. Ms. Frank, would you agree to that?

4 MS. FRANK: Yes, Your Honor.

5 JUDGE ELLIOT: All right. Thank you very much.
6 Okay. We need to -- Well, I will tell you what, I will
7 issue an order that simply announces when exhibit lists
8 will be required. I will probably require the Division
9 to submit its exhibit list before I require Mr. McDuff to
10 so that Mr. McDuff can see the Division's exhibits. And
11 then if there is anything that he wants to add to the
12 exhibits, then he can compile his own exhibit list.

13 But this will happen, of course, sometime
14 between now and June 14th. And it should be finished
15 before a couple of weeks before June 14th so that
16 everyone will know what the exhibits will be, but I will
17 put out an order that gives those deadlines. Ms. Frank,
18 I -- I have a vague recollection that you told me the
19 last time we spoke that you had some trials coming up.
20 Is that true?

21 MS. FRANK: Yes, Your Honor. I have one that's
22 actually set June 6, but I believe it is probably going
23 to settle. If it goes June 6, it would probably last
24 longer than -- well, it might stop by June 14th, but then
25 I would be not have time to prepare. But I think that I

1 really have a high degree of confidence that it's not
2 going to go on June 6. And so I think the June 14th date
3 is going to work.

4 JUDGE ELLIOT: All right. Very well. So if
5 something else comes up, then, of course, please notify
6 me.

7 MS. FRANK: I will.

8 JUDGE ELLIOT: All right. Give me just a
9 moment. I need to check something. I will be right
10 back. Hold on please.

11 (A brief recess was taken.)

12 JUDGE ELLIOT: Okay. I'm back. All right.
13 One more thing I just want to mention. I -- I said at
14 the beginning of this conference that I had reviewed the
15 transcript of the sentencing hearing and that there were
16 a number of findings by the judge regarding some of the
17 public interest factors.

18 I just want to make it clear my position is
19 that it is -- there is collateral estoppel effect to Mr.
20 McDuff's criminal conviction in the sense that scienter
21 is established. Scienter is an element of wire fraud.
22 And so scienter has been established and has collateral
23 estoppel effect, just so there's no confusion about that.
24 All right. So I don't have anything more to talk about.
25 Ms. Frank, anything else we need to discuss?

1 MS. FRANK: No, Your Honor. That covers
2 everything that was on my list.

3 JUDGE ELLIOT: All right. Mr. McDuff?

4 MR. MCDUFF: Yes, Your Honor. I would just ask
5 whether or not you would certify your findings today so
6 that I could seek review.

7 JUDGE ELLIOT: Hold on. Let me just look up
8 the rule here and make sure I am following the rule.

9 Give me a moment please. All right. All right. So I am
10 looking at Rule 400(c) and the certification -- If I were
11 to certify my rulings, which I will issue in writing so
12 you won't -- you won't -- the clock won't start ticking
13 for this, Mr. McDuff, until after I issue the written

14 order, which should come out by the end of this week.
15 I am not supposed to certify anything unless it
16 compels testimony of Commission members, officers or
17 employees or the production of documentary evidence and
18 their custody. That does not apply. And then 400(c)(2),
19 you have five days within which -- five days after the
20 ruling, that is five days after my written ruling within
21 which to apply for certification.

22 MR. MCDUFF: Will that be from the time I get
23 notice of it here, because, you know, the mail can -- I
24 could get it six days after you issue it.

25 JUDGE ELLIOT: Well, actually let me read this.

1 be clear about this. I'm not -- The hearing will also
2 proceed on some of the public interest factors. You will
3 be allowed to testify about whether you recognize the
4 wrongful nature of your conduct, whether you provided
5 some assurances that it won't happen again and what your
6 profession is. So you will be able to testify about
7 that, but the main issue is the broker-dealer issue.
8 Okay.

9 MR. MCDUFF: Well, it certainly seems
10 appropriate that there's never been a complaint filed
11 against me by any investor, any of these at any level in
12 this. There's been allegations by the SEC only or the I
13 guess you would say the AUSA as well, but there's never
14 been an investor who has ever signed any complaint or
15 made any complaint in relations to myself or any
16 misconduct that would -- that would be a public safety
17 factor or concern.

18 JUDGE ELLIOT: I'm sorry. Do you hold any
19 securities licenses?

20 MR. MCDUFF: I do not, Your Honor.

21 JUDGE ELLIOT: Okay. Well, I am not -- If you
22 had held any securities licenses and had been supervised
23 by FINRA, there would be a record of any complaints
24 against you and any proceedings against you, but if
25 you're not licensed, then I don't know that -- that I

1 Hold on. Let me look at this again. This may not be
2 required. Okay. I think actually you've satisfied this.
3 You are moving for certification right now?

4 MR. MCDUFF: Yes, sir.

5 JUDGE ELLIOT: Okay. So I think you've met
6 this. I think you've met the five day requirement. If I
7 am of the opinion that the ruling involves a controlling
8 question of law as to which there is substantial ground
9 for difference of opinion and an immediate review of the
10 order may materially advance the completion of the
11 proceeding, I find that neither of those are satisfied,
12 and so I will not certify any of my findings that I made
13 on this call. So on that understanding that I will not
14 certify it, Mr. McDuff, you may proceed accordingly. Any
15 questions about that?

16 MR. MCDUFF: No. Just primarily on the
17 limiting of the public hearing to the broker-dealer
18 issue. That's the -- that's the one that I think is the
19 most important one that I feel like based on the
20 Commission's remand instructions and the Supreme Court
21 case that they quoted in there, that there was no
22 findings, and relying on those findings has been
23 established and all the other issues is inappropriate in
24 this particular proceeding that we're in now.

25 JUDGE ELLIOT: Okay. Understood. Now, let me

1 would necessarily expect to have any record of complaints
2 against you. So --

3 MR. MCDUFF: But the SEC would have them as
4 part of their evidence because they are the ones who
5 spoke to all of the investors, and not one of them
6 produced any claim of wrongdoing on my behalf.

7 JUDGE ELLIOT: I'm sorry. I thought Mr. Biles
8 and Ms. Benyo, and I seem to recall a third investor as
9 well whose name escapes me who testified at your criminal
10 trial who testified about what you had told them. I
11 don't -- are you -- What are you trying to get at, Mr.
12 McDuff?

13 MR. MCDUFF: Just the -- limiting the scope of
14 the hearing to just the broker-dealer issue as opposed to
15 the representation issue.

16 JUDGE ELLIOT: Oh, okay.

17 MR. MCDUFF: The factors of what existed and
18 what did not exist, when the money was used and what was
19 said before it was used and after it was used is germane
20 to the investor's understanding.

21 JUDGE ELLIOT: Okay. I understand, Mr. McDuff,
22 yes. So I am not going to allow you to present evidence
23 on that. So you may -- I am not -- I'm also not going to
24 certify my ruling. Okay.

25 MR. MCDUFF: Yes.

1 JUDGE ELLIOT: All right. So any other matters
 2 you want to discuss, Mr. McDuff?
 3 MR. MCDUFF: Only the transcript that you
 4 quoted in your last order that was provided to you. I
 5 think it was on August or something. I'm sorry. It was
 6 on the 3rd of last month, I believe. And is there going
 7 to be a transcript available to me of today's
 8 teleconference? I would like to get both. I would like
 9 to make a request for both as soon as possible please.
 10 JUDGE ELLIOT: You know what, I'll tell you how
 11 to do this, why don't you have one of your family members
 12 call our office, the Office of ALJ's, the number that you
 13 called earlier today, the 6 -- I think it's 6030 number,
 14 and ask one of the people who answers the phone how to
 15 obtain a transcript of a pre-hearing conference. Can you
 16 do that?
 17 MR. MCDUFF: Yes.
 18 JUDGE ELLIOT: Okay. I think that's probably
 19 the simplest way to go -- way to go about it because it
 20 usually takes several days at a minimum before we get a
 21 copy of the pre-hearing conference transcripts. And you
 22 will have to order them directly. I think you order them
 23 directly from the court reporter. But I think the
 24 simplest way to do this is just wait a few days and then
 25 have one of your family members call our office. Okay?

1 PROOFREADER'S CERTIFICATE
 2
 3 In the Matter of: GARY L. MCDUFF
 4 ADMINISTRATIVE PROCEEDINGS - PRE-HEARING CONFERENCE
 5 File Number: 3-15764
 6 Date: Monday, April 11, 2016
 7 Location: Fort Worth, Texas 76102
 8
 9 This is to certify that I, Donna S. Raya,
 10 (the undersigned), do hereby swear and affirm that the
 11 attached proceedings before the U.S. Securities and
 12 Exchange Commission were held according to the record and
 13 that this is the original, complete, true and accurate
 14 transcript that has been compared to the reporting or
 15 recording accomplished at the hearing.
 16
 17 _____
 18 (Proofreader's Name) (Date)
 19
 20
 21
 22
 23
 24
 25

1 MR. MCDUFF: Okay. So are you saying that you
 2 are going to require us to purchase them as opposed to
 3 provide them?
 4 JUDGE ELLIOT: I believe that is how we do it.
 5 I believe that's how we do it. Yes. I don't think you
 6 can get them for free. I think you have to buy them.
 7 But I tell you what, I am not entirely sure. And that's
 8 why I am telling you to call the people at essentially
 9 our front office here at the Office of ALJs because they
 10 will be able to answer your questions better than I can.
 11 MR. MCDUFF: Okay.
 12 JUDGE ELLIOT: Anything else, Mr. McDuff?
 13 MR. MCDUFF: No, Your Honor. Just -- just
 14 re-urge the motion once again that you told me about
 15 before because that is the primary purpose of -- of the
 16 witnesses that I want to call to include the entire scope
 17 of the OIP, original proceedings.
 18 JUDGE ELLIOT: Very well. Then this matter is
 19 adjourned. Thank you very much. And again, let me urge
 20 the parties to reach out to me if there are any problems
 21 or hurdles that you run into. Otherwise, then I will see
 22 you in June. Thank you very much.
 23 MS. FRANK: Thank you, Your Honor.
 24 (Whereupon, at 2:54 p.m., the pre-hearing
 25 conference was concluded.)



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
BURNETT PLAZA, SUITE 1900
801 CHERRY STREET, UNIT #18
FORT WORTH, TEXAS 76102-6882
PHONE: (817) 978-3821 FAX: (817) 978-4927

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May 2, 2016

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United States Securities and Exchange Commission
100 F. Street, NE
Washington, D.C. 20549

Re: *In the Matter of Gary L. McDuff*
Administrative No. 3-15764

Dear Ladies and/or Gentlemen:

Pursuant to Rules 151 and 152 of the Commission Rules of Practice, the Division is filing the enclosed *Division of Enforcement's Response to Respondent's Rule 400 Petition for Interlocutory Review* regarding the above-referenced matter transmitting to the Commission (Office of the Secretary) an original and three copies.

Sincerely,

Rebecca R. Fairchild, CP, CFE
Supervisory Trial Paralegal

w/attachments

Via electronic and UPS
cc: Honorable Cameron Elliot
U.S. Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549

Via Certified Mail:
Mr. Gary L. McDuff

[Redacted]

[Redacted] Beaumont Low

[Redacted]

[Redacted]

Beaumont, TX [Redacted]

Pro Se Respondent

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FORT WORTH OFFICE - TRIAL UNIT
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Office: **FWRO Trial Unit**

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REMARKS:

In the Matter of Gary L. McDuff, 3-15764.

Division of Enforcement's Response to Respondent's Rule 400 Petition for Interlocutory Review

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