HARD COPY

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

MAY 9, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-15764

In the Matter of

GARY L. MCDUFF,
Respondent

REPLY TO RULE 400 PETITION FOR INTERLOCUTORY REVIEW

A. CERTIFICATION ISSUE

Because of Respondent's incarceration disability, he cannot reply to the Division's claim that certification is a condition precedent to interlocutory review, having no access to the cited cases.[1] However, the Division's following sub-heading clarifies that the Commission can sua sponte interlocutory review which Respondent requests.

B. ISSUES PRESENTED

1. LIMITATION OF HEARING TO THE BROKER-DEALER ISSUE

Contrary to the Division's allegations, Respondent contends and understands that the hearing has been limited to the broker-dealer issue only as to liability not as to sanctions.[2] It is that limitation to which Respondent therefore objects and requests review.

[1] Respondent requests that the Division be ordered to serve him with copies of cases not cited in the Official Supreme Court Reports, Federal Reporter, or Federal Supplement.

[2] Unable to fully reply lacking the Division's cited cases, this argument is a best-efforts logic-based reply.

Respondent also understands that these "follow-on proceeding [is limited to three issues]: (1) whether Respondent acted as a broker, [] 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[]" (Response, pg. 7).

The problem is that the ALJ and the Division ignore that this Commission has already ruled that neither the civil default judgment nor the criminal trial have any preclusive effect for either the liability or the sanctions issue. Rel. No. 74803, 4/23/15, pg. 2 ("the allegations in neither document have [] preclusive effect"); *id.*, pg. 5 ("the allegations in the civil complaint do not have the necessary preclusive effect here."); *id.*, ("we did not [in Mandell] hold that allegations in an indictment automatically have preclusive effect."). Accordingly, the undetermined allegations on which the civil injunction was based mirroring the OIP must be tried, not just the broker-dealer issue.

Moreover, the ALJ and the Division mistakenly assert that Respondent was convicted of wire fraud. They are mistaken. Clarifying it and its preclusive effect this Commission noted that --

> "a jury convicted McDuff of conspiracy to commit wire fraud in a general verdict, which the jury could do without making a specific finding as to which, if any, of the alleged overt acts McDuff committed. And although the jury also returned a general verdict that McDuff committed money laundering, that verdict generally establishes only that McDuff caused a Megafund-controlled account to transfer illegal proceeds to a Lancorp-controlled account with the intent to promote the wire fraud. Under these circumstances, the law judge erred in relying on the allegations in the superseding indictment in his sanctions analysis." Id., at 6.

Despite it, the ALJ insists on repeating the error.

Importantly, as to the limited issue the ALJ wishes to try, the question is not what Respondent AND/OR his co-conspirators did during the conspiracy given that in it "he is responsible for the acts of his co-conspirators" (*Smith v. United States*, 568 U.S. ___, ___, 133 S. Ct. 714, 719, 184 L. Ed. 2d 570, 577 (2013)) and thus too the "overt act of one partner in crime is

attributable to all[]" *(Pinkerton v. United States,* 328 U.S. 640, 647, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946)). The question, un-answered by the general verdict which merely established that Respondent agreed to the conspiracy or willfully joined it, is: What did Respondent personally do? As to it, therefore, the criminal conviction by general verdict has no preclusive effect on the issues in this hearing.

2. ADMISSION OF PRIOR SWORN STATEMENTS

While Respondent's objection to introduction of prior sworn statements is based on violation of his Sixth Amendment confrontation rights, those rights are the bases of Rule 235 of the Commission's Rules of Practice which allows them only on motion by the parties, and in this case only if "in the discretion of the [] hearing officer, it would be desirable, in the interests of justice, to allow [them]" (Rule 235(a)). But neither party made such motion here. Instead the ALJ sua sponte ruled he would admit them, not in the interests of justice, but for the convenience of the Court and the Division in holding this hearing in Respondent's prison. Moreover, the harm of prior sworn statements by government witnesses is not cured by the fact that other less important defense witnesses' statement swept into that admission order will help Respondent.

3. ADMISSION OF THE CRIMINAL TRIAL TRANSCRIPTS

There is nothing "disingenuous" about objecting to the admission of the criminal trial transcripts because the undersigned 'was not represented by counsel at [the] criminal trial' as the Division asserts. Our High Court has ruled differently. The issue in *Pointer v. Texas*, 380 U.S. 400 (1965) was not whether defendant should have been appointed counsel to represent him at the preliminary hearing where a critical witness gave damaging testimony against him, the legality of petitioner's *pro se* representation, or the reasons for the *pro se* defendant's failure to cross-examine the witness. The issue was whether an opportunity for counsel to cross-examine such witness was Constitutionally required before admitting it in a subsequent trial.

> "In this case the objections and arguments in the trial court as well as the arguments in the court of Criminal Appeals and before us make it clear," said the Court at pg. 403, "that petitioner's objection is based not so much on the fact that he had no lawyer when Phillips made his statements at the preliminary hearing, as on the fact

that use of the transcript of that statement at the trial denied petitioner any opportunity to have THE BENEFIT OF COUNSEL'S CROSS-EXAMINATION of the principal witness against him. It is the latter question which we decide here[]" (*id.*) (emphasis).

Unanimously the Court ruled that "[b]ecause the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner THROUGH COUNSEL an adequate opportunity to cross-examine Phillips, its introduction [] deni[ed him] the privilege of confrontation guaranteed by the Sixth Amendment" (*id.*, at 407) (emphasis). Furthermore, both concurring Justices fully agreed with that holding. See, Justice Stewart, Concurring, *id.*, at 409) ("I join in the judgment reversing this conviction, for the reason that the petitioner was denied the opportunity to cross-examine, THROUGH COUNSEL, the chief witness for the prosecution.") (emphasis); Justice Harlan, Concurring, *id.*, at 408 (same).

The rule of law thus established in *Pointer v. Texas* is that a criminal trial transcript is not admissible at a subsequent trial unless counsel, not a self-represented defendant, had the opportunity to cross-examine that witness. The Division cannot change the law.

Dated: May 9, 2016

Respectfully submitted,

Gary Lynn McDuff
Respondent in *Pro Se*

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SERVICE LIST

In accordance with the Commission's Rules of Practice, I hereby certify that a true and correct copy of the foregoing, **RESPONDENT'S REPLY TO RULE 400 PETITION FOR INTERLOCUTORY REVIEW** was mailed on the person (s) listed below on the 9th day of May, 2016, via US Postal Service, Pre-Paid First Class Mail, or USPS Priority Express Mail:

- Janie L. Frank
  Securities and Exchange Commission
  Fort Worth Regional Office
  801 Cherry Street, Suite 1900
  Fort Worth, TX 76102

- Honorable Brenda P. Murray – COURTESY COPY
  Chief Administrative Law Judge
  Securities and Exchange Commission
  100 F Street, N.E.
  Washington, DC 20549-2557

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

Gary L. McDuff,
Respondent in *Pro Se*