UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 6742 / March 11, 2020

Administrative Proceeding
File No. 3-15755

In the Matter of

Mark Feathers

Order Regarding Respondent's Subpoena

Respondent Mark Feathers requested that I issue a subpoena directing the Division of Enforcement to produce documents related to five filings in *SEC v. Small Business Capital Corp.*, 5:12-cv-3237 (N.D. Cal.). The Division moved to quash the subpoena. In response, Respondent twice updated his subpoena request to provide more specificity, and the Division renewed its motion to quash. On February 21, 2020, I held a prehearing conference addressing this issue. Following the conference, I instructed the Division to submit a plan for identifying documents responsive to the subpoena and submitting the responsive documents it maintains are privileged for in camera review.

The Division's response to the order reiterated its previous arguments that the requested documents are irrelevant because Respondent cannot relitigate the district court's findings in the *Small Business Capital* case.[1] The

[1] The Division's point about relevance is well taken. Respondent cannot use this follow-on proceeding to collaterally attack the judgment in the civil case, and I must give the findings of the district court preclusive effect. *Peter Siris*, Securities Exchange Act of 1934 Release No. 71068, 2013 WL 6528874, at *9 & n.60 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014); *Sherwin Brown*, Investment Advisers Act of 1940 Release No. 3217, 2011 WL 2433279, at *4 (June 17, 2011). Before reaching a decision, I intend to conduct a careful review of what material and arguments I can properly consider. At this point, however, without having a better understanding of what is in the documents responsive to the subpoena, I am unwilling to conclude that the material is categorically irrelevant. In particular, there may be material relevant to the first three *Steadman* factors—the egregiousness of the wrongdoing, the

Division also asserts that it has produced all the non-privileged documents required to be produced under 17 C.F.R. § 201.230[2] and that the documents sought by Respondent are privileged. The Division's review of material related to this case found 20,000 internal emails, 28 boxes of documents, and 800 electronic documents. Due to the volume of material and time constraints the Division did not undertake a review of the documents. The Division believes reviewing the documents would take 160 hours of total staff time, or approximately four weeks. The Division argues that Respondent has made an insufficient showing of relevance and need to justify the expenditure of such resources.

I concur with the Division's argument that a detailed, four-week review of every single paper file in storage would be burdensome. But a modified review process is preferable to quashing the subpoena in its entirety. Respondent's subpoena is focused on a few discrete litigation documents. It should be possible, based on a general review of each box, to determine whether a box is likely to contain responsive material. Indeed, Division counsel surmised that ten of the boxes contain materials already produced to Respondent. If the Division confirms in a written affidavit which boxes it already produced to Respondent, then it need not search those boxes. And if, after a general review of the remaining boxes, counsel determines that a box's documents are likely not responsive, document-by-document review of that box is not necessary. The Division must set forth, by March 18, 2020, its review criteria and estimate how many days it will take to complete its search, privilege review, and production.

The Division must prepare a privilege log and supporting declaration for responsive documents it asserts should be withheld on privilege grounds. 17 C.F.R. § 201.230(c); *see Dorf & Stanton Commc'ns, Inc. v. Molson Breweries*, 100 F.3d 919, 923 (Fed. Cir. 1996); *Caudle v. District of Columbia*, 263 F.R.D. 29, 35 (D.D.C. 2009). The log must contain sufficient detail to assess any claimed privilege. *See United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473–74 (2d Cir. 1996). After I receive the privilege log and determine whether it is facially sufficient, I will set a deadline by which Respondent may

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frequency of the wrongdoing, and the level of scienter—and the parties should focus their efforts on materials and arguments that address these factors. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[2] Rule 230(a) does not "limit the right of a respondent to seek access to or production pursuant to subpoena of any other document, or … limit the authority of the hearing officer to order the production of any document pursuant to subpoena." 17 C.F.R. § 201.230(a)(2).

challenge the Division's privilege assertions. I will review documents withheld due to privilege in camera, and the Division must submit a proposal for providing those documents to my office.

Unless the Division makes a particularized showing that its efforts in connection these procedures would be overwhelming and take more than two weeks, I am inclined to issue the subpoena under these conditions. Until this subpoena and motion to quash are resolved, all deadlines, including those for summary disposition, are postponed.

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Jason S. Patil
Administrative Law Judge