

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

Administrative Proceedings Rulings  
Release No. 6768 / June 12, 2020

Administrative Proceeding  
File No. 3-15755

In the Matter of  
**Mark Feathers**

**Order Regarding  
Stalker Report**

During a telephonic prehearing conference held in April 2020, Respondent Mark Feathers discussed his intent to offer into evidence a report prepared by Annette M. Stalker.<sup>1</sup> Feathers confirmed that he intends to offer the report as an expert report.<sup>2</sup> I did not rule during the conference on the admissibility of the report but told Feathers that I had concerns about its relevance.<sup>3</sup> During the conference and in a later order, I told Feathers that if he offered the Stalker report, he would have to comply with the Commission's rule of practice governing expert reports and the Commission's general rule governing the admissibility of evidence.<sup>4</sup>

Feathers now asks for a ruling on the admissibility of the Stalker report, noting that he intends to rely on it during summary disposition briefing. But I have no basis to rule on the admissibility of the report and decline to do so

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<sup>1</sup> Prehr'g Tr. 61–70. Stalker is a CPA. *See* Stalker Report at 2 (Aug. 22, 2016). She submitted her report to the United States District Court for the Northern District of California for consideration during Feathers's criminal trial. *Id.*; Prehr'g Tr. 61.

<sup>2</sup> Prehr'g Tr. 66–67.

<sup>3</sup> Prehr'g Tr. 63–65, 70–72.

<sup>4</sup> Prehr'g Tr. 67; *Mark Feathers*, Admin. Proc. Release No. 6752, 2020 SEC LEXIS 1066, at \*2–3 (ALJ Apr. 17, 2020); *see* 17 C.F.R. § 201.222(b), .320.

before Feathers attempts to demonstrate that consideration of it on summary disposition would be consistent with the rules of practice.

In a follow-on proceeding, a party may move for summary disposition by showing, based on “undisputed pleaded facts, declarations, affidavits, documentary evidence or facts officially noted pursuant to Rule 323 ...[,] that there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law.”<sup>5</sup> Although a party moving in district court for summary judgment—or opposing summary judgment—may not rely on evidence that cannot be presented at trial in admissible form,<sup>6</sup> the party need not anticipate every evidentiary objection to the party’s evidence.<sup>7</sup> Indeed, litigants often forgo raising valid but easily rectifiable evidentiary objections during summary judgment briefing.<sup>8</sup> But the Stalker report’s relevance was discussed during the April conference; the Division of Enforcement objected that it is irrelevant and I told Feathers that I had difficulty seeing how it could be relevant.<sup>9</sup> And because of the report’s apparent irrelevance, I told Feathers that if he wished to rely on the report during summary disposition briefing, he would “at least need to explain how it

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<sup>5</sup> 17 C.F.R. § 201.250(b). This summary-disposition procedure under Rule of Practice 250 is intended to be “analogous” to summary judgment in district court under Federal Rule of Civil Procedure 56, Amendments to the Commission’s Rules of Practice, 81 Fed. Reg. 50,212, 50,224 nn.112, 115 (July 29, 2016), on which Rule 250 was “modeled,” *AMS Homecare, Inc.*, Securities Exchange Act of 1934 Release No. 68506, 2012 WL 6642540, at \*2 n.19 (Dec. 20, 2012); see *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at \*6 n.26 (Feb. 4, 2008) (finding it appropriate to rely on “cases construing [Rule 56 to] clarify the obligations a motion for summary disposition places on the party opposing it”). Because Commission practice as to summary disposition is informed by practice in federal district court, it is appropriate in deciding a summary disposition motion to consider decisions interpreting Rule 56. See *AMS Homecare*, 2012 WL 6642540, at \*2 n.19 (relying on precedent relevant to a Rule 56 because Rule of Practice 250 was “modeled” on that rule).

<sup>6</sup> *Smith v. Kilgore*, 926 F.3d 479, 485 (8th Cir. 2019); *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 538–39 (4th Cir. 2015).

<sup>7</sup> *McDaniel v. Progress Rail Locomotive*, 343 F. Supp. 3d 753, 758 (N.D. Ill. 2018), *aff’d*, 940 F.3d 360 (7th Cir. 2019).

<sup>8</sup> See *Cehovic-Dixneuf v. Wong*, 895 F.3d 927, 932 (7th Cir. 2018).

<sup>9</sup> Prehr’g Tr. 67–70.

could be admissible if [he] were to offer it at a hearing.”<sup>10</sup> To show that the report is admissible and thus appropriate for consideration on summary disposition, Feathers must show that the report is relevant.<sup>11</sup>

Additionally, the Stalker report is unsworn.<sup>12</sup> It does not qualify as an undisputed pleaded fact, declaration, affidavit, documentary evidence, or fact subject to official notice, as required by Rule 250(b). And Courts may not consider unsworn expert reports in the summary judgment context when it is not otherwise clear that the expert evidence can be submitted in an admissible form at trial.<sup>13</sup> Here, the Division has objected that there are reasons to believe Stalker would not testify consistent with her report.<sup>14</sup> To rectify this issue for purposes of summary disposition briefing, Feathers must submit a sworn declaration or affidavit from Stalker declaring that she would testify consistent

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<sup>10</sup> Prehr’g Tr. 70, 73; *cf. Baines v. Walgreen Co.*, 863 F.3d 656, 662 (7th Cir. 2017) (“Evidence offered at summary judgment must be admissible to the same extent as at trial, *at least if the opposing party objects*, except that testimony can be presented in the form of affidavits or transcripts of sworn testimony rather than in person.”) (emphasis added); *Fowle v. C & C Cola, a Div. of ITT-Cont’l Baking Co.*, 868 F.2d 59, 67 (3d Cir. 1989) (“While evidence should not be excluded on summary judgment on hypertechnical grounds, we are swayed in this case by the fact that defendants raised this issue in the district court, and plaintiff did nothing to correct the error before that court.”).

<sup>11</sup> *See* 17 C.F.R. § 201.320; *cf. Kyles v. Baker*, 72 F. Supp. 3d 1021, 1032 (N.D. Cal. 2014) (sustaining objection to irrelevant evidence submitted in opposition to summary judgment motion); *Evans v. City of San Diego*, 913 F. Supp. 2d 986, 993 (S.D. Cal. 2012) (sustaining objection to irrelevant photographic evidence submitted in support of summary judgment motion).

<sup>12</sup> Stalker Report at 18.

<sup>13</sup> *Tanner v. McMurray*, 429 F. Supp. 3d 1047, 1136 n.176 (D.N.M. 2019); *see Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 1000 (5th Cir. 2001) (“Unsworn expert reports ... do not qualify as affidavits or otherwise admissible evidence for [the] purpose of Rule 56, and may be disregarded by the court when ruling on a motion for summary judgment.” (quoting 11 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 56.14[2][c])); *see also Lyons v. Lancer Ins. Co.*, 681 F.3d 50, 57 (2d Cir. 2012) (“In ruling on a motion for summary judgment, the district court may rely on ‘any material that would be admissible’ at a trial.”).

<sup>14</sup> Prehr’g Tr. 69.

with the contents of her report.<sup>15</sup>

To summarize, if Feathers wishes to rely on the Stalker report in either opposing summary disposition or affirmatively moving for summary disposition, he must (1) show that the report is relevant;<sup>16</sup> and (2) submit a sworn declaration or affidavit from Stalker showing that if called to testify at a merits hearing, she would testify in a manner consistent with her report. Feathers's request for a ruling on the admissibility of the Stalker report is DENIED as premature.

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James E. Grimes  
Administrative Law Judge

Served by e-mail on all participants.

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<sup>15</sup> See *Humphreys*, 790 F.3d at 539 (“[S]ubsequent verification or reaffirmation of an unsworn expert’s report, either by affidavit or deposition, allows the court to consider the unsworn expert’s report on a motion for summary judgment.”) (internal quotation marks omitted); *Davis v. Fernandez*, 798 F.3d 290, 292 (5th Cir. 2015) (“[B]ecause the testimony that Davis initially offered in opposition to summary judgment was neither sworn nor declared under penalty of perjury to be true and correct, it was not competent evidence. Once Davis reiterated his testimony on objection ... and declared under penalty of perjury that it was true and correct, it became competent evidence at that point. Had Davis initially submitted the evidence in competent form, there is no question that the court would have had to consider it.”); 17 C.F.R. § 201.250(b) (explaining that summary disposition in follow-on proceedings is adjudicated based on “undisputed pleaded facts, declarations, affidavits, documentary evidence or facts officially noted [under] Rule 323”); see also *Am. Fed’n of Musicians of U.S. & Can. v. Paramount Pictures Corp.*, 903 F.3d 968, 977 (9th Cir. 2018) (holding that a sworn “declaration that [an expert] would testify in accordance with [his] report ... satisfies the functional concerns behind Rule 56(c)(4)”).

<sup>16</sup> As I’ve previously explained to Feathers, this proceeding is not a forum to attack the district court’s injunction, the district court’s material factual findings, Feathers’s conviction, or the conduct of any government attorney in any related district court criminal or civil action. See Prehearing Tr. 63–65, 70, 72, 90–91; *Feathers*, 2020 SEC LEXIS 1066, at \*2 nn.1–2, \*4 n.13. Evidence related to these matters is not relevant in this proceeding. Feathers may, however, “introduce evidence regarding the circumstances surrounding” the allegations against him in the order instituting proceedings. *Jose P. Zollino*, Exchange Act Release No. 55107, 2007 WL 98919, at \*4 (Jan. 16, 2007) (internal quotation marks omitted).