

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

Administrative Proceedings Rulings
Release No. 6772 / July 7, 2020

Administrative Proceeding
File No. 3-15755

In the Matter of
Mark Feathers

**Order Quashing Subpoena
Directed to the SBA**

After the Small Business Administration (SBA) moved to quash a subpoena I issued for seven categories of documents sought by Respondent Mark Feathers, I ordered Feathers to explain “the relevance of the materials encompassed in the first four categories in his subpoena” and explain why his subpoena for those materials is not unreasonable.¹ I also ordered him to explain “why he has a substantial need for the work-product in his” fifth, sixth, and seventh categories and “why he would suffer an undue hardship in acquiring the information any other way.”²

In his response to the order, Feathers does not attempt to show that the first four categories of documents are relevant or that his subpoena for them is not unreasonable. Instead, Feathers argues that the SBA has not shown that work-product privilege could apply to documents created before June 2012,

¹ *Mark Feathers*, Admin. Proc. Rulings Release No. 6763, 2020 SEC LEXIS 1772, at *11 (ALJ June 2, 2020).

² *Id.* As previously noted, “[t]he work-product privilege applies to materials ‘prepared in anticipation of litigation.’” *Id.* at *8 (quoting *FTC v. Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 149 (D.C. Cir. 2015)). To obtain factual materials in work-product documents, a litigant must show “a substantial need for the materials and an undue hardship in acquiring the information any other way.” *Id.* (quoting *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997)).

which he says is before litigation commenced.³ And for documents created after June 2012, he appears to argue that because he did not make “overtures to engage SBA in a civil action,” the SBA could not have prepared these documents in anticipation of litigation.⁴ Feathers also argues that because he was not indicted until much later—and by the Department of Justice, not the SBA—documents the SBA created from August 2013 through December 2014 cannot constitute work product.⁵ Finally, he asserts that documents created after December 2014 were not prepared in anticipation of litigation, but were instead prepared in “relat[ion] to the sale/transfer of the assets of Respondent’s SBA-regulated companies.”⁶

There are a few problems with Feathers’s claims. First, I’ve already determined that his first four categories of documents do not constitute work product.⁷ So Feathers’s argument is irrelevant to the first four categories and only relates to his last three categories. His argument that the first four categories are not work product does not show that those categories are relevant or reasonable.

Second, I have also already determined that Feathers’s last three categories constitute work product.⁸ Those categories concerned Feathers’s express request for *work product* related to claims against the receivership estate *in the underlying litigation* and to assistance the SBA gave to prosecutors in connection with Feathers’s indictment.⁹ By their nature, these documents were either created during actual, on-going litigation—the underlying civil litigation in which a receiver was appointed—or in anticipation of litigation—Feathers’s indictment.¹⁰

³ Response at 1.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Feathers*, 2020 SEC LEXIS 1772, at *8.

⁸ *Id.*

⁹ *See id.*

¹⁰ *See United States v. Constr. Prod. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (“To invoke this privilege, a party generally must show that the

Third, Feathers has not explained “why he has a substantial need for the work-product in his” fifth, sixth, and seventh categories. Feathers simply states that he “will employ” the requested materials “in his *Steadman* Factor defenses” and that “[t]here is no ‘other way’ to obtain these materials.”¹¹ But merely saying he will use the materials and opining that he cannot obtain them in any other way does not show a substantial need.¹²

Because Feathers has shown neither that his first four categories of documents are relevant or reasonable nor that he has a substantial need for the last three categories of documents, his subpoena to the SBA is QUASHED.

James E. Grimes
Administrative Law Judge

Served by e-mail on all participants.

documents were prepared principally or exclusively to assist in anticipated or ongoing litigation.”).

¹¹ Response at 2.

¹² See *Boehringer Ingelheim*, 778 F.3d at 155 (“[A] moving party’s burden is generally met if it demonstrates that the materials are relevant to the case [and] the materials have a unique value apart from those already in the movant’s possession”); cf. *Fletcher v. Union Pac. R.R. Co.*, 194 F.R.D. 666, 674 (S.D. Cal. 2000) (“Conclusory allegations do not establish that no substantially equivalent source of information exists.”).