

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

Administrative Proceedings Rulings
Release No. 6745 / March 18, 2020

Administrative Proceeding
File No. 3-15755

In the Matter of
Mark Feathers

**Order Regarding Division's
Inability to Comply with Prior
Orders**

On March 17, 2020, the Division of Enforcement submitted a “notice of inability to comply” with my orders asking it to set forth its review criteria and to estimate how long the document review process would take if I were to issue the subpoena requested by Respondent. This response falls short of what was required. No production has been ordered yet. I have twice asked the Division to submit a proposal for reviewing responsive documents, and both times the Division has said it is unable to take even that preliminary step. Although the Division is now prepared to “undertake a box-level review” of the paper files it previously identified, it states that a review of the emails and electronic documents would be impossible without individually examining each of the 20,000 emails.

The Division’s position is that the documents sought are irrelevant and privileged. Although the Division may set forth reasons and examples to establish its position, it is not the role of Division counsel to decide what is relevant and privileged at the outset and then decline to comply with my orders. Moreover, the Division cannot reasonably reach the conclusion that no documents are relevant when it has not yet undertaken any review of them and counsel is admittedly unfamiliar with their content. And no showing has been made to establish that the estimated 18 boxes of paper files it has not previously produced are all privileged. Also, there is surely some ability to conduct a computer-aided search of the emails and electronic files, rather than counsel having to examine each one individually.

My March 11, 2020, order was an attempt at finding a balance between an intensive document-by-document review and conducting no review at all. I

still believe such a balance can be achieved, for both the paper files and electronic documents, including emails. I will give the Division a third chance to propose a method for reviewing the documents. If the Division is unwilling or unable to do so, I will order search criteria and in camera review of the entire corpus, if necessary. The Division's proposal for both paper and electronic review is due April 1, 2020. The Division's estimate of time must be supported by a declaration and include reasoned methodology. Its full privilege log would be due later after it has completed review of the documents or in connection with in camera review, if one of those steps is ordered.

Jason S. Patil
Administrative Law Judge