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

Administrative Proceedings Rulings
Release No. 6752 / April 17, 2020

Administrative Proceeding
File No. 3-15755

In the Matter of

Mark Feathers

Order Following Prehearing Conference

I held a telephonic prehearing conference on April 14, 2020, with Respondent Mark Feathers, pro se, and counsel for the Division of Enforcement. We addressed five topics: email service, Feathers's third-party subpoena requests, Feathers's motion to refer matters to the Commission's Office of Inspector General, the expert report of Annette M. Stalker, and Feathers's request for a subpoena of Division work product.

Email Service

In light of the Commission's March 18, 2020, order encouraging parties to confer about service, the parties said that they will waive paper service of opinions and orders and accept service by email. Feathers declined to waive paper service of the Division's filings. On April 15, 2020, the Division filed a notice confirming these representations.

Third-Party Subpoenas

Feathers requested subpoenas directed to the Small Business Administration, the Federal Deposit Insurance Corporation, and the California Department of Business Oversight. I asked Feathers to modify the subpoenas, and I signed the modified subpoenas on April 15, 2020.

Referral to Office of Inspector General

Feathers has requested that I ask the Office of Inspector General to review the Division's litigation conduct in the underlying civil proceeding. This motion is DENIED without prejudice. I am not in a position to pass judgment on

litigation conduct that did not occur before me. As the Commission has stated, a follow-on proceeding is "not the appropriate forum for challenging the propriety of the Division's conduct in [an underlying] injunctive action; such a challenge should have been brought before the District Court."[1] The Office of Inspector General accepts complaints from the public, and Feathers may submit his complaint directly to that office.

Stalker Report

Annette M. Stalker prepared a report that was filed in Feathers's criminal case. It appears that Feathers will offer this report into evidence during this proceeding. Because the content of the report, however, contradicts findings made by the district court in the civil case that is the predicate for this follow-on proceeding, it is not clear that I could properly consider it in this proceeding.[2] Nonetheless, because Feathers has yet to offer the report into evidence, I need not now resolve whether to admit it.

Feathers indicated during the conference that he intends to rely on the report as an expert report. As I explained to him, expert reports must comply with Rule of Practice 222(b).[3] And a party's expert must be made available for cross-examination at any merits hearings. If Feathers offers the report as an exhibit without calling Stalker as an expert witness and outside of the requirements of Rule 222(b), he should be prepared to show that it is relevant, material, not unduly repetitious, and reliable.[4] Feathers must therefore show

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[1] *Harold F. Harris*, Securities Exchange Act of 1934 Release No. 53122A, 2006 WL 307856, at *6 (Jan. 13, 2006); *see also Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1108 (D.C. Cir. 1988) (holding that an attack on the Division's conduct related to an underlying injunctive proceeding was "doomed to fail").

[2] *See Sherwin Brown*, Investment Advisers Act of 1940 Release No. 3217, 2011 WL 2433279, at *4 (June 17, 2011) ("The doctrine of collateral estoppel precludes the Commission from reconsidering the injunction as well as factual and procedural issues that were actually litigated and necessary to the court's decision to issue the injunction. Thus, we have repeatedly stated that a respondent in a follow-on administrative proceeding may not challenge the findings made by the court in the underlying proceeding.")

[3] 17 C.F.R. § 201.222(b).

[4] 17 C.F.R. § 201.320.

how facts or opinions in the report—that are not contradicted by the district court's findings—are relevant to the *Steadman* public interest factors.[5]

Subpoena of Division Work Product

Feathers submitted a subpoena directing the Division to produce "[a]ll work product (charts, tables, narratives, spreadsheets, emails, etc.)" as well as a listing of source documents related to specific statements and financial representations the Division made in several of its filings in the civil case. During the prehearing conference, Feathers clarified that he already possesses the source documents. Feathers instead wants the Division to explain how its employees reached certain conclusions in documents filed with the district court. His request for a list of source documents is thus a request for the Division's work product.[6]

Under the Commission's Rules of Practice, legal work product generally may be withheld by Division.[7] This policy is modeled on the similar rule in the

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[5] *See Jose P. Zollino*, Exchange Act Release No. 55107, 2007 WL 98919, at *4 (Jan. 16, 2007) ("While Zollino may not challenge the allegations that provide the basis for the court action, he was free to introduce evidence regarding the circumstances surrounding those allegations as means of addressing whether sanctions should be imposed in the public interest." (internal quotation marks omitted)); *see also Siris v. SEC*, 773 F.3d 89, 95 (D.C. Cir. 2014) ("[T]he petitioner may not relitigate those factual questions conclusively decided in the underlying civil suit, but the Commission must consider mitigating evidence proffered by the petitioner about the circumstances surrounding his misconduct.").

[6] The party asserting a privilege bears the burden of establishing its applicability. *See Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 766 (D.C. Cir. 1965). Since Feathers has acknowledged that he is seeking the Division's work product—materials that are by definition privileged—the Division has established that the documents sought are work product.

[7] 17 C.F.R. § 201.230(b)(1)(ii); *see* Rules of Practice, 60 Fed. Reg. 32,738, 32,762 (June 23, 1995) ("Work product includes any notes, working papers, memoranda or other similar materials, prepared by an attorney in anticipation of litigation. … Accountants, paralegals and investigators who work on an investigation do so at the direction of the director, an associate director, an associate regional administrator or another supervisory attorney, and their work product is therefore shielded by the rule.").

Federal Rules of Civil Procedure.[8] The protection afforded to fact work product is, however, not absolute.[9] The Federal Rules provide that work product may be discovered if "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[10] The Commission has applied this test in administrative proceedings as well.[11]

To be entitled to discovery of the material he seeks, Feathers must show "a substantial need for the materials and an undue hardship in acquiring the information any other way."[12] Feathers may file a brief addressing this issue by April 27, 2020.[13] The Division's response will be due May 7. After resolving

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[8] 60 Fed. Reg. at 32,762; *see* Fed. R. Civ. P. 26(b)(3)(A) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).").

[9] In contrast to fact work product, opinion work product—an attorney's mental impressions, conclusions, opinions, or legal theories—is entitled to "special protection" beyond that afforded to fact work product, *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981), and is "virtually undiscoverable." *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997); Fed. R. Civ. P. 26(b)(3)(B).

[10] Fed. R. Civ. P. 26(b)(3)(A)(ii).

[11] *See Clark T. Blizzard*, Investment Advisers Act Release No. 2030, 2002 WL 662783, at *4 (Apr. 23, 2002).

[12] *Director, Office of Thrift Supervision*, 124 F.3d at 1307.

[13] As I explained to Feathers during the conference, "[t]he basis for this proceeding is the action of the district court— in … enjoining him—and its purpose is not to revisit the factual basis for that action but, rather, to determine what remedial sanctions, if any, should be imposed in the public interest." *Zollino*, 2007 WL 98919, at *4 (footnote omitted). Feathers thus does not have a substantial need for evidence that might support an attack on the district court's injunction and material findings. *See Siris*, 773 F.3d at 96 (holding that the Commission could "reject … purported mitigation evidence that, in reality, constituted a collateral attack on" an underlying judgment); *Ted Harold Westerfield*, Exchange Act Release No. 41126, 1999 WL 100954, at *4 n.22 (Mar. 1, 1999) ("[M]aterial findings in an injunctive proceeding may [not] be collaterally attacked in an administrative proceeding.").

this outstanding subpoena issue, I will set a more complete prehearing schedule.

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James E. Grimes
Administrative Law Judge

Served by email on all parties.