

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

Administrative Proceedings Rulings
Release No. 6760 / May 12, 2020

Administrative Proceeding
File No. 3-15755

In the Matter of
Mark Feathers

Order Quashing Subpoena

Respondent Mark Feathers submitted a subpoena request seeking certain documents from the Division of Enforcement. During a prehearing conference held in April 2020, Feathers conceded that he already possesses the documents he seeks; he actually wants access to the Division’s work product.¹ Because fact work product is only discoverable on a showing of “a substantial need for the materials and an undue hardship in acquiring the information any other way,” I gave Feathers ten days to show that he could meet this standard.²

Feathers quickly responded, arguing that (1) a Division accountant, whose work product he seeks, is not a client of any Division attorney; (2) the Division’s work product is no longer part of an active investigation; (3) the Division’s opposition *before* he conceded that he already has the documents he seeks relied on “rote” burden arguments; and (4) the Division submitted false and

¹ *Mark Feathers*, Admin. Proc. Release No. 6752, 2020 SEC LEXIS 1066 (ALJ Apr. 17, 2020). “The attorney work product doctrine provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial.” *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183 (2d Cir. 2007) (internal quotation marks omitted).

² *Feathers*, 2020 SEC LEXIS 1066 (quoting *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997)).

misleading materials to the district court in the underlying action.³ None of these arguments has anything to do with Feathers’s threshold burden to show substantial need for the materials he seeks.⁴ In any event, the work product of Securities and Exchange Commission accountants is also protected from disclosure.⁵

Feathers also says the Division has never shown that the authors of the documents he seeks “performed their work with litigation intended.”⁶ This is an odd assertion. Feathers has conceded he seeks work product. Indeed, he wants to discover how a Division accountant and one of its attorneys reached certain opinions and conclusions reflected in filings submitted in the underlying district court action.⁷ These materials were not just prepared “in anticipation of litigation,” but rather in actual litigation. They are, by definition, work product.⁸

Finally, Feathers speculates that the Division might be withholding *Brady* material.⁹ But “[m]ere speculation,” which is all Feathers offers, “that

³ Response at 1–4.

⁴ Feathers similarly failed to discuss substantial need in a reply he filed to the Division’s opposition.

⁵ Rules of Practice, 60 Fed. Reg. 32,738, 32,762 (June 23, 1995) (“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.”); *see also In re Grand Jury Subpoena Dated Dec. 19, 1978*, 599 F.2d 504, 513 (2d Cir. 1979) (holding that the work-product doctrine protects the work of an accountant where the accountant is working at the direction of an attorney for the purpose of anticipated litigation).

⁶ Response at 2.

⁷ *See id.* at 3 (narrowing subpoena to include “review of only those emails during this calendar period which ... pertain to their ... factual allegations made in the Commission[']s civil request for a TRO and for a summary judgement against Respondent ... in ... civil court pleadings”).

⁸ *See In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d at 183 (holding that the work-product doctrine protects “materials prepared by or at the behest of counsel ... for trial”).

⁹ Response at 3–4. The requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), relating to documents that contain material exculpatory evidence,

government documents may contain *Brady* material is not enough to require ... *in camera* review.”¹⁰

Feathers has not shown substantial need for the Division’s work product related to filings it submitted in the underlying district court action. His subpoena directed to the Division is QUASHED.

James E. Grimes
Administrative Law Judge

Served by e-mail on all parties.

apply in Commission administrative proceedings. *See* 17 C.F.R. § 201.230(b)(3).

¹⁰ *Orlando Joseph Jett*, Admin. Proc. Rulings Release No. 514, 1996 WL 360528, at *1 (June 17, 1996).