

**UNITED STATES OF AMERICA**  
**before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-15755**

**In the Matter of**  
  
**MARK FEATHERS,**  
  
**Respondent.**

**DIVISION OF ENFORCEMENT'S BRIEF**  
**IN RESPONSE TO COMMISSION'S JULY 10, 2020 ORDER**

**I. INTRODUCTION**

The issue before the Commission, pursuant to its June 18, 2020 Order Directing Filing of Briefs (“Order”), is whether the Commission should seek judicial enforcement of a subpoena issued at the request of Respondent Mark Feathers to the Federal Deposit Insurance Corporation (“FDIC subpoena”). The Division showed that Commission should not seek judicial enforcement because it cannot establish a *prima facie* case for enforcement: there is no evidence that proper service was effected, that the subpoena seeks relevant evidence, or that the subpoena is reasonable in scope or burden. To the contrary, the purpose of the subpoena is to try to obtain evidence that Respondent intends to try to use to collaterally attack the district court’s factual findings in *SEC v. Small Business Capital Corp., et al.*, (“*SEC v. SBCC*”) Case No. 5:12-cv-3237-EJD (N.D. Cal.), *aff’d sub nom SEC v. Feathers*, 774 Fed. App’x 354 (9th Cir. 2019), *amended as to costs*, 773 Fed. App’x 929 (Mem) (9th Cir. 2019). Nothing in Respondent’s

“Response to Order of The Secretary for an ‘Essay to 5,000 words long’ in the Matter re: Feathers 3-15755,” dated July 18, 2020, establishes either a *prima facie* case for enforcement of the FDIC subpoena, or that the subpoena is proper in any way. For the reasons stated in the Division’s opening brief filed June 29, 2020, the Commission should exercise its discretion to refuse to enforce the FDIC subpoena, and should revoke the subpoena.

## **II. LEGAL ARGUMENT**

The Division’s opening brief cited the relevant case law requiring courts to conduct a *de novo* review in a subpoena enforcement action to assess whether the information sought is reasonably relevant and probative, the need for the information, and the burden of compliance. The Division asserted that the Commission should exercise its discretion and not seek judicial enforcement of the FDIC subpoena because there was no evidence of proper service, it did not seek relevant evidence, and it was not reasonable in scope or burden. Respondent’s brief failed to address any of these issues and thus failed to make any showing that the Commission should exercise its discretion and enforce the FDIC subpoena.

First, there is no evidence in the record that Respondent served the FDIC with the subpoena consistent with the Commission’s Rules of Practice or the FDIC’s regulations. Respondent failed to provide any information to establish that the FDIC subpoena was properly served. For this reason alone, the Commission should exercise its discretion and refuse to seek judicial enforcement of the subpoena.<sup>1</sup>

Second, Respondent has not shown that the subpoena seeks relevant evidence, but rather confirmed that the information sought from the FDIC is for the purpose of collaterally attacking

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<sup>1</sup> See, e.g., *Idaho v. Telford*, Case No. 12:12-mc-07216-MHW (D. Idaho Jan. 23, 2012) (subpoena not properly served by pro se party was not enforceable).

the district court’s findings in the injunctive action underlying this follow-on proceeding, *SEC v. SBCC*. Respondent claims that he was “approved in 2011 by FDIC as a director for a troubled bank operating under an FDIC Memorandum of Understanding,” and that this essentially foreclosed the Commission’s injunctive action and any claims that he violated the federal securities laws.<sup>2</sup> Respondent thus seeks to try to prove through an FDIC background check that the district court erred in finding that there were violations of the federal securities laws. It is well established that evidence designed to attack a district court judgment or criminal conviction in a follow-on proceeding is not relevant.<sup>3</sup> Respondent has not shown that the information sought by the FDIC subpoena is relevant to this proceeding, such that the subpoena is judicially enforceable.

Third, Respondent did not show how the FDIC subpoena is reasonable in scope or burden, claiming that the Division’s arguments on these points amount to “‘privilege’ and similar nonsense.”<sup>4</sup> The Division pointed out that the subpoena covered an indefinite period and the description of documents was vague but appeared to cover internal and possibly privileged documents. Respondent did not explain how the FDIC, or any federal agency, can respond to the overbroad and vague request, or why he has a need for internal and possibly privileged documents from the FDIC in this follow-on proceeding. Indeed, Respondent fails to identify which of the *Steadman* factors such information might relate to, and then to show why he has a need for such documents that outweighs any potential claim of privilege. The evidence in the

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<sup>2</sup> See Respondent’s Response to Order of the Secretary for an “Essay to 5,000 words long” In the Matter re: Feathers 3-15755 (July 18, 2020), at p. 1.

<sup>3</sup> See *Sherwin Brown*, Investment Advisers Act of 1940 Release No. 32317, 2011 WL 2433279, at \*4 (June 17, 2011).

<sup>4</sup> See Respondent’s Response to Order of the Secretary for an “Essay to 5,000 words long” In the Matter re: Feathers 3-15755 (July 18, 2020), at p. 1.

record establishes that the subpoena is vague and overbroad, and as such, not susceptible to judicial enforcement.

Fourth, the Division asserted that the Commission could exercise its discretion to refuse to enforce the subpoena, and that Respondent could pursue judicial enforcement and bear the burden of establishing a *prima facie* case for enforcement. Respondent did not make any argument in response to this point. Instead, Respondent asserted that the public has a right to the materials the FDIC might have about him, without regard to the issues in this case or the procedural requirements for issuance and enforcement of an administrative subpoena. Respondent has other available avenues to pursue disclosure of information from a federal agency, and if his goal is to obtain information to share with the public, then his use of the Commission's subpoena power in this proceeding is not an appropriate avenue to obtain such information.

Fifth, for all of the reasons stated in the Division's opening brief, the Division requests that the Commission revoke the FDIC subpoena to prevent an abuse of its process. The Commission has discretion to refuse to issue subpoenas that seek evidence which is neither relevant nor material, and to revoke a subpoena that has been issued by a hearing officer to "prevent an abuse of a court's processes" in an adjudicatory proceeding.<sup>5</sup>

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<sup>5</sup> See, e.g., *San Francisco Mining Exchange*, 41 S.E.C. 560, Release No. 7106, 1963 WL 62756 (July 31, 1963) (affirming hearing examiner's refusal to issue subpoena *duces tecum* for evidence that was neither relevant nor material), and *San Francisco Mining Exchange*, 41 S.E.C. 860, Release No. 7247, 1964 WL 66148 (Feb. 26, 1964) (revoking hearing examiner's issuance of subpoena *ad testificandum* because it sought information that was neither relevant nor material), both *affirmed sub nom. San Francisco Mining Exchange v. SEC*, 378 F.2d 162 (9th Cir. 1967).

**III. CONCLUSION**

For the reasons stated in the Division's opening brief and in this response brief, the Commission should decline to seek judicial enforcement of the FDIC subpoena. Alternatively, the FDIC subpoena should be revoked.

Respectfully submitted,  
DIVISION OF ENFORCEMENT  
By its Attorneys:

Dated: July 27, 2020

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**IN THE MATTER OF MARK FEATHERS**  
**ADMINISTRATIVE PROCEEDING FILE NO. [3-15755]**

**SERVICE LIST**

Pursuant to Commission Rule of Practice 151 (17 C.F.R. § 201.151), I certify that the attached:

**DIVISION OF ENFORCEMENT'S BRIEF IN RESPONSE TO COMMISSION'S JULY 10, 2020 ORDER**

was served on July 27, 2020 upon the following parties as follows:

**By Email**

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Dated: July 27, 2020

*/s/ Sarah Mitchell*  
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