

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 CONSOLIDATED RESPONSE TO FIVE
FEATHERS’ MOTIONS FILED BETWEEN JULY 29 AND AUGUST 2, 2020**

I. INTRODUCTION

Between July 29 and August 2, 2020, Respondent Mark Feathers filed a flurry of five motions, each consisting of less than one page: (1) Respondent’s Request to Terminate Hearings Due to Unconstitutional Double Jeopardy, filed July 29, 2020 (“Double Jeopardy Motion”); (2) Respondent’s Request to Terminate Hearings Due to Governmental Abuse of Power, and Violations of the APA, filed July 30, 2020 (“Terminate Motion”); (3) Respondent’s Request for a 180 day stay, filed July 30, 2020 (“180 Day Stay Motion”); (4) Respondent’s Motion for Stay in the Matter of District Court Determining Relevant Evidentiary Materials, filed August 2, 2020 (“Stay Motion”); and (5) Respondent’s Motion for Court Order to Direct SEC to Post Prior

Motions, filed August 2, 2020 (“Post Motion”).¹

Feathers has made many of the same arguments in prior filings, including in his numerous requests for a stay of these proceedings to allow him to pursue actions in other forums. In the interest of economy, the Division files this consolidated response to the five motions. As discussed below, each of the motions lack merit and should be denied.

II. LEGAL ARGUMENT

A. Double Jeopardy Motion and Terminate Motion Should be Denied

Feathers filed the Double Jeopardy Motion on July 29 seeking to terminate these proceedings based on double jeopardy, and the next day filed the Terminate Motion seeking to terminate these proceedings for “governmental abuse of power, and violations of the APA.”² Neither motion has any merit and should be denied.

1. The Double Jeopardy Motion does not raise double jeopardy

Feathers asserts in his Double Jeopardy Motion that the retrial of this administrative proceeding constitutes “double jeopardy.” (Motion at p. 1.) Contrary to Feathers’ assertions, the remand of this case for a new trial does not constitute double jeopardy. First, the Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated criminal prosecutions for the same offense. *See, e.g., Oregon v. Kennedy*, 456 U.S. 667 (1982), *United States v. Dinitz*, 424 U.S. 600, 606 (1976); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (“Congress may impose both a criminal and a civil sanction in respect to the

¹ Feathers also filed a Motion for Summary Disposition, to which the Division will respond separately.

² Feathers made almost identical arguments in his May 15, 2020 motion seeking a stay to permit him to pursue a constitutional challenge in the Ninth Circuit based on double jeopardy and abuse of the Administrative Procedures Act. That motion to stay was denied. *See Mark Feathers*, Release No. 6762, at pp. 9-10 (May 29, 2020).

same act or omission, for the Double Jeopardy Clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.”) This is a civil proceeding in the public interest, and the industry bar is not a criminal sanction. For that reason alone, Feathers’ motion lacks merit.

Second, Feathers’ argument that the retrial mandated by the Ninth Circuit constitutes “double jeopardy” ignores the law of the case doctrine and the “mandate rule.” Parties cannot typically relitigate issues resolved by the court at a prior stage of the litigation. *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994). Under the law of the case doctrine, “findings made at one point in the litigation become the law of the case for subsequent stages of the same litigation.” *Id.* The rule restrains courts from reconsidering issues already decided, *Keith v. Bobby*, 618 F.3d 594, 599 (6th Cir. 2010), and it applies to “the trial court before an appeal, after the case has been remanded to the trial court by an appellate court, or in a later appeal.” Bryan A. Garner, et al., *The Law of Judicial Precedent* 441 (2016). Here, the Ninth Circuit mandated that the cure for the constitutional infirmities raised by Feathers’ appeal was a retrial in this administrative proceeding. Feathers has obtained a remedy for the issues raised on appeal. There is no basis for this tribunal to provide additional remedies to Feathers beyond those ordered by the Ninth Circuit – which was based on Supreme Court precedent. Feathers may not like the remedy of another administrative proceeding before a new administrative law judge, but that is the remedy dictated by the Ninth Circuit and the Supreme Court.

For these reasons, Feathers’ Double Jeopardy Motion lacks merit and should be denied.

2. The Terminate Motion does not identify any “abuse of process”

Feathers’ Terminate Motion is unclear in the relief it seeks, as it appears to request both that the administrative proceeding be terminated and that the proceedings be stayed to allow him to prepare a “circuit court action challenging the Commission as abusing its power”

(Terminate Motion at p. 1.)³ To the extent Feathers is seeking a stay to prosecute some proceeding in the Ninth Circuit, such a motion is improper because Feathers must raise his constitutional claims in this proceeding, and he may seek review after the Commission issues its decision. *See Mark Feathers*, Release No. 6762, at pp. 9-10 (May 29, 2020).

To the extent Feathers is raising a constitutional argument in this proceeding of “abuse of power, and violations of the APA,” (Motion at p. 1), he has not identified any constitutional harm or other basis to “terminate” this administrative proceeding. First, Feathers provides “background” about his life and his business to argue that in connection with the matters determined in *SEC v. Small Business Capital Corp., et al.*, he was an “issuer” of securities and not a “broker,” so there is no basis for this proceeding. In fact, the district court expressly found that Feathers was a broker. *See SEC v. Small Business Capital Corp., et al.*, 2013 WL 4455850, at * 14-15 (N.D. Cal. Aug. 16, 2013) (finding that Feathers and his company were “brokers” under Section 15(a) of the Exchange Act). This is not an argument based on any constitutional principle, but is merely another effort by Feathers to collaterally attack the district court’s factual findings, which is not appropriate in this follow-on proceeding. *See Mark Feathers*, Release No. 6768, at p. 4 n.16 (June 12, 2020) (noting that the Court had previously explained to Feathers that this proceeding is not a forum to attack the district court’s injunction or the district court’s material factual findings, and that evidence related to these items is not relevant).

Second, Feathers makes a broad challenge to the “modern administrative state” and

³ On July 10, 2020, Feathers filed with the Administrative Law Judge and served on the Division a document captioned: “Request for Injunction by United States 9th Circuit Court of Appeals to Stay Administrative Law Court Proceedings and Request for Order Requiring SEC to Allow as Evidentiary Materials the Stalker Forensic Accounting Report on Petitioner’s Prior-Managed Investment Funds.” The Division does not know if Feathers filed this document with the Ninth Circuit.

asserts this proceeding is an “abuse of power.” Contrary to Feathers’ assertions, this follow-on proceeding is expressly authorized by Congress in Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o, and is brought in the public interest. It is well established that the Commission’s combining administrative and adjudicative functions is consistent with due process. *See, e.g., John Thomas Capital Management Group LLC et al.*, Release No. 693, 2014 WL 5304908, at *3 (Oct. 17, 2014). Feathers has not, and cannot, show that this follow-on proceeding brought in the public interest under a provision of the Exchange Act is an abuse of process in any way. To the contrary, the record in this proceeding shows that Feathers has been accorded due process at every step.

The Terminate Motion, whether construed as a motion for a stay or a motion to terminate the proceedings, should therefore be denied because it does not identify or allege any cognizable constitutional harm.

B. The 180 Day Stay Motion and Stay Motion Should be Denied

Feathers has filed several motions to stay these proceedings on a variety of grounds – some of which are essentially repeated in the 180 Day Stay Motion and Stay Motion. Once again, Feathers has failed to show good cause to grant either the 180 Day Stay Motion or the Stay Motion. *See Mark Feathers*, Release No. 6755 (April 28, 2020) (respondent must show good cause for a temporary postponement).

1. The 180 Day Stay Motion does not provide good cause

In the 180 Day Stay Motion, Feathers requests a stay for 180 days so that he may file a motion under Federal Rule of Civil Procedure 60 in the district court action *SEC v. Small Business Capital Corp., et al.* (N.D. Cal.). Feathers asserts that he reserved a motion date in July 2019 in that proceeding, but he failed to file a timely motion that was ultimately going to challenge the district court’s summary judgment decision. Feathers fails to explain that this was

after the Ninth Circuit affirmed in all respected the district court’s summary judgment in a decision issued May 14, 2019. *See SEC v. Feathers*, 774 Fed. App’x 354 (9th Cir. 2019), *amended as to costs*, 773 Fed. App’x 929 (Mem) (9th Cir. 2019). It is unclear on what basis, after losing his appeal, Feathers would be able to challenge the district court’s 2013 decisions on summary judgment, *see SEC v. Small Business Capital Corp., et al.*, 2013 WL 4455850 (Aug. 16, 2013), and entry of a permanent injunction and monetary remedies, *see SEC v. Small Business Capital Corp., et al.*, 2013 WL: 5955669 (N.D. Cal. Nov. 6, 2013).

In his motion, Feathers references the so-called “Stalker report,” which is dated August 22, 2016. Generally, a motion under Rule 60 must be made within a “reasonable time,” and for reasons such as new evidence, fraud, or misconduct by an opposing party, “no more than a year after the entry of the judgment or order or the date of the proceeding.” *See Fed. R. Civ. P. 60(c)(1)*. At this point, any Rule 60 motion would be filed almost seven (7) years after the summary order was issued, almost four (4) years after the date of the draft “Stalker report,” and over one year after the Ninth Circuit affirmed the district court’s summary judgment and remedies decisions. Feathers does not provide any legal analysis to support that his Rule 60 motion is timely, explain why he and his court-appointed counsel did not present the “Stalker report” to the Ninth Circuit during the appeal, or explain the legal basis on which he expects to obtain relief in the district court proceeding.⁴

Based on this motion, it appears Feathers’ plan is to try to relitigate the district court’s summary judgment decision, which was affirmed by the Ninth Circuit, under the guise of a Rule

⁴ The “Stalker report” concedes that several thousand pages of audit workpapers had not been reviewed before the report was prepared, and the analysis was subject to change depending on the content of those documents. The report was prepared for the criminal proceeding, in which Feathers pled guilty.

60 motion. Feathers does not explain how such litigation could be completed in 180 days. Feathers' plan to try to obtain relief from the district court's summary judgment decision, based on the "Stalker report," does not show good cause for a stay. To the contrary, Commission precedent supports the conclusion that a motion to stay while pursuing a remedy in another forum is not good cause for a stay. *See Matter of Joseph Amundsen, CPA, Michael T. Remus, CPA, and Michael Remus, CPA*, Release No. 4044, 2019 WL 1868172, 2019 WL 1868172 (April 25, 2019) (refusing to stay administrative proceeding pending ruling in separate district court action). *See also Mark Feathers*, Release No. 6774 (July 14, 2020) (denying motion for stay while Feathers pursues a motion for injunction filed in the Ninth Circuit for lack of showing of good cause, noting two prior denials of stay in this matter).

The 180 Day Stay Motion does not show good cause for a stay and should be denied.

2. The Stay Motion fails to show good cause

Feathers' Stay Motion also references the so-called "Stalker report" as a basis for an indefinite stay so that he may pursue a district court action, noting *Gupta v. SEC*, 796 F. Supp. 2d 503 (S.D.N.Y. 2011). *Gupta* provides that a respondent might assert an equal protection claim in district court to challenge an administrative proceeding, where other defendants connected to the same allegations of wrongdoing was brought in a judicial instead of administrative proceeding. *See Harding Advisory LLC*, Release No. 3796, 2014 WL 988532, at n. 42 (Mar. 14, 2014) (describing *Gupta* as "declining to dismiss complaint alleging an equal protection violation where there existed 'a well-developed public record of *Gupta* being treated substantially disparately from 28 essentially identical defendants" (emphasis added in *Harding*)). Feathers simply has no colorable claim under *Gupta* because no one else associated with Small Business Capital was the subject of civil, administrative, or criminal charges. There is no factual basis for any claim by Feathers of a violation of equal protection under the theory of *Gupta*.

Feathers states that he seeks an indefinite stay “so that Respondent may argue with the district court that the Stalker report is relevant.” (Motion at p. 1.) It is unclear whether the Stay Motion is premised on the same arguments that underlie the 180 Day Stay Motion, because they both refer to Feathers’ plan to challenge the district court’s proceedings in *SEC v. Small Business Capital Corp., et al.*, with the so-called “Stalker report.” Whatever plans Feathers has to “argue with the district court,” his request for an indefinite stay to pursue such arguments is not allowed. *See Mark Feathers*, Release No. 6755, at p. 1 and n.2 (April 28, 2020) (under Rule 161 any postponement must be for a definite period of time and cannot be open-ended). Moreover, the Commission has opined that “stays for the purposes of pursuing other relief are inappropriate.” *See Matter of Daniel Joseph Touizer*, Release No. 85321, 2019 WL 1225724 (March 14, 2019) (quoting *Matter of Jon Edelman*, Exchange Act Release No. 30096, 1996 SEC LEXIS 3560, at *2-3 (May 6, 1996) (denying stay of administrative proceedings pending appeal of underlying criminal conviction).

Because Feathers has not shown any good cause for an indefinite stay, the Stay Motion should be denied.

C. The Post Motion should be denied as moot

Feathers asserts in the Post Motion that only items from June 25, 2020 through the date he filed his motion are being posted on SEC.gov. On August 4, 2020, the Division’s staff accessed SEC.gov for this proceeding, and it appears that the relevant filings in this proceeding, from the OIP on February 18, 2014, through filings as of July 30, 2020, are available on SEC.gov. Because it appears nothing is missing from the Commission’s website relating to this proceeding, the motion should be denied as moot.

III. CONCLUSION

For the reasons stated, Feathers’ five motions discussed above should each be denied.

Respectfully submitted,
DIVISION OF ENFORCEMENT
By its Attorneys:

Dated: August 5, 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 CONSOLIDATED RESPONSE TO FIVE FEATHERS' MOTIONS FILED BETWEEN JULY 29 AND AUGUST 2, 2020

was served on August 5, 2020 upon the following parties as follows:

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/s/ Sarah Mitchell

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