

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15755

In the Matter of

MARK FEATHERS,

Respondent.

THE DIVISION OF ENFORCEMENT'S
BRIEF IN OPPOSITION TO
RESPONDENT MARK FEATHERS'
PETITION FOR REVIEW

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	2
	A. The District Court Proceeding	2
	B. The Administrative Proceeding	3
	C. The Criminal Case.....	5
III.	ARGUMENT.....	6
	A. Respondent’s Collateral Attacks on the District Court Findings Are Not Relevant..	6
	B. Respondent’s Objection to Exclusion of the “Stalker Report” Lacks Merit.....	9
	C. Respondent’s Other Scattershot Arguments Are Not Relevant.....	12
	D. It is in the Public Interest to Bar Respondent	13
	1. Feathers is subject to a permanent injunction.....	13
	2. The public interest factors support a permanent bar	13
	a. Respondent’s violations of the antifraud provisions were egregious, recurrent, and involved a high level of scienter	14
	b. Feathers operated an unregistered broker-dealer.....	16
	c. Feathers has neither recognized the wrongful nature of his conduct, nor provided credible assurances against future violations	16
	d. Likelihood of future violations	18
IV.	CONCLUSION	18

TABLE OF AUTHORITIES

CASES

Blinder, Robinson & Co. v. SEC
837 F.2d 1099 (D.C. Cir. 1988)..... 7

Dasenbrock v. Enenmoh
Case No. 1:11-cv-01884-DAD-GSA-PC, 2018 WL 10322174 (E.D. Cal. Jan. 8, 2018) 11

Davis v. Fernandez
798 F.3d 290 (5th Cir. 2015) 10

Galley Schuler v. Rainforest Alliance, Inc.
Case No. 2:14-cv-226, 2016 WL 10516026 (D. Ver. Feb. 10, 2016) 11

James E. Franklin
285 F. App’x 761 (D.C. Cir. 2008) 7

James E. Franklin
Exchange Act Release No. 56649 (Oct. 12, 2007), 91 S.E.C. Docket 2708, 2007 WL 2974200.. 7

Jason A. Halek
Release No. 1376, 2019 WL 2071396 (May 9, 2019)..... 13

Jose P. Zollino
Release No. 2579, 2007 WL 98919 (Jan. 16, 2007) 17, 18

Lucia v. SEC
138 S. Ct. 2044 (2018)..... 4

Mark Feathers
Exchange Act Release No. 71565, 2014 WL 606596 (Feb. 18, 2014) 3

Mark Feathers

Exchange Act Release No. 73634, 2014 WL 6449870 (Nov. 18, 2014)4

Mark Feathers

Exchange Act Release No. 87226, 2019 WL 4916615 (Oct. 4, 2019)4

Mark Feathers

Exchange Act Release No. 90380, 2020 WL 6581207 (Nov. 9, 2020)4

Mark Feathers

Initial Decision Release No. 1403, 2020 WL 5763383 (Sept. 25, 2020)..... 1, 4, 7, 10, 13

Mark Feathers

Release No. 6768 (June 12, 2020).....10

Mark Feathers

Exchange Act Release No. 90572, 2020 WL 7122719 (Dec. 4, 2020).....7

Marshall E. Melton

56 S.E.C. 695 (2003).....13

Michael V. Lipkin and Joshua Shainberg

88 S.E.C. Docket 2872, 2006 WL 2668516 (Sept. 15, 2006)7

Peter Siris

S.E.C. Release No. 71068, 2013 WL 6528874 (Dec. 12, 2013)17, 18

Richard C. Spangler, Inc.

46 S.E.C. 238 (1976).....13

SEC v. Feathers

773 F. App'x 929 (Mem) (9th Cir. 2019)1

SEC v. Feathers

774 F. App'x 354 (9th Cir. 2019)..... passim

SEC v. ITT Educ. Svcs., Inc.

Case No. 1:15-cv-00758-JMS-MJD, 2017 WL 5508453 (S.D. Ind. Sept. 28, 2017)..... 12

SEC v. Pentagon Cap. Mgmt. PLC

No. 08-civ-3324, 2010 WL 4608681 (S.D.N.Y. Nov. 10, 2010)..... 12

SEC v. Small Business Capital Corp., et al.

No. 5:12-cv-3237, 2013 WL 5955669 (N.D. Cal. Nov. 6, 2013)..... passim

Sherwin Brown

Investment Advisers Act Release No. 3217, 2011 WL 2433279 (June 17, 2011) 7

Siris v. SEC

773 F.3d 89 (D.C. Cir. 2015)..... 17

Steadman v. SEC

603 F.2d 1126 (5th Cir. 1979) 13

United States v. Ritchie

342 F.3d 903 (9th Cir. 2003) 11

United States v. Visinaiz

546 U.S. 1123 (2006)..... 11

United States v. Visinaiz

428 F.3d 1300 (10th Cir. 2005) 11

Securities Act of 1933

Section 17(a)

[15 U.S.C. § 77q(a)].....2, 13

Securities Exchange Act of 1934

Section 10(b)

[15 U.S.C. § 78j(b)]2, 13

Section 15(a)

[15 U.S.C. § 78o(a)].....2, 3, 13

FEDERAL REGULATIONS

Rule 10b-5

[17 C.F.R. § 240.10b-5].....2, 13

OTHER AUTHORITIES

Enforcement Manual § 2.4..... 12

Rule of Practice 222(a)(4)..... 10

Rule of Practice 222(b) 10

Rule of Practice 230 12

Rule of Practice 231 12

Rule of Practice 330 11

Rule of Practice 411(d)6, 12

I. INTRODUCTION

In his petition for review dated December 1, 2020 (“Petition”), Respondent Mark Feathers seeks to establish “error on the part of the civil court in its findings” in the underlying civil injunctive action, *SEC v. Small Business Capital Corp., et al.*, No. 5:12-cv-3237 (N.D. Cal. Nov. 6, 2013) (“*SEC v. SBCC*”), *aff’d sub. nom. SEC v. Feathers*, 774 F. App’x 354 (9th Cir. 2019), *amended as to costs*, 773 F. App’x 929 (Mem) (9th Cir. 2019). Feathers claims that the administrative law judge refused to “accept evidentiary materials which contest the basis of the civil and criminal court findings, and question the validity of evidentiary materials presented by Enforcement to civil and criminal court.” (Petition at p. 1.) It is true that the administrative law judge relied on the district court’s factual findings, consistent with Commission precedent. *Mark Feathers*, Initial Decision Release No. 1403, 2020 WL 5763383, *passim* (Sept. 25, 2020). Feathers’ collateral attacks on the district court’s findings are not relevant to the public interest determination at issue here.

Feathers does not dispute that he is subject to a permanent injunction against future violations of the antifraud and broker-dealer registration provisions of the federal securities laws, issued in *SEC v. SBCC*. Feathers does not dispute that the district court found that he violated the federal securities laws, that his conduct was egregious, that it was recurrent, and that it involved a high degree of scienter. Feathers just believes that the district court was wrong. Feathers does not recognize or acknowledge that he did anything wrong, and provides no assurances against future violations. The public interest factors weigh strongly in favor of imposing industry and penny stock bars on Feathers, as the administrative law judge correctly concluded in the initial decision.

Accordingly, the Division requests that for the reasons set out in the initial decision, the Commission impose the sanctions recommended in the initial decision, and impose industry and penny stock bars on Feathers.

II. BACKGROUND

A. The District Court Proceeding

On June 21, 2012, the Commission filed a civil injunctive action against Feathers and three of his entities in United States District Court for the Northern District of California, alleging violations of Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder,¹ Section 15(a) of the Exchange Act,² and Section 17(a) of the Securities Act of 1933 (“Securities Act”).³ The Commission filed an emergency application for a temporary restraining order, appointment of a temporary receiver, and other relief, which was granted. *SEC v. SBCC*, Dkt. No. 16. On July 3, 2012, Feathers signed a stipulation and consent to entry of a preliminary injunction and appointment of a permanent receiver, order freezing assets, and other relief, with the advice of counsel of limited engagement. *Id.*, Dkt. No. 29.

On August 16, 2013, the district court decided cross-motions for summary judgment, granted the Commission’s motion, and made extensive factual findings that Feathers violated the antifraud and broker-dealer registration provisions of the federal securities laws. *See SEC v. SBCC*, 2013 WL 4455850 (N.D. Cal. Aug. 16, 2013). On November 6, 2013, the district court made additional factual findings and permanently enjoined Feathers from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 17(a) of the Securities Act,

¹ 15 U.S.C. § 78(b) and 17 C.F.R. § 240.10b-5.

² 15 U.S.C. § 78o(a)(1).

³ 15 U.S.C. § 77q(a).

and Section 15(a)(1) of the Exchange Act. *See SEC v. SBCC*, 2013 WL 5955669 (N.D. Cal. Nov. 6, 2013).

Feathers appealed the district court's summary judgment decision, and many other aspects of the district court proceedings, to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit eventually appointed counsel for Feathers. The Ninth Circuit eventually affirmed the district court's conduct of the case and factual findings. *SEC v. Feathers*, 774 F. App'x 354.

On August 19, 2020, Feathers filed the first of several motions seeking relief under Fed. R. Civ. P. 60. *SEC v. SBCC*, Dkt. No. 1285. After the Commission filed its opposition, virtually all of the docket entries from 1293 through 1377 involve Feathers' efforts to relitigate all aspects of the district court proceeding from its inception, as well as a request to file an action against the court-appointed receiver. Most recently on January 5, 2021, Feathers filed an administrative motion seeking to enforce subpoenas issued in the administrative proceeding, but either quashed or deemed unenforceable by the Commission or not served. *SEC v. SBCC*, Dkt. No. 1378.

B. The Administrative Proceeding

On February 18, 2014, the Commission issued an Order Instituting Proceedings against Mark Feathers pursuant to Section 15(b) of the Exchange Act, based on the permanent injunction entered in the district court action. *Mark Feathers*, Exchange Act Release No. 71565, 2014 WL 606596 (Feb. 18, 2014). Feathers filed his Answer to the OIP on or about March 12, 2014 ("2014 Answer").

The Commission issued an opinion and order in this proceeding on November 18, 2014, finding that Feathers had been permanently enjoined by a federal district court from future violations of the antifraud and registration provisions of the federal securities laws and that it was

in the public interest to bar Feathers from the securities industry. *Mark Feathers*, Exchange Act Release No. 73634, 2014 WL 6449870 (Nov. 18, 2014). While Feathers' appeal of the Commission's decision was pending before the Ninth Circuit, the Supreme Court issued its decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). On May 19, 2019, the Ninth Circuit vacated the Commission's prior opinion and order and remanded the case. *SEC v. Feathers*, 774 F. App'x 354, 358 (9th Cir. 2019). On October 4, 2019, the Commission ordered that Feathers be provided with an opportunity for a new hearing before an administrative law judge who had not previously participated in this matter. *Mark Feathers*, Exchange Act Release No. 87226, 2019 WL 4916615 (Oct. 4, 2019).

On January 23, 2020, Feathers served his Answer and Defenses to OIAP ("2020 Answer"). In the 2020 Answer, Respondent "re-asserts those defenses originally appearing in his March 12th, 2014 Answer," and stated: "Respondent will not re-litigate matters already litigated in prior civil proceedings." (January 2020 Answer at p.3.) In the 2014 Answer, Feathers did not contest the factual allegations concerning the district court proceedings, its findings, and entry of the permanent injunction. (See 2014 Answer at p. 2, "First Defense," "paragraph 3," "paragraph 4.")

On September 25, 2020, the administrative law judge issued an initial decision. *Mark Feathers*, 2020 WL 5763383. Shortly thereafter on September 25, 2020, Feathers sent his Petition for Review to the Division, which was filed on September 28, 2020. On November 9, 2020, the Commission granted the petition for review and issued a briefing schedule. *Mark Feathers*, Exchange Act Release No. 90380, 2020 WL 6581207 (Nov. 9, 2020). Respondent filed his brief in support of his petition for review on or about December 1, 2020.

C. The Criminal Case

On October 29, 2014, Feathers was named in a 29-count indictment based upon the same conduct that gave rise to the Commission's allegations in *SEC v. SBCC*. See *United States v. Mark Feathers*, 14-cr-oo531-LHK, Dkt. No. 1 (N.D. Cal. Oct. 29, 2014). On March 7, 2017, while on bond, Feathers sent a threatening email to eight individuals, including the court-appointed receiver and his counsel, Feathers' own defense counsel, and the Commission's counsel, with the subject line: "you will need to ask the court for extra marshals to my jury trial," threatening the addressees with physical violence at trial. As a consequence, the criminal authorities sought revocation of Feathers' bond. *Id.*, Dkt. No. 108 (N.D. Cal. Mar. 22, 2017). Feathers' bond was revoked on March 23, 2017. *Id.*, Dkt. No. 109 (N.D. Cal. Mar. 23, 2017). Feathers subsequently entered a plea of guilty to one count of the indictment. *Id.*, Dkt. No. 161 (N.D. Cal. Dec. 20, 2017). Feathers was sentenced on March 7, 2018. *Id.*, Dkt. No. 192 (N.D. Cal. Jan. 15, 2020) (transcript of sentencing hearing). In his 2020 Answer, Feathers stated that a "full copy of the sentencing hearing transcript will be presented to this court," (2020 Answer at p. 4, n.5), apparently conceding the relevance of the transcript to these proceedings.

At the sentencing, in response to questions from the Court concerning how long Feathers might not be allowed to perform financial offerings, Feathers' counsel replied: "I think there would be a lifetime bar by the SEC, your Honor." *United States v. Feathers*, Dkt. No. 192 at pp. 27-28. In addition, the Court acknowledged that Feathers knowingly and voluntarily pled guilty to count 20 of the indictment, and in so doing "agreed that he knowingly participated in the scheme to defraud, in a scheme or plan for obtaining money or property by making false promises or statements, that he knew . . . were false when made, that . . . were material . . . that he acted with

intent to defraud” *Id.* at pp. 45-46.

III. ARGUMENT

Respondent’s Petition does not identify any specific issues with the findings in the initial decision, as required by Rule of Practice 411(d) and the Commission’s Order Granting Petition for Review. Instead, the Petition presents a scattershot attack on a variety of matters, focusing primarily on the district court proceedings in *SEC v. SBCC*, and Respondent’s disagreement with the district court’s factual findings. Respondent focuses mostly on the district court’s issuance of the temporary restraining order, but also refers to the district court’s supervision and approval of the receiver’s conduct in *SEC v. SBCC*, and the district court’s summary judgment findings. Respondent also complains about his criminal defense counsel, the district court’s decision concerning use of investors’ funds to pay for his personal counsel, the administrative law judge, and exclusion by the administrative law judge of a draft report prepared by Annette Stalker. Feathers’ broad attack on the district court’s conduct of the case and its findings are not relevant to this proceeding, and provide no basis to question the administrative law judge’s findings in the initial decision.

A. Respondent’s Collateral Attacks on the District Court Findings Are Not Relevant

While Feathers stated in his 2020 Answer that “Respondent will not re-litigate matters already litigated in prior civil proceedings,”⁴ in fact, the Petition clearly seeks to do just that. In thirty-two numbered paragraphs, Feathers seeks to show “error on the part of the civil court in its findings,” that he is presenting “evidentiary materials which contest the basis of the civil and

⁴ 2020 Answer at p. 3.

criminal court findings, and question the validity of evidentiary materials presented by Enforcement to the civil and criminal court.” (Petition at p. 1.) Feathers has been advised that this proceeding is not a forum for collaterally attacking the district court’s findings. *See Mark Feathers*, 2020 WL 5763383, at * 4 and n. 35. Feathers never tries to reconcile his promise not to relitigate the district court proceedings with his effort to show that the district court was just plain wrong.

The Commission has repeatedly refused to entertain collateral attacks on the validity of underlying district court injunctive proceedings and the findings made therein, and has made clear that the appropriate remedy is to challenge them on appeal. *See, e.g., Mark Feathers*, Exchange Act Release No. 90572, 2020 WL 7122719, at *3 and n.17 (Dec. 4, 2020); *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1108 (D.C. Cir. 1988) (refusing to entertain respondent’s collateral attacks on the validity of underlying district court injunctive proceeding); *Sherwin Brown*, Investment Advisers Act Release No. 3217, 2011 WL 2433279, at *4 (June 17, 2011) (explaining that “a respondent in a follow-on administrative proceeding may not challenge the findings made by the court in the underlying proceeding” and that “their remedy is to challenge them on appeal from the injunctive action”); *James E. Franklin*, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 S.E.C. Docket 2708, 2713 & n.13, 2007 WL 2974200, *petition for review denied*, 285 F. App’x 761 (D.C. Cir. 2008); *Michael V. Lipkin and Joshua Shainberg*, Initial Dec. Rel. No. 317 (Aug. 21, 2006), 88 S.E.C. Docket 2346, 2006 WL 2422652 (“It is well established that the Commission does not permit a respondent to relitigate issues decided in the underlying civil proceeding.”), *notice of finality*, 88 S.E.C. Docket 2872, 2006 WL 2668516 (Sept. 15, 2006).

Respondent’s thirty-two enumerated paragraphs, while presented in a scattershot approach,

appear to relate to a variety of issues. The majority reference the Commission's request for a temporary restraining order in the district court action. (Petition at ¶¶ 1, 3, 5, 9, 10, 11, 12, 13, 17, 23, 24, 25, 27, 30.) These arguments must fail for a variety of reasons. First, the temporary restraining order is not the basis for this proceeding, and so Respondent's complaints about it are irrelevant to the public interest determination. Second, Respondent raised and litigated these issues in the district court, in some cases repeatedly, and the district court rejected Respondent's arguments.⁵ Third, Respondent also litigated issues surrounding the temporary restraining order in separate actions. *See Feathers v. United States*, Case No. 5:15-cv-02194-PSG (N.D. Cal.); *Feathers v. Boudreau*,⁶ Case No. 5:16-cv-00529-RMW (N.D. Cal.). Fourth, Feathers also filed complaints against Commission employees with regulatory authorities such as the State Bar of California and the California Board of Accountancy. Respondent's complaints about conduct surrounding the temporary restraining order were rejected in each forum. For all these reasons, the Commission should reject Respondent's attempt to relitigate, yet again, his complaints about the temporary restraining order, which are irrelevant to this proceeding.

Respondent contests facts found by the district court in the summary judgment motion. (Petition at ¶¶ 16, 18, 19, 20, 21, 22, 26, 28, 31.) Respondent appealed the district court's summary judgment decision to the United States Court of Appeals for the Ninth Circuit, which affirmed the district court's findings. *See SEC v. Feathers*, 774 F. App'x 354. Other than the fact that he disagrees with the district court's findings, Respondent offers no legal basis to allow him to

⁵ Feathers is a prolific litigant, and filed numerous motions that repeatedly raised the same issues. A few examples of his challenges to various circumstances surrounding the temporary restraining order may be found at Dkt. Nos. 93, 96, 126, 273, 274.

⁶ Roger Boudreau was a certified public accountant employed by the Commission at the time *SEC v. SBCC* was filed. He retired a few years ago, after a distinguished career with the agency.

relitigate these matters in this forum, and there is none. *E.g.*, *Michael V. Lipkin and Joshua Shainberg*, 2006 WL 2422652 (“It is well established that the Commission does not permit a respondent to relitigate issues decided in the underlying civil proceeding.”).

Respondent complains about the district court’s decision not to allow him to use investors’ funds for his defense. (Petition at ¶ 8.) This issue was challenged on appeal, and the district court was affirmed by the Ninth Circuit. *See SEC v. Feathers*, 774 F. App’x 354.

Respondent complains about actions taken by the court-appointed receiver in *SEC v. SBCC*. (Petition at ¶¶ 2, 7, 22, 29, 32.) Respondent objected to almost every action the receiver took, and every report the receiver filed.⁷ Indeed, Feathers recently filed a motion seeking clarification from the district court concerning his intention to file an action against the receiver, even though the receivership has been concluded. *See SEC v. SBCC*, Dkt. No. 1327 (N.D. Cal. Oct. 15, 2020). There is no basis to relitigate the district court’s management of the receivership in this proceeding, and Feathers’ complaints about the receiver are not relevant to any issue in this proceeding.

Thus, the essence of Respondent’s petition is as he stated, to try to show “error on the part of civil court in its findings.” (Petition at p. 1.) None of these arguments are relevant to this proceeding.

B. Respondent’s Objection to Exclusion of the “Stalker Report” Lacks Merit

Respondent repeatedly sought to have admitted into evidence a draft report prepared for his criminal proceedings prepared by Annette Stalker, for the purpose of showing that this draft report contradicts the district court’s findings. (Petition at ¶ 22.) The administrative law judge addressed

⁷ The filings are too numerous to provide a complete list. *See, e.g.*, Dkt. Nos. 94 (Respondent’s motion to dismiss the receiver), 120, 138, 179, 185, 273, 766, 767, 821, 824, 916, 1023, 1083, 1136, 1160, 1178 (Respondent’s opposition to motion to conclude the receivership).

Feathers request for a determination that the report was admissible on several occasions, and concluded that it was not relevant or admissible evidence. *See, e.g., Mark Feathers*, Release No. 6768 (June 12, 2020) (Order Regarding Stalker Report); *Mark Feathers*, 2020 WL 5763383, at * 8. Feathers provides no legal or factual basis to contradict the administrative law judge’s decision. Indeed, there is no legal or factual basis to admit into evidence or give any weight to the Stalker report.

First, in the district court proceeding, Feathers conceded that the draft report was not completed, and asked the district court to order the Commission and the receiver to fund the completion of the report by Ms. Stalker. *SEC v. SBCC*, Dkt. No. 1285, filed August 19, 2020, at p. 8 of 11 (“Defendant asks this Court to approve a completion by Stalker of her report.”). It is therefore unclear what Ms. Stalker’s final opinions might have been if she completed her review of all relevant documents. Feathers does not explain why a draft report is relevant to this proceeding, and it is not.

Second, Respondent did not identify Ms. Stalker as a witness pursuant to Rule of Practice 222(a)(4), and the draft report does not provide the information required by Rule of Practice 222(b). The Division did not have an opportunity to depose Ms. Stalker and test her opinions, and the Commission does not have the benefit of any sworn testimony from her. *See, e.g., Davis v. Fernandez*, 798 F.3d 290, 292 (5th Cir. 2015) (testimony that is neither sworn nor declared under penalty of perjury is not competent evidence).

Third, a draft expert report is not an appropriate subject for judicial notice, because by definition an expert report does not state facts that generally known or capable or ready determination. An expert report contains the opinions and interpretations of the facts by the expert,

and therefore is not appropriate for judicial notice. *See, e.g., Galley Schuler v. Rainforest Alliance, Inc.*, Case No. 2:14-cv-226, 2016 WL 10516026, at *5-6 (D. Ver. Feb. 10, 2016) (court declined to take judicial notice of expert report prepared by agency of federal government because contents of report were not generally known and capable of ready determination, and court was not to interpret, rely on, or second guess the expert report); *Dasenbrock v. Enenmoh*, Case No. 1:11-cv-01884-DAD-GSA-PC, 2018 WL 10322174, at *1 (E.D. Cal. Jan. 8, 2018) (while court could take judicial notice that a report was issued, it could not take judicial notice of facts or opinions in because they were not generally known or capable of ready determination); *United States v. Visinaiz*, 428 F.3d 1300, 1314 (10th Cir. 2005), *cert. denied*, 546 U.S. 1123 (2006) (affirming district court’s refusal to take judicial notice of expert report); *United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003) (“Courts may only take judicial notice of adjudicative facts that are not subject to reasonable dispute.”).

Fourth, because the draft report is being offered to collaterally attack the district court’s factual findings, it is not relevant and therefore not admissible. Rule of Practice 330.

Fifth, even if the Commission were to consider the draft Stalker report, it does not exculpate Feathers. The draft report takes the misappropriation estimate that the Commission submitted to the district court in its remedies motion, accepts as true all of Respondent’s arguments without regard to whether they are supported by facts, and then “adjusts” the Commission’s calculation of the investors’ misappropriated funds for summary judgment, reducing it to \$1,575,075.37. In short, even if all of Feathers’ arguments are accepted as true, Ms. Stalker preliminarily concluded that he still misappropriated over \$1.5 million – or so it appears from the draft. Ms. Stalker’s testimony would be necessary to clarify exactly what she did and her

conclusions.

For all these reasons, the Stalker report should not be admitted into evidence or given any weight in this proceeding.

C. Respondent's Other Scattershot Arguments Are Not Relevant

Although not clearly identified as issues under Rule of Practice 411(d), some of the enumerated paragraphs may include more than one issue, although Respondent's intent is not clear. In an effort to respond to all arguments, the Division addresses those other arguments.

Respondent takes issue with his representation in the criminal case. (Petition at ¶ 4.) Respondent fails to explain how that is relevant to these proceedings, and it is not.

Respondent makes the unsupported statement that suggests the Division and Commission did not provide "all material exculpatory and impeachment evidence" "until 2014 at the earliest." (Petition at ¶ 13.) The Commission did not have an obligation to produce such material during the civil injunctive proceeding. *See, e.g., SEC v. ITT Educ. Svcs., Inc.*, Case No. 1:15-cv-00758-JMS-MJD, 2017 WL 5508453, at * 1-2 (S.D. Ind. Sept. 28, 2017); *SEC v. Pentagon Cap. Mgmt. PLC*, No. 08-civ-3324, 2010 WL 4608681, at * 1 (S.D.N.Y. Nov. 10, 2010). The Division complied in all respects with its obligations under Rule of Practice 230 and 231 in this proceeding after the OIP was issued February 14, 2014. There is absolutely no basis for Respondent's statement.

Respondent complains that did not receive a Wells notice. (Petition at ¶ 27.) The Wells process is informal and a Wells notice is not required before the Commission files an action. *See* Enforcement Manual, § 2.4.

Respondent complains that the administrative law judge did not perform his "own independent research." (Petition at p. 1.) This claim is belied by the administrative law judge's

explanation in the initial decision that rather than relying on the Division’s statement of undisputed facts, the administrative law judge relied “primarily on the supporting evidence submitted by the parties and official notice taken of the dockets in the Civil Case and in Feathers’s criminal case, together with orders, decisions, and proceeding transcripts in those cases.” *Mark Feathers*, 2020 WL 5763383, at * 2. The administrative law judge’s statement in the initial decision that he relied on the primary documents, e.g., did his own research, directly contradicts Feathers’ assertion.

D. It is in the Public Interest to Bar Respondent

1. Feathers is subject to a permanent injunction

On November 6, 2013, the district court permanently enjoined Feathers from violations of the antifraud provisions of the federal securities laws – Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 17(a) of the Securities Act – and the broker-dealer registration provisions of Section 15(a)(1) of the Exchange Act. *SEC v. SBCC*, 2013 WL 5955669 (N.D. Cal. Nov. 6, 2013.) Feathers does not dispute that the district issued a permanent injunction against him. An antifraud injunction is considered to be particularly serious. *See Marshall E. Melton*, 56 S.E.C. 695, 710, 713 (2003). The public interest requires a severe sanction when a respondent’s past misconduct involves fraud, because opportunities for dishonesty recur constantly in the securities business. *See Richard C. Spangler, Inc.*, 46 S.E.C. 238, 252 (1976).

2. The public interest factors support a permanent bar

The criteria for assessing the public interest are found in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff’d on other grounds*, 450 U.S. 91 (1981); *Jason A. Halek*, Release No. 1376, 2019 WL 2071396, at *3 (May 9, 2019). The public interest factors include:

The egregiousness of the respondent’s actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent’s

assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.

Id. “The existence of an injunction can, in the first instance, indicate the appropriateness in the public interest of a suspension or bar from participation in the securities industry.” *Michael V. Lipkin, supra*, 2006 WL 2422652 at *4.

a. Respondent's violations of the antifraud provisions were egregious, recurrent, and involved a high level of scienter

The first three factors are established by the court's extensive findings in the district court's decisions on summary judgment and remedies. *See SEC v. SBCC*, 2013 WL 4455850, at *1-15; *SEC v. SBCC*, 2013 WL 5955669, at * 2. Feathers managed two mortgage investment funds that he established in 2007: Investors Prime Fund, LLC (“IPF”), and SBC Portfolio Fund, LLC (“SPF”) (collectively the “Funds”). According to the offering documents of IPF and SPF issued in 2007, the manager of the Funds was Feathers' company, Small Business Capital Corporation (“SBCC”). *SEC v. SBCC*, 2013 WL 4455850, at *1.

Beginning in 2009 through 2012, Feathers made several material misstatements, misrepresentations, and omissions to the Funds' investors about fund loans and money transfers, conservative lending standards, and returns to investors. First, Feathers caused the Funds to represent to investors that there would be no loans from the Funds to the manager SBCC other than loans secured by real property, but contrary to that representation, Feathers caused the Funds to transfer over \$7 million in cash to SBCC under the guise of a “manager's note” or “due from” SBCC. *SEC v. SBCC*, 2013 WL 4455850, at *4-7. Feathers used the money he transferred from the Funds to SBCC to pay SBCC's expenses and to manage the yield of the Funds. Feathers made these transfers under the guise of a “due from” SBCC to the Funds. This provided a mechanism

for the Funds to transfer money to SBCC, which was not earning any net management fees from the Funds under the terms of the offering documents. In addition, recording expenses as a “due from” effectively converted the excess expenses into an “asset” of the Funds rather than a liability, which allowed the Funds to give the misleading appearance that they were generating net income necessary to pay the target yield of returns to investors. *Id.*

Second, Feathers caused the Funds to represent that they adhered to conservative lending standards by only making secured loans, but contrary to that representation, Feathers caused the Funds to make unsecured loans to SBCC, which had no ability to repay the loans. The Funds’ disclosures stated that all loans made by the Funds were to be secured by deeds of trust and the Funds would use conservative 65% or 75% loan-to-value guidelines. *SEC v. SBCC*, 2013 WL 4455850, at * 7-9. These representations were materially false and misleading, because the loans and money transfers Feathers caused the Funds to make to SBCC were not secured by any real property, and there was no loan-to-value ratio for these unsecured loans. *Id.* Third, Feathers caused the Funds to represent that member returns would be paid from profits generated by the Funds’ investments, but in fact the Funds were not profitable and Feathers used investors’ money to make “Ponzi-like payments” of returns to investors. *Id.* at * 8.

The court found that there was “abundant evidence demonstrating that Feathers acted intentionally and recklessly in carrying out the misrepresentations and misstatements” *SEC v. SBCC*, 2013 WL 4455850, at *9-11. For example, Feathers prepared and distributed the IPF and SPF offering circulars from at least 2009 to 2011 that clearly prohibited loans to SBCC, yet at the same time Feathers caused the Funds to transfer over \$7 million to SBCC. *Id.* In addition, “Feathers’ creation and utilization of ‘due from’ and ‘manager’s note’ accounting evinces

Feathers’ intent to deceive the investors as to the true amount of cash in the Funds the ‘due from’ device actively disguised the true financial performance of the Funds.” *Id.* Feathers’ “interaction with the auditor of the Funds further evinces an intent to deceive or recklessness in his management of the Funds and representations made to investors.” *Id.* Feathers was advised by his auditor and his lawyer that transferring money from the Funds to SBCC as loans violated the offering documents, yet continued with his unlawful conduct and rejected the advice of these professionals. *Id.*

Thus, Feathers made multiple misstatements and omissions, over a period of years, with a high degree of scienter, in violation of the antifraud provisions of the federal securities laws. *SEC v. SBCC*, 2013 WL 4455850, at * 14-15.⁸

b. Feathers operated an unregistered broker-dealer

Feathers violated the broker-dealer registration provisions of the Exchange Act. Feathers and SBCC actively solicited new investments in IPF and SPF, and Feathers and SBCC employed investor representatives who were paid a salary and commission for sales of securities of IPF and SPF. Feathers and SBCC had been selling IPF and SPF securities regularly for years, with sales of at least \$46 million of securities in these Funds. *SEC v. SBCC*, 2013 WL 4455850, at *15.

c. Feathers has neither recognized the wrongful nature of his conduct, nor provided credible assurances against future violations

Feathers refuses to recognize that he did anything wrong, although the district court made

⁸ At the sentencing hearing in the criminal case, the Judge recited that Feathers’ guilty plea meant Feathers agreed he knowingly participated in a scheme to defraud, that he knew his statements were false when made and that the statements or promises were material, and that he acted with intent to defraud. *See United States v. Mark Feathers*, Case No. 14-cr-00531-LHK, Dkt. No. 192 at pp. 45-46 (N.D. Cal. Jan. 15, 2020).

explicit findings which were affirmed in all respects by the Ninth Circuit. See *SEC v. Feathers*, 774 F. App'x 354. In 2013, the district court found that there was “no evidence” that Feathers recognized the wrongful nature of his conduct. *SEC v. SBCC*, 2013 WL 5955669, at * 2. Feathers’ refusal to acknowledge the wrongful nature of his conduct has persisted to the present. In his 2020 Answer, Feathers argues that since “June 2012 there has been a cascade of injustices against” him, that he “eventually took a plea in criminal court to a single government-manufactured count of mail fraud,” that he “operated legitimate business enterprises,” and that he is “*not guilty of charges* outlined in the OIPA of 2014.”⁹ In subsequent filings in this matter, Feathers defiantly refuses to recognize that he did anything wrong. For example, in an April 7, 2020 filing, Feathers requested an investigation of the Commission’s staff in connection with the filing of the injunctive action *SEC v. SBCC*.¹⁰ In a May 1, 2020 filing, Feathers claimed that various federal agencies operating as a “cabal” had engaged in unconstitutional and occasionally criminal actions and methods”¹¹ In *SEC v. SBCC*, since August 2020, Feathers is seeking to relitigate all aspects of the district court proceeding using Fed. R. Civ. P. 60, despite the Ninth Circuit’s affirmance, and his guilty plea in the criminal case in which he acknowledged he intentionally defrauded his investors. Feathers has not meaningfully recognized the wrongful nature of his conduct, and has not provided any assurances against future misconduct. See, e.g., *Peter Siris*, S.E.C. Release No. 71068, 2013 WL 6528874, at *7 (Dec. 12, 2013), *pet. for review denied*, *Siris v. SEC*, 773 F.3d 89 (D.C. Cir. 2015); *Jose P. Zollino*, Release No. 2579, 2007 WL

⁹ See 2020 Answer at pp. 2, 3 (emphasis in original).

¹⁰ See Respondent’s Motion Request dated April 7, 2020 at p. 1.

¹¹ See Respondent’s Request to Stay SEC Administrative Proceedings While Pursuing Subpoenas dated May 1, 2020 at p.1.

98919, at *6 (Jan. 16, 2007).

d. Likelihood of future violations

In issuing its injunction, the district court found: “As to the fourth factor, Feathers did not show that he would not re-enter the brokerage industry if he were able, and in his Response indicated that in the future he would hire a securities attorney so as not to violate securities law.” *SEC v. SBCC*, 2013 WL 5955669, at * 2. Feathers’ failure to acknowledge his guilt or show remorse demonstrates there is a significant risk, given the opportunity, that Feathers would commit future misconduct. Absent a bar, Feathers could seek to engage in the sale of securities, acting as an unregistered broker-dealer. *See, e.g., Jose Zollino*, 2007 WL 989919, at *6, *Peter Siris*, 2013 WL 6528874, at *6-7.

IV. CONCLUSION

The Commission should find that the public interest mandates imposition of industry and penny stock bars against Feathers.

Dated: January 8, 2021

Respectfully submitted,

/s/ John B. Bulgozdy
John B. Bulgozdy
Lynn M. Dean
Division of Enforcement
Los Angeles Regional Office
Securities and Exchange Commission
5670 Wilshire Boulevard, 11th Floor
Los Angeles, CA 90036
(323) 965-3322 (telephone)
(323) 965-3908 (facsimile)
Email: bulgozdyj@sec.gov

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:

**THE DIVISION OF ENFORCEMENT'S BRIEF IN OPPOSITION TO
RESPONDENT MARK FEATHERS' PETITION FOR REVIEW**

was served on January 8, 2021 upon the following parties as follows:

By Email

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 1090
Washington, DC 20549-1090
Facsimile: (703) 813-9793
Email: apfilings@sec.gov

By Email and U.S. Mail

Mark Feathers

Menlo Park, CA

Email:

Pro Se Respondent

Dated: January 8, 2021

/s/ Sarah Mitchell

Sarah Mitchell