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 JUNE 18, 2020 ORDER

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I. INTRODUCTION

The subpoena issued to the Federal Deposit Insurance Corporation ("FDIC supboena") at the request of Respondent Mark Feathers should not be judicially enforced by the Commission because it does not seek information relevant to this proceeding, and is too indefinite and unreasonable to be enforced by a district court on a *de novo* review. Moreover, Respondent already has in his possession the facts which he is apparently seeking to prove through the FDIC subpoena, so that he does not have any need for the information sought. The Commission does not have the facts to make a *prima facie* case for enforcement, such as evidence that the FDIC subpoena was properly served. For all these reasons, the Commission should decline to seek enforcement of the FDIC subpoena. Moreover, for all these reasons, the Commission should revoke the FDIC subpoena to avoid any abuse of its process.

II. PROCEDURAL BACKGROUND

A. The OIP in this Follow-on Proceeding Based on Entry of an Injunction and Respondent's Answer

The Commission instituted this follow-on proceeding with an Order Instituting Proceedings ("OIP") on February 18, 2014, pursuant to Section 15(b) of the Exchange Act. Feathers was served with the OIP on February 24, 2014. This follow-on proceeding is based on the district court's findings and injunction 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). In an Order issued August 16, 2013, the district court in *SEC v. SBCC* made extensive factual findings, granted the Commission's motion for summary judgment, and denied Feathers' motion for summary judgment. In an Order issued on November 6, 2013, the district court permanently enjoined Feathers from future violations of Section 10(b) of the Exchange Act and Rule 10b-5

thereunder; the broker-dealer registration provisions of Section 15(a)(1) of the Exchange Act; and Section 17(a) the Securities Act of 1933 ("Securities Act"). The Ninth Circuit Court of Appeals affirmed the district court's actions in all respects in 2019, but remanded this administrative proceeding pursuant to *Lucia v. SEC*, 585 U.S. ____, 138 S.Ct. 2044, 2055, 201 L.Ed.2 464 (2018).

Feathers filed his Answer and Defenses on January 23, 2020, in which he also re-asserted the defenses asserted in his March 12, 2014 Answer.[1] In his Answer, Feathers attacks the basis for the district court's orders in *SEC v. SBCC*, accuses the Commission's staff of wrong-doing, and defends all of his conduct which was litigated in *SEC v. SBCC*. Respondent also references criminal proceedings against him that were commenced after the Commission's case was concluded, and specifically states that a full copy of the sentence hearing transcript will be presented as part of his defense of the OIP.[2] Respondent asserted that he "is *not guilty* of charges outlined in OIAP of 2014." (Emphasis in original.)

B. Respondents' Evolving Requests for Subpoenas

The initial Scheduling Order on remand, issued January 15, 2020, required the parties to submit any requests for subpoenas by February 3, 2020. On February 3, 2020, Respondent submitted one request for subpoena to "Roger Boudreau, CPA,"[3] which sought the Division's work product and privileged material generated in connection with the 2012 civil action *SEC v.*

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[1] Respondent's Answer and Defenses to OIAP, dated January 23, 2020.

[2] *US v. Feathers*, Case No. cr-14-00531-LHK (N.D. Cal.), indictment filed November 29, 2014. The transcript of the sentencing hearing conducted on March 7, 2018, is Dkt. No. 192 on the Pacer system.

[3] Mr. Boudreau was a certified public accountant employed by the Commission when *SEC v. SBCC* was filed.

SBCC.[4] Respondent did not seek documents from any other parties under the original schedule.

Over a month later, on March 16, 2020, Feathers asked the ALJ for leave to issue a subpoena to the Small Business Administration ("SBA"). On March 17, 2020, before the Division had a chance to respond, the ALJ granted Respondent's motion. On March 17, Respondent filed a "New Motion Request," which requested two weeks for Respondent to draft subpoenas to the California Department of Real Estate ("CDRE"), the Federal Deposit Insurance Corporation ("FDIC"), the United States Office of Personnel Management ("OPM"), and the California Department of Financial Institutions ("CDFI"). In support of the request, Respondent stated: "Because these are state and federal agencies, their reports may have relevance in assisting this Court examine relevant *Steadman* factors in these proceedings."[5] On March 19, 2020, before the Division had responded, the ALJ granted Respondent's motion.[6]

On March 30, 2020, Respondent submitted to the ALJ subpoenas for the production of documents from: (1) SBA, (2) FDIC, and (3) California Department of Business Oversight ("CDBO"). Respondent did not provide any further reasons justifying the information requested in the subpoenas, and did not identify what relevance documents from CDBO might have to the proceeding.[7]

On April 14, 2020, the Court held a telephonic prehearing conference. The ALJ asked Respondent to modify the subpoenas to delete a demand for "source documents." On April 15,

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[4] The subpoena to the Division was quashed because Respondent was unable to show a substantial need for the materials and an undue hardship in acquiring the information any other way. *See* Release No. 6760 (May 12, 2020).

[5] Respondent's New Motion Request, dated March 17, 2020.

[6] Release No. 6746 (March 19, 2020).

[7] Subpoenas, lodged March 30, 2020.

2020, Respondent submitted modified subpoenas to SBA, FDIC, and CDBO which were signed by the ALJ on April 15, 2020.[8]

The subpoena to the FDIC is addressed to "Nicholas Podsiadly, Esq., FDIC General Counsel," and commands the production of the following:

> All FDIC charts, tables, exhibits, written commentaries (i.e. notes, emails, spreadsheets, memos, analysis reports, final reports, etc.) produced by FDIC agents, departments, employees, and/or contractors of other federal agencies at FDIC's request (including FBI and U.S. Office of Personal [sic][Management and the Offices of Inspector General for both, as well as OIG for FDIC), related to FDIC examinations, audits, reviews, and applications for:
>
> (1) approval for bank director for MARK FEATHERS, and
>
> (2) for investments in FDIC insured financial institutions of the following entities controlled or managed by MARK FEATHERS:
>
> - Small Business Capital Corp. (dba SB Capital)
> - Investors Prime Fund, LLC, and
> - SBC Portfolio Fund, LLC, and
> - Small Business Capital, LLC, and [sic]

See April 15, 2020 Subpoena to Produce Documents to Nicholas Podsiadly, Esq., FDIC General Counsel.

On May 1, 2020, Respondent filed a "Request to Stay SEC Administrative Law Court Proceedings While Pursuing Subpoenas." Respondent reported that the FDIC and SBA had "declined" the subpoenas, attached letters from the FDIC and SBA, and requested time to pursue enforcement of the subpoenas under the "APA." Respondent noted that the subpoenas to the SBA and FDIC presented an "opportunity to paper a trail for the review of SEC Commissioner's to review on the matter of unconstitutional/criminal actions of its own officers and agents, when

[8] There is nothing in the record to show whether the CDBO was ever served or responded to the subpoena Feathers requested.

the time is ripe for that."[9]

The Division opposed Respondent's motion to stay, noting that Respondent had now stated that he had issued subpoenas to the FDIC and SBA for very limited purposes, and that Respondent could provide that factual information to the ALJ without engaging in protracted litigation with two federal agencies.[10]

Respondent replied on May 11 "that the investigations, reports, narratives, etc., of SBA and FDIC may also not be 'categorically irrelevant.'"[11]

On May 29, 2020, the ALJ issued an Order Certifying Subpoena to the Commission for Enforcement, Denying Motion for Stay to Challenge Constitutionality of Proceeding, and Setting Prehearing Schedule, which referred the FDIC subpoena to the Commission.[12] On June 2, 2020, in response to the SBA's unopposed motion to quash, the ALJ ordered additional briefing from Respondent and the SBA.[13]

To date, Respondent has not provided any proof of proper service on the FDIC of the subpoena issued by the ALJ.

III. LEGAL ARGUMENT

The Commission has asked for additional briefing addressing "whether it should exercise its authority to seek judicial enforcement of the subpoena," any "procedural or substantive

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[9] Respondent's Request to Stay SEC Administrative Law Court Proceedings While Pursuing Subpoena, dated May 1, 2020 (notes omitted).

[10] Division of Enforcement's Opposition to Respondent's Second Request to Stay "While Pursuing Subpoenas," dated May 11, 2020.

[11] Respondent's Response to "Division of Enforcement's Opposition to Respondent's Second Request to Stay 'While Pursuing Subpoenas,'" dated May 11, 2020.

[12] Release No. 6762 (May 29, 2020).

[13] Release No. 6763 (June 2, 2020).

matters," and "the reasonableness of the subpoena and the relevance, if any, of the documents that Feathers seeks to subpoena from the FDIC."[14]

A. Adjudicative Subpoenas Must Seek Relevant Evidence and Not Impose an Unreasonable Burden

The FDIC subpoena was issued pursuant to Rule 232 of the Commission's Rules of Practice, which apply to adjudicative proceedings. While the Commission has both investigative and adjudicative authority, courts recognize that there is a distinction between investigative and adjudicative function.[15] In fact, the Commission's Rules of Practice explicitly recognize this distinction, stating that the Rules of Practice do not apply to "investigations, except where made specifically applicable by the Rules Relating to Investigations, part 203 of this chapter."[16]

A respondent in an agency action does not have an absolute right to subpoena documents or testimony for a hearing, and an agency has discretion to deny a subpoena. *See* Koch and Murphy, 2 Administrative Law and Practice § 5:40 (3d ed) (2020). The decision whether to order discovery on behalf of a private party is within the sound discretion of the agency. *Id*. An agency need not follow all of the formalities applicable in a court and is not controlled by the Federal Rules of Civil Procedure. *Id*. The right to submit rebuttal evidence does not create an obligation on an agency to order discovery. *Id*. The general practice is not to provide for

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[14] Order Directing Filing of Briefs, Release No. 89095 (June 18, 2020).

[15] *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992) ("The standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one."); *FTC v. Waltham Watch Co.*, 169 F. Supp. 614, 617-618 (S.D.N.Y. 1959) (recognizing there is a distinction between the investigative and adjudicative functions of a federal agency).

[16] Rule of Practice 100(b)(1). 17 C.F.R. Part 203 sets forth the Commission's Rules Relating to Investigations.

subpoenas on request, but rather to require an initial showing of need and reasonableness. *Id*.

The Commission has given hearing officers powers which include "issuing subpoenas authorized by laws and revoking, quashing, or modifying any such subpoena."[17] Rule 232(b) provides "Standards for Issuance" of subpoenas, and instructs a hearing officer to examine whether a "subpoena may be unreasonable, oppressive, excessive in scope, or unduly burdensome," and if so, a hearing officer may require a person to show the general relevance and reasonable scope of the subpoena. The Commission's Rules of Practice provide discretion for a hearing officer, or the Commission, to examine the relevance, reasonableness, scope, and burden of a subpoena before a subpoena is issued in an adjudicative proceeding.[18] Such an examination is necessary to ensure that a subpoena is issued for a legitimate purpose connected to the adjudicative proceeding.[19] Finally, Rule 232(b) provides that a "person issuing a subpoena may inquire of the other participants whether they will stipulate to the facts sought to be proved."

The Commission has long recognized its power to refuse to issue subpoenas that seek evidence which is "neither relevant nor material,"[20] and to revoke a subpoena that has been

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[17] Rule of Practice 111(b).

[18] *See, e.g.*, Attorney General's Manual on the Administrative Procedure Act, section 6(c) (1947) (stating that "agencies may refuse to issue private party subpoenas which appear to be so irrelevant or unreasonable that a court would refuse to enforce them").

[19] *See, e.g., NLRB v. Interbake Foods, LLC*, 637 F.3d 492 (4th Cir. 2011) ("Even when a subpoena targets relevant and well-defined material, it may nonetheless be revoked if it is invalid "for any other reason sufficient in law." (citations omitted)); *NLRB v. K Mark Ent., LLC*, Case No. 15 C 9353, 2016 WL 233096 at *2 (N.D. Ill. Jan. 20, 2016) (administrative subpoena should not be enforced if demand for information was made for an illegitimate purpose).

[20] *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), *affirmed sub nom. San Francisco Mining Exchange v. SEC*, 378 F.2d 162 (9th Cir. 1967).

issued by a hearing officer to "prevent an abuse of a court's processes" in an adjudicatory proceeding.[21]

B. Courts Conduct a *De Novo* Review in a Subpoena Enforcement Action

In considering whether to take action to enforce an administrative adjudicative subpoena such as the FDIC subpoena, courts will weigh the same factors that a hearing officer has discretion to consider under the Commission's Rules. Courts conduct a *de novo* review to assess whether the information sought is reasonably relevant and probative, the need for the information, and the burden of compliance. In such a *de novo* review, an Article III court is not required to defer to any of the agency's determinations concerning the enforceability of a subpoena. Instead, a district court weighs the parties' contentions and is obligated to reach its own conclusions about the enforceability of an administrative subpoena.[22]

C. The FDIC Subpoena is Not Judicially Enforceable

The FDIC subpoena is not judicially enforceable because there is no evidence that it was properly served, it does not seek relevant evidence, and there is no evidence in the record that the subpoena is reasonable in terms of scope or burden.

1. There is no evidence in the record of proper service

The Commission is not in possession of crucial facts needed to commence an

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[21] *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), *affirmed sub nom. San Francisco Mining Exchange v. SEC*, 378 F.2d 162 (9th Cir. 1967).

[22] *See, e.g., Dow Chemical Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982) (an ALJ's decisions to issue subpoena and denial of motion to quash are not binding on the Article III court); *Invention Submission Corp.*, 965 F.2d at 1090 (in a subpoena enforcement action, the district court can inquire into all matters, unlimited by the agency's inquiry).

enforcement proceeding. As a preliminary matter, there is no evidence in the record that the FDIC was properly served with the subpoena so as to confer jurisdiction on the Commission to seek to enforce the subpoena. Respondent was required to effect service of the FDIC on the FDIC under Rule of Practice 150. Failure properly to serve a subpoena may render it unenforceable.[23] In addition, the FDIC has regulations providing for service of process on the FDIC.

There is no evidence in the current record to establish that the subpoena was properly served. While it appears the FDIC received the subpoena, there is no information in the record confirming proper service. For example, if the subpoena were only emailed to the FDIC, service would not be proper under Commission Rule of Practice 150 or under the FDIC's regulations. If Respondent did not properly serve the subpoena, any action brought by the Commission could be easily defeated.[24]

In addition, the subpoena is addressed to "Nicholas Podsiadly, Esq., FDIC General Counsel." The FDIC has promulgated a regulation providing for service of process on the agency, 12 C.F.R. § 309.7, and has information readily available on the Internet which identifies agents for service of process.[25] Neither the regulation nor the list identify "Nicholas Podsiadly, Esq., FDIC General Counsel" as an agent for service of process. The Commission is not responsible for how a respondent addresses a subpoena. The Commission should not bring an action to enforce a subpoena if the subpoena is procedurally defective.

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[23] *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).

[24] *See, e.g., Ho v. US*, 374 F. Supp. 2d 82 (D.D.C. 2005) (a person seeking to subpoena an agency that has enacted valid *Touhy* regulations must comply with those regulations for the subpoena to be enforceable).

[25] *See* www.fdic.gov/about/contact/agents/index.html.

2. The FDIC subpoena does not seek relevant evidence

There is insufficient information in the record to support a determination that the FDIC subpoena seeks evidence that is relevant and probative to the issues in this proceeding. Respondent has subpoenaed two broad categories of documents, including privileged material, concerning: (1) any approval of Respondent as a bank director; and (2) "investments in FDIC insured financial institutions of" entities controlled by Respondent. To support this broad request, Respondent vaguely asserts that the document "may" be relevant as mitigating information on the "*Steadman* factors." Thus, Respondent concedes that the subpoenaed information is of uncertain relevance to this proceeding. Although the breadth of the subpoena makes it difficult to evaluate what information is sought, there is no basis to conclude that the subpoena seeks relevant evidence.

In examining whether an adjudicative subpoena seeks relevant evidence, courts may impose a more restrictive reading of relevance measured against the charges in the administrative complaint.[26] The fact that information has little probative value, even if it is relevant, weighs against enforcement of a subpoena.[27] Where a subpoena calls for different categories of documents, each category must be examined to determine if it seeks relevant documents. A subpoena is unenforceable if the information called for is irrelevant for the purposes of the inquiry.[28] In a follow-on proceeding such as this case, it is well established that Respondent may

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[26] *See, e.g., Dow Chemical Co.*, 672 F.2d at 1268, 1270 (relevancy of an adjudicative subpoena is measured against the charges in the complaint); *FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979) (same).

[27] *Dow Chemical*, 672 F.2d at 1268-72.

[28] *Lee v. Federal Maritime Board*, 284 F.2d 577, 581 (9th Cir. 1960).

not challenge the findings made by the court in the underlying proceeding.[29] The Commission may properly reject evidence offered in "mitigation" that in reality is an effort to collaterally attack a district court judgment or criminal conviction on which a follow-on proceeding is predicated.[30]

The relevant facts in this case relate to the *Steadman* public interest factors: "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."[31] The first three factors are analyzed by reference to the district court's factual findings in the injunctive proceeding. The fourth, fifth, and sixth factors are prospective and look to what steps a respondent has taken in view of the violations of the securities laws that were found in the injunctive proceeding.

Respondent's request for all documents in the FDIC's possession concerning his approval as a bank director does not relate to any of the *Steadman* factors. Respondent argues evidence from the FDIC (and the SBA) may show that he was "in good standing with FDIC and SBA,

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[29] *See Sherwin Brown*, Investment Advisers Act of 1940 Release No. 32317, 2011 WL 2433279, at *4 (June 17, 2011).

[30] *See, e.g., Siris v. SEC*, 773 F.3d 89, 96 (D.C. Cir. 2015) (*en banc*) (Commission properly rejected evidence offered as mitigation that was in reality a collateral attack on judgment); *Kornman v. SEC*, 592 F.3d 173, 187 (D.C. Cir. 2010) (Commission properly ruled that mitigation arguments were "essentially collateral attacks on his conviction" and that respondent was estopped from making such arguments); *Jose P. Zollino*, Release No. 2579, 2007 WL 98919 (Jan. 16, 2007) (mitigating evidence is not evidence that challenges the district court proceeding or tries to prove that no violation occurred).

[31] *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).

who were two of his federal regulators at the time of a surprise seizure of his personal and business assets in 2012, along with companies that he founded and managed."[32] Such evidence does not relate to any of the *Steadman* factors. It does not bear at all on the district court's findings of fraud which are the first three *Steadman* factors, and it does not show any efforts of mitigation such as to correcting false statements, acknowledging wrongdoing, or providing assurances against future violations. Moreover, Respondent raised his service as a bank director employee in the district court, so this issue was already litigated and decided in that forum.[33] Consistent with his arguments in his Answer that he is not guilty of the violations found by the district court, Respondent plainly intends to use any such evidence to argue that the FDIC did not uncover his fraud and so the district court's findings are wrong. Because the district court's findings are not at issue here, any such information or arguments are irrelevant to any issues in this proceeding.

Respondent's second request in the FDIC subpoena for all documents, including internal communications, concerning "investments in FDIC insured financial institutions of" entities controlled by Respondent is so vague and indefinite that it is difficult to discern any relevance of that request to this proceeding. As discussed below, this request is so ill-defined that it is unclear how the FDIC would search for such information. As with the first category, even assuming the FDIC did not uncover Respondent's fraud, such information is not relevant to any of the

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[32] Respondent's Request to Stay SEC Administrative Law Court Proceedings While Pursuing Subpoenas, dated May 1, 2020

[33] In connection with the remedies motion leading to the entry of the injunction, Feathers argued that he "has worked for several federal agencies including the Department of Defense and the SBA, as well as many banks as an officer, senior manager, and director. When he is aware of the rules, he obeys them." *SEC v. SBCC*, Dkt. No. 603, at p. 7.

Steadman factors. Moreover, if Respondent was successful in hiding his fraud from other federal agencies, that is an aggravating factor rather than a mitigating factor.

Respondent has not made any showing why the broad sweep of the subpoena, which specifies production of internal, potentially privileged FDIC documents, is relevant to the matters charged in the OIP. The FDIC subpoena clearly seeks privileged materials:

> All FDIC charts, tables, exhibits, written commentaries (i.e., notes, emails, spreadsheets, memos, analysis reports, final reports, etc.) produced by FDIC agents, departments, employees, and/or contractors of other federal agencies at FDIC's request (including FBI and U.S. Office of Personnel Management and the Office of Inspector General for both, as well as OIG for FDIC) related to FDIC examinations, audits, reviews, and applications . . . .

Before such a broad request is made to a third party to produce documents that are obviously privileged, a person requesting a subpoena should show a great need for such documents.[34] Otherwise, a respondent in a Commission action may use the Commission's processes to impose an undue burden on third parties, who would be required to assert privilege and otherwise litigate the reasonableness of the subpoena.[35] Respondent has not made any showing concerning his need to obtain potentially privileged documents from the FDIC or how they are relevant to this proceeding.

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[34] *See, e.g., Johnson v. Folino*, 528 F. Supp. 2d 548 (E.D. Pa. 2007) (recognizing that where a subpoena requires disclosure of privileged information, the person requesting the subpoena must show the need is so great as to outweigh privilege concerns); *Miami-Luken, Inc. v. DOJ*, Case No. 1:16-mc-012, 2016 WL 3855205, at * (S.D. Ohio July 15, 2016) (production of likely irrelevant documents creates an undue burden).

[35] For example, in this proceeding, the SBA appeared and moved to quash the subpoena, in part, on privilege grounds. Although Respondent did not oppose the motion to quash, it was denied and the SBA was ordered to provide additional information to the ALJ and additional briefing on compliance with the subpoena.

Finally, Respondent's attempt to sweep his requests into the category of "mitigation" should be rejected. Mitigation is not a catch-all category to allow a respondent to use the Commission's subpoena power for other purposes. Historical information about another agency's internal deliberations is not mitigation. Mitigation looks to proactive steps a respondent may have taken since committing the challenged acts, and not to evidence which tries to prove that the alleged violations did not occur.[36]

Because the FDIC subpoena does not seek information that is relevant to this proceeding, there is an insufficient basis to seek judicial enforcement.

3. The FDIC subpoena is not reasonable in scope or burden

The FDIC subpoena seeks two broad categories of documents, without any time frame, and includes internal documents such as notes, emails, and analyses. On its face, the subpoena is indefinite, overbroad and unduly burdensome, such that any effort to enforce it would likely fail.

The reasonableness of a subpoena is considered in connection with the relevance of the documents sought, and even a subpoena seeking relevant information may not be enforced if the burden imposed is unreasonable. Resolution of the question of reasonableness requires juxtaposition of the need and probative value of the evidence against the burden of compliance.[37]

On its face, the scope of the FDIC subpoena is excessively broad. There is no time frame specified, so that the request covers an indefinite period. The description of documents to be

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[36] *See, e.g.*, *Jose P. Zollino*, Release No. 2579, 2007 WL 98919 (Jan. 16, 2007) (mitigating evidence is not evidence which challenges the district court proceeding or tries to prove that no violation occurred).

[37] *See, e.g.*, *Dow Chemical*, 672 F.2d at 1268-72 (significant need may justify imposition of a very substantial burden, whereas information that is unlikely to resolve the dispute in question would not); *Johnson*, 528 F. Supp. 2d at 551-52 (courts weigh need for evidence against burden); *K Mark Ent.*, 2016 WL 233096, at *2 (subpoena should not be enforced if unduly burdensome or made for an illegitimate purpose).

produced is vague but appears to cover internal, possibly privileged documents such as "notes, emails, spreadsheets, memos, analysis reports, final reports, etc."; documents produced by other agencies such as the FBI, OPM, "and Offices of Inspector General for both, as well as OIG for FDIC"; and covers "examinations, audits, reviews, and applications." In that context, Respondent then asks for two categories of documents: (1) approval for bank director for Mark Feathers; and (2) "for investments in FDIC insured financial institutions of" four entities controlled or managed by Feathers.

While the Division is not in a position to assess the burden that might be imposed on the FDIC to search for and produce responsive documents, as well as the privileges that might be implicated, the sheer breadth of the documents requested is excessive, particularly given the lack of relevance. On this point, in weighing whether to enforce an administrative subpoena, courts consider whether the subpoena is "too indefinite."[38] As drafted, the subpoena seeks such a broad category of documents that a recipient such as the FDIC would be hard-pressed to ascertain how to respond and where to search. Any response would be complicated by privilege issues. Given the lack of relevance of the information sought, the FDIC subpoena is too indefinite to be enforced, and therefore should not have issued.

In assessing reasonableness, courts also consider a requestor's need for the information sought. Feathers does not need to subpoena the FDIC to establish the fact he claims is at issue: in 2011, the FDIC did not object to Feathers being named a director of a troubled bank. The information is known to Feathers, and he has asserted that as a fact in his filings. There is no need to issue a broad and unduly burdensome subpoena to a federal agency to obtain records to

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[38] *K Mark Ent.*, 2016 WL 233096, at *2 (citations omitted). *See also FTC v. Anderson*, 631 F.2d at 745 (demand for documents must not be "too indefinite").

establish a fact that is already known to Respondent. Because Respondent cannot show he needs to subpoena the information from the FDIC for this case, a court would likely find that the subpoena is unenforceable.[39]

It is also not clear that Respondent's subpoena was issued for a proper purpose, which if that were the case, makes the subpoena unenforceable. Respondent's request for a stay revealed his intent to pursue discovery to prove a conspiracy theory against the Commission, its employees, and other federal agencies:

> For, federal government agencies and their most senior career personnel, including their senior counsel, at times clearly engage in cabal activities internally within their agency, and well as amongst federal agencies coordinating their actions. Federal agencies and their career personnel appear to have no problem destroying the life of a citizen such as Respondent, employing unconstitutional and occasional criminal actions and methods on their part, if it means furthering their own dubious causes.

Respondent then acknowledged that his subpoenas to the FDIC and SBA were "an opportunity to paper a trail for the review of SEC Commissioner's to review on the matter of the unconstitutional/criminal actions of its own officers and agents, when the time is ripe for that."[40] Respondent has pursued numerous avenues since 2012 to try to blame others for his fraudulent conduct.[41] To the extent Respondent has requested this broad and intrusive subpoena to the

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[39] *See, e.g., Dow Chemical*, 672 F.2d at 1272-73 (refusal to enforce subpoena based in part on requestor's lack of need for the information); *Johnson*, 528 F. Supp. 2d at 551-52 (requestor must show need for information).

[40] Respondent's Request to Stay SEC Administrative Law Court Proceedings While Pursuing Subpoenas, dated May 1, 2020

[41] Respondent has repeatedly sought to blame others for his misconduct. In November 2012, Respondent filed a motion in *SEC v. SBCC* for "F.R.C.P. Special Sanctions Against Roger Boudreau for Misconduct of a Government Agent Acting Under Color of Authority and F.R.C.P. 12(b)(6) Dismissal for Cause," which sought to blame Commission employees for Respondent's conduct and sought sanctions for use of the term "'Ponzi-like' payments" to investors. The

FDIC in pursuit of evidence for some other case, that is an improper purpose and the subpoena should not have issued.[42]

Weighing the lack of relevance and lack of need against the indefinite scope of documents sought, the FDIC subpoena does not appear to be judicially enforceable on a *de novo* review.

D. Respondent May Bring a Judicial Action to Enforce the FDIC Subpoena

While the Commission always has the discretion to enforce an adjudicative subpoena, in this case, a number of prudential considerations argue against the Commission acting to enforce the FDIC subpoena. First, the Commission does not have all the facts concerning service. Second, Respondent's arguments for relevance are vague and marginal, and the issue of the reasonableness of the subpoena was not addressed, so that there is not a sufficient record for the Commission to make a *prima facie* case for enforcement. To the extent Respondent has propounded the subpoena, Respondent is better suited to make the *prima facie* case for enforcement. Third, because a subpoena enforcement action is an adversary proceeding, Respondent is better suited to respond to any arguments the FDIC might make as to burden,

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District Court denied the motion. In addition, Respondent filed a claim under the Federal Tort Claims Act ("FTCA") based on alleged misconduct of SEC staff. *Mark Feathers v. United States of America*, Case No. 5:15-cv-2194-PSG (N.D. Cal.). Respondent's initial complaint was dismissed with leave to amend, *Feathers v. US*, 2015 WL 5263056 (N.D. Cal. Sept. 9, 2015), and his amended complaint was subsequently dismissed without leave to amend. *Feathers v. US*, 2015 WL 7734291 (N.D. Cal. Dec. 1, 2015). Respondent also filed complaints with various state and other licensing agencies alleging misconduct by various members of the Commission's staff and others. All of those complaints were resolved against Respondent.

[42] *See, e.g., Exxon Shipping Co. v. DOI*, 34 F.3d 774, 779 (9th Cir. 1994) (federal government has legitimate concern to ensure its resources are not commandeered to serviced private litigants for purposes other than the instant proceedings); *Delaware River Stevedores*, 178 F.R.D. 51, 52 (E.D. Pa. 1997) (administrative subpoena must be issued for proper purpose to be enforceable).

privilege, and scope. The Respondent sought a stay so that he could pursue enforcement of the subpoenas under the APA, and under all the circumstances, Respondent is better suited to proceed with any such action. Under the APA, Respondent may file an application in district court to compel compliance with the subpoena.[43]

E. The Commission Should Revoke the Subpoena

It is well-established that the Commission may revoke a subpoena certified to it for review. In *San Francisco Mining Exchange*,[44] the Commission reviewed a subpoena issued by a hearing officer, and recognized its inherent power to refuse to issue a subpoena to prevent an abuse of a court's processes. In that case, finding that the evidence sought was not relevant and the subpoena was burdensome, the Commission ordered that the subpoena should not issue or become effect. The finding in that case is consistent with the Commission's Rules of Practice, which allow for a subpoena to be issued, modified, quashed, or revoked.[45]

As discussed above, the FDIC subpoena does not seek relevant evidence, Respondent already had the evidence, the subpoena is too indefinite, and there has been no showing why Respondent has a need for privileged materials. Under all the circumstances, the FDIC subpoena should be revoked.

IV. CONCLUSION

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[43] *See, e.g.*, 5 U.S.C. § 555(d); *EPA v. General Electric Co.*, 197 F.3d 592 (2d Cir. 1999) (company had action under APA to enforce subpoena); *Gov't of Terr. of Guam v. Sea-Land Service, Inc.*, 958 F.2d 1150 (D.C. Cir. 1992) (proponent of subpoena had obligation to enforce); *Dow Chemical Co.*, 672 F.2d 1262 (manufacturer sought subpoenas and brought action to enforce them); *Miami-Luken, Inc. v. DOJ*, Case No. 1:16-mc-012, 2016 WL 3855205 (S.D. Ohio July 15, 2016) (plaintiff corporation sought court's assistance pursuant to APA in compelling compliance with an adjudicative administrative subpoena).

[44] *San Francisco Mining Exchange*, 41 S.E.C. 860, Release No. 7247, 1964 WL 66148 (Feb. 26, 1964).

[45] Rule of Practice 111(b).

For the foregoing reasons, 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: June 29, 2020

/s/ John B. Bulgozdy

John B. Bulgozdy
Lynn Dean
Securities and Exchange Commission
444 S. Flower Street, Suite 900
Los Angeles, CA 90071

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 JUNE 18, 2020 ORDER

was served on June 29, 2020 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
Honorable James E Grimes
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E., Mail Stop 2557
Washington, DC 20549-2557
Email: alj@sec.gov

By Email and U.S. Mail
Mark Feathers
[redacted]
Email: [redacted]
Pro Se Respondent

Dated: June 29, 2020

/s/ Sarah Mitchell
Sarah Mitchell