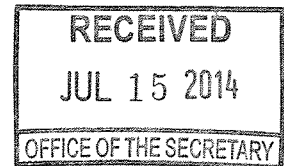


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**UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION**



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

**HARD COPY**

**In the Matter of**

**MARK FEATHERS,**

**Respondent.**

**THE DIVISION OF ENFORCEMENT'S  
MOTION FOR SUMMARY AFFIRMANCE OF INITIAL DECISION**

**INTRODUCTION**

The Division of Enforcement (“Division”) respectfully moves for summary affirmance, pursuant to Rules of Practice 154 and 411(e), of the Initial Decision of the Administrative Law Judge issued on May 30, 2014, which barred Respondent Mark Feathers (“Feathers”) from the securities industry based on the entry of a permanent injunction against Feathers by a United States District Court. On June 23, 2014, Feathers petitioned the Securities and Exchange Commission (“Commission”) for review of the Initial Decision, based on events that occurred in the District Court action, and his allegation that summary disposition of this follow-on administrative proceeding is a “kangaroo court” because no public hearing was convened. Because summary disposition was appropriate and Feathers’ petition for review does not raise any substantive issues, the Commission should reject the petition for review and summarily affirm the Initial Decision.

The Administrative Law Judge correctly based the Initial Decision on the Order Instituting Proceedings (“OIP”), Feathers’ Answer to the OIP, and other filings in the administrative proceeding. There is no dispute that Feathers was permanently enjoined from violating the antifraud and registration provisions of the federal securities laws, Section 17(a) of the Securities Act of 1933 (“Securities Act”) and Sections 10(b) and 15(a) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder, in the civil injunctive action captioned *SEC v. Small Business Capital Corp., et al.*, No. 5:12-cv-3237 (N.D. Cal. Nov. 6, 2013), appeal docketed, No. 13-17304 (9th Cir. Nov. 12, 2013). In fact, the OIP summarized the District Court’s findings that Feathers violated the federal securities laws, and Feathers stated in his Answer that he did not contest these summaries. The Administrative Law Judge properly considered the public interest factors and correctly concluded that they warranted imposition of a permanent bar.

In the District Court litigation and in his Answer and pleadings filed in this proceeding, Feathers has never denied that he used over \$7 million of investors’ money to pay the operating expenses of his company, contrary to express representations to investors, or that he misrepresented in offering memoranda that there had been no “loans” made to the Funds’ manager. Instead, Feathers’ petition for review focuses on an error in an allegation in the complaint in the underlying litigation. Feathers fails to acknowledge that the Division’s staff did not pursue the erroneous allegation in its motion for summary judgment, or that the District Court granted summary judgment based on other conduct of Feathers that plainly violated the federal securities laws. Feathers also fails to acknowledge that he has complained about this error, and other alleged actions by the Division’s staff and the court-appointed receiver and his counsel that Feathers mistakenly characterizes as “misconduct,” to the District Court, the State Bar of California, the

California Board of Accountancy, and the CFA Institute, and in each instance, Feathers' complaints were dismissed and there has been no finding of misconduct.

Based on the record and a consideration of the public interest, the Administrative Law Judge found that Feathers should be barred from the securities industry. This conclusion is supported by the record, which established that Feathers misled investors, misappropriated investors' funds, and operated as an unregistered broker-dealer in the offering of over \$40 million of securities. Feathers' petition does not identify any issue that warrants review. Accordingly, the Commission should summarily affirm the Initial Decision and permanently bar Feathers from the securities industry, based on the permanent injunction entered in the District Court proceeding.

## **I. FACTS**

### **A. The District Court Proceedings**

The OIP summarized the District Court's findings in paragraphs II.3 and II.4. Feathers stated in his Answer that he did not contest these summaries. *See* Feathers' Answer and Defenses at p. 2.

The District Court found that in the offer and sale of securities of two funds, Investors Prime Fund, LLC ("IPF") and SBC Portfolio Fund, LLC ("SPF") (collectively, the "Funds"), Feathers and his company, Small Business Capital Corp. ("SBCC"), made numerous material misrepresentations to investors with a high level of scienter. *See* Order Granting Plaintiff's Motion for Summary Judgment; Denying Defendants' Motion for Summary Judgment entered on August 16, 2013 in *SEC v. Small Business Capital Corp., et al.*, Civil Action No. 5:12-cv-03237-EJD.

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. *Id.* at pp. 8-13.

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 them. *Id.* at pp. 13-15. The District Court also found that Feathers made material misrepresentations and omissions concerning the Funds’ “Operations to Date,” by falsely stating that 100% of IPF’s loans were secured by “First Trust Deeds” when IPF had loaned \$1.85 million, or 11% of its assets, to SBCC in unsecured loans. *Id.* at p. 14. Similarly, Feathers made materially false and misleading statements that SPF had “0%” loans outstanding to SBCC as of December 31, 2010, when in fact SBCC owed SPF \$707,464, which represented over 18% of SPF’s assets, at that time. *Id.* at pp. 14-15.

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 pp. 15-17. Indeed, Feathers instructed his employees to maintain monthly payments to investors in IPF and SPF at a return of 7.5% per annum and 9-10% per annum, respectively, without taking into consideration the Funds’ net income or actual profitability. *Id.* at p. 15.

The District Court also found that Feathers acted with scienter. *Id.* at pp. 17-21. The District Court found that “it is beyond dispute that Feathers prepared and distributed the IPF and SPF offering circulars from at least 2009 to 2011, which clearly prohibited certain loans and money transfers. Rather than refraining from this prohibited conduct, Feathers continued to cause the Funds to transfer cash to SBCC and make other unsecured loans and transfers since 2009.” *Id.*

at p. 18. The District Court further found that “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, or, at the least, an extreme recklessness in his management of the Funds.” *Id.* at p. 19. The District Court found that “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.* The District Court found there were yet “more communications that evince that Feathers knew that his representations to investors in his letters and offering documents were false or misleading.” *Id.* at p. 20.

After addressing Feathers’ defenses, the District Court concluded that Feathers made material misstatements, misrepresentations, or omissions of fact to investors regarding his and SBCC’s management of the Funds, and that the “misrepresentations were made with the intent to deceive investors and other parties or with extreme recklessness.” *Id.* at p. 27.

In addition, the District Court found that Feathers and SBCC fell under the definition of “brokers” under Section 15(a) of the Exchange Act, and that they were not registered with the SEC. *Id.* at pp. 27-28. Finally, the District Court found that Feathers and SBCC were liable as control persons under Section 20(a) of the Exchange Act. *Id.* at pp. 28-29.

After subsequent briefing, the District Court found that injunctive relief was warranted. In an order issued on November 6, 2013, the district court addressed the factors set forth in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980), to determine whether injunctive relief was appropriate, and found that it was. *See Order Granting in Part and Denying in Part Plaintiff’s Motion for Injunctive Relief and Monetary Remedies entered on November 6, 2013 in SEC v. Small Business Capital Corp., et al.* The District Court found there was “substantial evidence of Feathers’ scienter and there were multiple instances of misrepresentation.” *Id.* at p. 3. The District Court further found

“no evidence presented in the pleadings or in the hearing that Feathers recognizes the wrongful nature of his conduct.” *Id.* There was also no evidence that Feathers would not re-enter the brokerage industry if he were able. *Id.*

## **B. The Administrative Proceedings**

The Commission instituted this proceeding with the OIP on February 18, 2014, pursuant to Section 15(b) of the Exchange Act. This is a follow-on proceeding based on *SEC v. Small Business Capital Corp., et al.*

Feathers was served with the OIP on February 24, 2014. Under cover of a letter dated February 28, 2014, the Division produced a copy of its investigative file to Feathers. Feathers filed his Answer on or about March 12, 2014. In his Answer, Feathers did not contest certain allegations in the OIP, including that he has never been registered with the Commission in any way and has never had a securities license.

At a prehearing conference on March 24, 2014, the Administrative Law Judge granted the Division leave to file a motion for summary disposition pursuant to Rule 250 of the Commission’s Rules of Practice, 17 C.F.R. § 201.250. The Division subsequently filed its motion, which was fully briefed.

On May 30, 2014, the Administrative Law Judge issued an Initial Decision which granted the Division’s motion for summary disposition and permanently barred Feathers from the securities industry.

On June 6, 2014, Feathers filed a motion to correct manifest error in the Initial Decision based on an alleged “patent omission of facts” in the Initial Decision pertaining to Feathers’ contentions about alleged misconduct by the Division’s staff, the receiver, and the receiver’s counsel. The Division opposed the motion. In an Order issued on June 13, 2014, the

Administrative Law Judge denied the motion on the grounds that Feathers was raising a misapplication of the law, and not a misstatement of fact. Specifically, the Administrative Law Judge found that Feathers' "allegation of misconduct by Commission staff in *Small Business Capital Corp.* is not relevant to the issues in this proceeding. Any challenge to the propriety of the staff's conduct should be brought before the court in which that case was heard, which Feathers is doing. See *Harold F. Crews*, 87 SEC Docket 350, 359 (Jan. 13, 2006) (footnote omitted)." See June 13, 2014 Order at 2.

## II. ARGUMENT

Rule of Practice 411(e) governs motions for summary affirmance.<sup>1</sup> Rule 411(e) permits the Commission to grant summary affirmance if it finds "that no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument," but summary affirmance is not to be granted "upon a reasonable showing that a prejudicial error was committed in the conduct of the proceeding or that the decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review."<sup>2</sup> While summary affirmance is rare because the Commission generally has an interest in articulating its views on important matters of public interest, it may be appropriate when it is clear that submission of briefs by the parties will not benefit the Commission in reaching a decision.<sup>3</sup> Summary affirmance may therefore be appropriate where "the relevant facts are undisputed and the initial decision does not embody an important question of law or policy warranting further review by the Commission."<sup>4</sup>

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<sup>1</sup> 17 C.F.R. § 201.411(e).

<sup>2</sup> *Id.*

<sup>3</sup> *Richard D. Cannistraro*, Exchange Act Release No. 39521, 1998 SEC LEXIS 15, at \*4 n.3 (Jan. 1, 1998).

<sup>4</sup> *Eric S. Butler*, Exchange Act Release No. 65204, 2011 SEC LEXIS 3002, at \*2 n.1 (Aug. 26, 2011).

The relevant facts are not disputed and the Initial Decision does not embody an important question of law or policy. There is no dispute that Feathers is subject to a permanent injunction against violations of the antifraud and broker-dealer registration provisions of the federal securities laws. There is also no dispute that the Administrative Law Judge found that the public interest factors supported the imposition of a permanent bar against Feathers. To the contrary, the Administrative Law Judge here applied well settled law to undisputed facts to reach the conclusion that an important public policy was served in barring from the securities industry an individual such as Feathers, who among other things, misappropriated over \$7 million of investors' funds.

Feathers' petition for review relies on events in the District Court action, and does not identify any issues in the administrative proceeding. The Administrative Law Judge correctly applied Commission precedent that does not permit a respondent to re-litigate issues that were addressed in a previous civil proceeding involving a respondent. *See* Initial Decision at p. 2 (citing cases). Feathers complains that there was an error in the original complaint filed in the District Court, and that an accountant employed by the Division repeated this error in his declaration filed in support of the emergency action authorized by the Commission. *See* Petition at pp. 1-2. The Administrative Law Judge correctly found that any challenge to the propriety of the staff's conduct in the District Court action should be brought in the court in which the case was heard, which Feathers had done and is doing. *See* Initial Decision at p. 2. In fact, Feathers filed over 50 motions in the District Court action, including motions to dismiss, for sanctions, and for injunctive relief, based on the alleged misconduct of the staff. The District Court denied all of those motions.

Feathers also ignores the undisputed fact that the challenged allegation that is the basis of his petition was not pursued in the motion for summary judgment filed by the staff in the District Court. Instead, the staff relied on other evidence of fraudulent conduct by Feathers. The District



Court granted summary judgment to the Commission on all that other evidence of fraud, and imposed the permanent injunction without any reliance on, or consideration of, the challenged allegations. An error by the staff in putting together an emergency application to stop an ongoing fraud does not absolve the defendant from responsibility for his or her fraudulent conduct. The permanent injunction was not based in any way on the alleged error that is the basis for Feathers' petition.

Thus, Feathers' petition does not identify any prejudicial error in the conduct of the administrative proceeding, does not identify any erroneous finding or conclusion of material fact, and does not identify any erroneous conclusion of law. While Feathers seeks to characterize this administrative proceeding as a "kangaroo court," that *ad hominem* argument lacks any weight, particularly since Feathers does not contest the allegations of the OIP about the findings of the District Court or the entry of a permanent injunction. Summary proceedings are appropriate where the facts have been litigated and determined in an earlier judicial proceeding, an injunction has been entered, and the sole determination is the appropriate sanction.<sup>5</sup>

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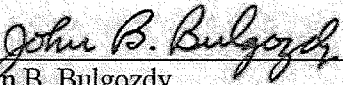
<sup>5</sup> See, e.g. *Omar Ali Rizvi*, Initial Dec. Rel. No. 479 (Jan. 7, 2013), 2013 WL 64626 ("Commission has repeatedly upheld use of summary disposition in cases where the respondent has been enjoined and the sole determination concerns the appropriate sanction."), *notice of finality*, Release No. 69019 (Mar. 1, 2013), 2013 WL 772514; *Daniel E. Charboneau*, Initial Dec. Rel. No. 276 (Feb. 28, 2005), 84 S.E.C. Docket 3476, 2005 WL 474236 (summary disposition granted and penny stock bar issued based on injunctions and memorandum opinion issued by trial court on Commission complaint), *notice of finality*, 85 S.E.C. 157, 2005 WL 701205 (Mar. 25, 2005); *Currency Trading Int'l Inc.*, Initial Dec. Rel. No. 263 (Oct. 12, 2004), 83 S.E.C. Docket 3008, 2004 WL 2297418 (summary disposition granted and broker-dealer bar issued based on trial court's entry of injunctions and findings of fact and conclusions of law), *notice of finality*, 84 S.E.C. Docket 440, 2004 WL 2624637 (Nov. 18, 2004).

## CONCLUSION

Accordingly, the petition for review should be denied and the Commission should summarily affirm the determination of the Administrative Law Judge that Feathers should be permanently barred from the securities industry.

Dated: July 14, 2014

Respectfully submitted,

  
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