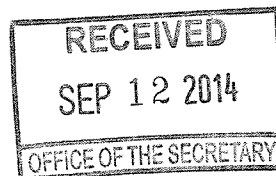


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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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. FACTS 2

 A. The District Court Proceedings..... 2

 B. The Administrative Proceedings..... 5

III. ARGUMENT 6

 A. Summary Affirmance Is Proper Because Feathers Does Not Raise Any Valid Issues
 For Review 6

 B. The Public Interest Warrants A Permanent Bar 8

 C. Feathers’ Effort To Re-Litigate Matters Heard By The District Court Should Be
 Rejected 10

IV. CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Currency Trading Int'l Inc.

Initial Dec. Rel. No. 263, 83 S.E.C. Docket 3008, 2004 WL 2297418 (Oct. 12, 2004)7

Daniel E. Charboneau

Initial Dec. Rel. No. 276, 84 S.E.C. Docket 3476, 2005 WL 474236 (Feb. 28, 2005)7

Eric S. Butler

Exchange Act Release No. 65204, 2011 SEC LEXIS 3002 (Aug. 26, 2011)8

Harold F. Crews

87 SEC Docket 350 (Jan. 13, 2006)6

Michael V. Lipkin and Joshua Shainberg

Initial Dec. Rel. No. 317, 88 S.E.C. Docket 2346, 2006 WL 2422652 (Aug. 21, 2006)9, 12

Omar Ali Rizvi

Initial Dec. Rel. No. 479, 2013 WL 64626 (Jan. 7, 2013).....6

Richard D. Cannistraro

Exchange Act Release No. 39521, 1998 SEC LEXIS 15 (Jan. 1, 1998)7

SEC v. Murphy

626 F.2d 633 (9th Cir. 1980)4

Steadman v. SEC

603 F.2d 1126 (5th Cir. 1979)9

Securities Act of 1933

Section 17(a)

[15 U.S.C. § 77q(a)]..... 1, 5

Securities Exchange Act of 1934

Section 10(b)

[15 U.S.C. § 78j(b)] 1, 5

Section 15(a)

[15 U.S.C. § 78o(a)]..... 1, 4, 5

Section 15(b)

[15 U.S.C. § 78o(b)] 5

Section 20(a)

[15 U.S.C. § 78t(a)]..... 4

FEDERAL REGULATIONS

Commission Rule of Practice 250

[17 C.F.R. § 201.250] 5

Commission Rule of Practice 411(e)

[17 C.F.R. § 201.411(e)]..... 7

Rule 10b-5

[17 C.F.R. § 240.10b-5]..... 1, 5

I. INTRODUCTION

The Division of Enforcement (“Division”) opposes the petition for review filed by Respondent Mark Feathers (“Feathers” or “Respondent”) and respectfully requests that the Securities and Exchange Commission (“Commission”) affirm the Initial Decision and bar Respondent from the securities industry, based on the permanent injunction entered against him by a United States District Court. The Division filed a separate request for summary affirmance and reaffirms that request.

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). The Order Instituting Proceedings (“OIP”) summarized the District Court’s findings that Feathers violated the federal securities laws, and Feathers stated in his Answer to the OIP that he did not contest the summary of the District Court’s findings. The Administrative Law Judge (“ALJ”) properly considered the public interest factors and correctly concluded that they warranted imposition of a permanent bar. 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.

In his petition for review, Feathers does not dispute that the District Court entered a permanent injunction against him, and does not contend that the ALJ incorrectly considered or applied the public interest factors. Instead, Feathers seeks to re-litigate the sufficiency of

allegations in the Complaint and to disparage the integrity of the Division's staff – arguments he has repeatedly and unsuccessfully made in the District Court. Thus, Feathers has not raised any arguments that warrant additional consideration or review by the Commission. Therefore, 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 and the public interest.

II. 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 (Dkt. No. 591) ("SJ Order") entered on August 16, 2013 in *SEC v. Small Business Capital Corp., et al.*, Civil Action No. 5:12-cv-03237-EJD.

First, the District Court found that 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. SJ Order 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, the District Court found that 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 made extensive factual findings that Feathers acted with scienter. *Id.* at pp. 17-21. The District Court found:

[I]t 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. Further, “Feathers’ interaction with the auditor of the Funds further evinces 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, including arguments that the Division’s staff had made misrepresentations in its initial papers and Feathers’ allegations that the staff had engaged in fraud, *id* at pp. 21-27, 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, and on November 6, 2013, issued an Order Granting in Part and Denying in Part Plaintiff’s Motion for Injunctive Relief and Monetary Remedies (Dkt. No. 622) (“PI Order”). In the PI Order, 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. The District Court found there was “substantial evidence of Feathers’ scienter and there were multiple instances of misrepresentation.” PI Order 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.* Accordingly, the District Court entered a permanent injunction against Feathers enjoining him from violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 15(a) of the Exchange Act, and Section 17(a) of the Securities Act. *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, based on the District Court injunction entered in the enforcement action in the Northern District of California.

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 ALJ 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 ALJ 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 ALJ denied the motion on the grounds that Feathers was raising a misapplication of the law, and not a misstatement of fact. Specifically, the ALJ 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.” June 13, 2014 Order at 2 (citing *See Harold F. Crews*, 87 SEC Docket 350, 359 (Jan. 13, 2006) (footnote omitted)).

III. ARGUMENT

A. Summary Affirmance Is Proper Because Feathers Does Not Raise Any Valid Issues For Review

Feathers does not identify any valid issues for review, and for that reason his petition should be denied and the Initial Decision should be summarily affirmed. This is a “follow-on” proceeding to a District Court action, and is based upon the entry of a permanent injunction by the District Court. The ALJ correctly decided the issues presented by the OIP on a motion for summary disposition,¹ and applied the public interest factors to determine whether, based on the

¹ It is well established that 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. *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

entry of the injunction, Feathers should be barred from the securities industry. Based on the District Court record and the ALJ's assessment of the public interest, the ALJ correctly determined that a permanent bar was appropriate. Feathers does not dispute the existence of the injunction, the factual findings made by the District Court, and does not dispute the application of the public interest factors.

Rule of Practice 411(e) governs motions for summary affirmance.² 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."³ 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.⁴ Summary affirmance may

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).

² 17 C.F.R. § 201.411(e).

³ *Id.*

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

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.”⁵ .

Here, Feathers does not raise any important question of law or policy relating to the action by the ALJ that warrants further consideration by the Commission. Feathers does not contest the application of the public interest factors, and does not dispute that the District Court entered a permanent injunction. While Feathers makes allegations aimed at disparaging the conduct of the Division’s staff, he made all those allegations in the District Court and they were rejected. The Division’s staff acted properly at all times, and Feathers’ allegations do not raise any important question of law or policy relating to the action by the ALJ, which was to impose a permanent bar based upon the entry of an injunction and the public interest factors. Accordingly, the Commission should summarily affirm the Initial Decision and issue a permanent bar against Feathers.

B. The Public Interest Warrants A Permanent Bar

The facts found by the District Court establish that it is in the public interest to permanently bar Feathers from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock.

The imposition of administrative sanctions based upon an injunction requires consideration of 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, recognition of the wrongful conduct, and the likelihood that the respondent’s occupation will present future opportunities for violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir.

⁵ *Eric S. Butler*, Exchange Act Release No. 65204, 2011 SEC LEXIS 3002, at *2 n.1 (Aug. 26, 2011).

1979), *aff'd on other grounds*, 450 U.S. 91 (1981). “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 and Joshua Shainberg*, Initial Dec. Rel. No. 317 (Aug. 21, 2006), 88 S.E.C. Docket 2346, 2006 WL 2422652 at *4.

The ALJ correctly recited the public interest factors, and the facts and circumstances found by the District Court, to conclude that a permanent bar was in the public interest. Initial Decision at pp. 4-5. Both the District Court and the ALJ concluded that Feathers’ conduct was egregious, recurrent, and involved at least a reckless degree of scienter. Moreover, the ALJ stated: “The lack of assurances against future violations and recognition of the wrongful nature of the conduct goes beyond a vigorous defense of the charges.” *Id.* at p. 5. The ALJ considered the degree of harm to investors and the marketplace, and found that the disgorgement amount of \$7,497,402.51 was indicative of the harm. The ALJ also found that the violations are recent, and that Feathers’ occupation, if he were allowed to continue to manage funds and raise money from investors, would present opportunities for future violations. *Id.* Thus, the ALJ reached the same determination with regard to permanent industry bars as the District Court reached with regard to the permanent injunction: that it is in the public interest.

Feathers does not contest any of those findings in his opening brief or his petition for review. Accordingly, the Commission should likewise find that the public interest factors support imposition of a permanent industry bar on Feathers.

C. Feathers' Effort To Re-Litigate Matters Heard By The District Court Should Be Rejected

Feathers seeks to re-litigate matters he raised, repeatedly, in the District Court, concerning allegations in the Complaint that defendants made Ponzi-like payments to investors in 2011 and the first quarter of 2012. Feathers argues that the Division's staff deliberately falsified certain numbers alleged in the Complaint. Feathers first raised this issue in a motion to dismiss and for sanctions filed in the District Court in November 2012. *See, e.g.*, Defendant's Request for F.R.C.P. 9 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 (Dkt. No. 126). The Division pointed out in its opposition that even using Feathers' numbers, the defendants' financial statements showed that they made Ponzi-like payments to investors in excess of net income in 2011 and the first quarter of 2012. *See* Plaintiff Securities and Exchange Commission's Opposition to Defendant Mark Feathers' Motion (Dkt. No. 160). The Division also argued that these particular allegations were just one small part of the extensive factual allegations in the Complaint that supported the claims that defendants violated the federal securities laws. *Id.* The Court considered, and repeatedly denied, Feathers' motions based on the purported errors in the Complaint. In any event, the Division did not rely on the disputed allegations in its motion for summary judgment. Instead, the Division focused on the other allegations of fraud in the Complaint, and the Court granted summary judgment on the basis of the undisputed facts supporting those claims. *See* Dkt. No. 591.

Nonetheless, Feathers has doggedly pursued his contention that the Division's staff engaged in improper conduct. In addition to filing over 50 motions in the District Court that raised

these allegations, Feathers and/or his wife have filed complaints making such allegations against the Division's staff with the California State Bar and the California Board of Accountancy. All of the motions and complaints have been denied or rejected. Feathers has encouraged fund investors to file, and he and his wife have filed, FTCA claims with the Commission. Feathers has threatened to file lawsuits in state court against employees of the Division and the receiver, and has threatened to file criminal complaints with state and federal authorities against the receiver and the Division's staff. In his appeal to the Ninth Circuit, Feathers has accused the District Court of somehow joining the conspiracy to deny him his rights. Now, in his petition for review, Feathers complains of a "Kangaroo court" because the ALJ followed Commission precedent. *See* Respondent Mark Feathers' Petition for Review of Initial Decision of the ALJ filed June 24, 2014.

In contrast to Feathers' unfounded allegations, the facts establish that Feathers made material misrepresentations and omissions to investors in the offer and sale of securities in the Funds, and misappropriated over \$7 million of investors' funds. Rather than acknowledging his wrongdoing and then taking steps to satisfy the judgment entered against him, Feathers seeks to damage the reputations of the people who are responsible for putting a stop to his fraudulent conduct. The Commission should summarily reject Feathers' effort to re-litigate, again, his theories which are contradicted by the evidence and lack any basis in fact. The ALJ correctly applied Commission precedent that a respondent may not re-litigate issues that were addressed in a previous civil proceeding involving that respondent. *See* Initial Decision at p. 2 (citing cases). The

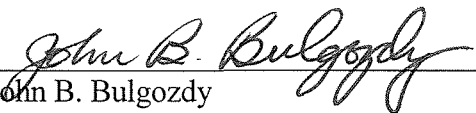
Commission should likewise reject Feathers' effort to re-litigate issues that have been raised and decided in the District Court,⁶ and which lack any merit whatsoever.

IV. CONCLUSION

The Commission should summarily affirm the Initial Decision and permanently bar Feathers from the securities industry. In the alternative, the Commission should find that the public interest mandates imposition of a permanent bar against Feathers.

Dated: September 10, 2014

Respectfully submitted,



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⁶ See *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).

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 OPPOSITION TO RESPONDENT MARK
FEATHERS' PETITION FOR REVIEW**

was served on September 10, 2014 upon the following parties as follows:

By Facsimile and Overnight Mail

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Dated: September 10, 2014


Javier Delgadillo