

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 89095 / June 18, 2020

Admin. Proc. File No. 3-15755

In the Matter of

MARK FEATHERS

ORDER DIRECTING THE FILING OF BRIEFS

On November 18, 2014, the Commission issued an opinion and order finding that Mark 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.¹ While Feathers's appeal was pending in the United States Court of Appeals for the Ninth Circuit, the Supreme Court held in *Lucia v. SEC* that Commission administrative law judges are inferior officers for purposes of the Appointments Clause of Article II of the Constitution.² The Court held that "the 'appropriate remedy' for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official" other than the law judge who heard the case initially.³

On May 14, 2019, the Ninth Circuit vacated the Commission's prior opinion and order in this case and remanded to the Commission "with the direction that if it chooses to proceed, it must order a new hearing before a different and properly appointed law judge."⁴ On October 4, 2019, the Commission ordered that Feathers be provided with the opportunity for a new hearing before an administrative law judge who did not previously participate in the matter.⁵

While this matter was pending before the newly assigned law judge, Feathers sought the issuance of a document subpoena to the Federal Deposit Insurance Corporation. During a prehearing conference in April 2020, counsel for the Division of Enforcement represented to the law judge that, although the Division believed Feathers was seeking irrelevant information, the

¹ *Mark Feathers*, Exchange Act Release No. 73634, 2014 WL 6449870 (Nov. 18, 2014).

² 138 S. Ct. 2044 (2018).

³ *Id.* at 2055 (citations omitted).

⁴ *SEC v. Feathers*, 774 F. App'x 354, 2019 WL 2121072, at *2 (9th Cir. 2019).

⁵ *Mark Feathers*, Exchange Act Release No. 87226, 2019 WL 4916615 (Oct. 4, 2019).

Division was not objecting to the request “because . . . these third-party agencies can speak for themselves.” The law judge issued a subpoena for documents to the FDIC on April 15, 2020.

The FDIC did not move to quash. Instead, the FDIC sent Feathers a letter on April 24, 2020, in which the FDIC asserted that the subpoena was ineffective because “[a] federal agency that is not a party to an administrative proceeding is not subject to a subpoena issued by a state court unless the agency has waived sovereign immunity” and that the FDIC had not waived sovereign immunity. After an email inquiry by the law judge’s office about whether the FDIC intended to move to quash the subpoena, the FDIC responded that “[w]ithout waiving any defenses, the FDIC does not intend to move to quash the subpoena.”

On May 29, 2020, the law judge found that the FDIC had received a valid subpoena and “declined to avail itself of the chance to move to quash that subpoena.” The law judge therefore found that the FDIC “waived any defense or objection to the subpoena” and that, “[a]s a result, it is appropriate to certify this matter to the Commission so that it may decide whether to exercise its authority to invoke the aid of a district court to enforce the subpoena.”

Given these circumstances, we believe that additional briefing would be helpful to the Commission in determining whether it should exercise its authority to seek judicial enforcement of the subpoena. In addition to any procedural or substantive matters that the parties believe important regarding that issue, they should address the reasonableness of the subpoena and the relevance, if any, of the documents that Feathers seeks to subpoena from the FDIC.⁶

Accordingly, it is ORDERED that the parties shall file simultaneous briefs addressing these issues, not to exceed 5,000 words, by June 29, 2020. The parties shall file simultaneous response briefs, not to exceed 3,000 words, by July 9, 2020.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Secretary

⁶ 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”).