UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 90572 / December 4, 2020

Admin. Proc. File No. 3-15755

In the Matter of

MARK FEATHERS

ORDER DECLINING TO SEEK JUDICIAL ENFORCEMENT OF SUBPOENA

On February 18, 2014, we issued an Order Instituting Proceedings against Mark Feathers pursuant to Section 15(b) of the Securities Exchange Act of 1934.[1] Feathers subsequently sought to subpoena documents from the Federal Deposit Insurance Corporation. The law judge then presiding over this matter found that the FDIC had not provided the requested documents and had waived any defense or objection to the subpoena. The law judge therefore certified to the Commission the question of whether the Commission should exercise its authority to seek judicial enforcement of the subpoena. We decline to exercise that authority.[2]

I. Background

We previously 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.[3] While Feathers's appeal of that decision was pending before the Ninth Circuit Court of Appeals, 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.[4] The Court held that "the 'appropriate

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

2 The law judge issued an initial decision in this matter on September 25, 2020. *Mark Feathers*, Initial Decision No. 1403, 2020 WL 5763383 (Sept. 25, 2020). Feathers filed a petition for review of that initial decision on September 28, 2020. On November 9, 2020, we granted the petition for review and issued a briefing schedule. *Mark Feathers*, Exchange Act Release No. 90380, 2020 WL 6581207 (Nov. 9, 2020).

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

4 138 S. Ct. 2044 (2018).

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.[5]

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."[6] On October 4, 2019, the Commission ordered that Feathers be provided with the opportunity for a new hearing before an administrative law judge who had not previously participated in the matter.[7]

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, the Division of Enforcement represented to the law judge that, although the Division believed Feathers was seeking irrelevant information, it did not object 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 subpoena asked the FDIC to produce 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]

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 the FDIC had not waived sovereign immunity. After the law judge inquired if the FDIC intended to move to quash, it responded that "[w]ithout waiving any defenses, the FDIC does not intend to move to quash the subpoena."

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5 *Id.* at 2055 (citations omitted).

6 *SEC v. Feathers*, 774 F. App'x 354, 358 (9th Cir. 2019).

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

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 found that the FDIC therefore "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." On June 19, 2020, the parties were directed to provide additional briefing to assist the Commission in determining whether it should exercise its authority to seek enforcement of the subpoena.[8]

II. Analysis

Our Rules of Practice provide that a party to a Commission proceeding may seek the issuance of a subpoena requiring the production of documentary evidence.[9] But parties do not have an absolute right to subpoena documents, and an agency has discretion to deny a subpoena.[10] We have long recognized, for example, that we may refuse to enforce a subpoena during an adjudicatory proceeding that seeks evidence that is not relevant and material.[11] To

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[8] *Mark Feathers*, Exchange Act Release No. 89095, 2020 WL 3397778 (June 18, 2020) (directing that, "[i]n addition to any procedural or substantive matters that the parties believe important," the parties "should address the reasonableness of the subpoena and the relevance, if any, of the documents that Feathers seeks to subpoena from the FDIC"); *see also Mark Feathers*, Exchange Act Release No. 89288, 2020 WL 3892711 (July 10, 2020) (extending time to file briefs).

[9] Rule of Practice 232(a), 17 C.F.R. § 201.232(a).

[10] *See* Charles H. Koch, Jr., and Richard Murphy, ADMINISTRATIVE LAW AND PRACTICE § 5:40 (3d ed.) (2020); *Attorney General's Manual on the Administrative Procedure Act* (1947) (stating that agencies may refuse to issue to private parties subpoenas "which appear to be so irrelevant or unreasonable that a court would refuse to enforce them"), *available at* https://fall.fsulawrc.com/admin/1947v.html; *cf. Foxy Lady, Inc. v. City of Atlanta, Ga.*, 347 F.3d 1232, 1237 (11th Cir. 2003) ("[N]o absolute or independent right to subpoena witnesses exists during administrative proceedings, and [we] now hold expressly that procedural due process also does not require an absolute or independent right to subpoena witnesses in administrative hearings."); *Travers v. Jones*, 323 F.3d 1294, 1297 (11th Cir. 2003) ("[A] party has no right to subpoena witnesses to state administrative hearings." (citations omitted)); *Amundsen v. Chicago Park Dist.*, 218 F.3d 712, 717 (7th Cir. 2000) ("Nonetheless, this court has held that in the administrative hearing context, the ability to subpoena witnesses is not an absolute right. . . . Indeed, in administrative matters, due process is satisfied when the party concerned is provided an opportunity to be heard in an orderly proceeding which is adapted to the nature and circumstances of the dispute." (quotation marks and citations omitted)).

[11] *San Francisco Mining Exch.*, Exchange Act Release No. 7247, 1963 WL 62756, at *4 (July 31, 1963) (sustaining hearing examiner's refusal to issue subpoena duces tecum for evidence that was neither relevant nor material), *aff'd*, 378 F.2d 162, 169 (9th Cir. 1967) (finding that "the Commission was entitled to refuse the request for subpoenas ad testificandum if, as the

hold otherwise could lead to an "unreasonable and unnecessary delay of the administrative process."[12] And courts require agencies to establish a *prima facie* showing of relevance before they will enforce an administrative subpoena.[13] Those considerations, which apply regardless of whether the subpoena is directed to an administrative agency or to a private entity, lead us to decline to seek judicial enforcement of the FDIC subpoena here.

Feathers argues that, "[i]f FDIC has materials it holds about Respondent, the public should be allowed to see those material, because not only Respondent, but the public benefits through transparency of all federal agencies." But Feathers does not explain how such materials are relevant to these proceedings—or even how their disclosure would benefit the public.[14] Instead, Feathers suggests only vaguely that "ultimately" the FDIC possesses materials that "might assist his '*Steadman* Factors' defense." Speculating that the FDIC might hold documents that could help his defense without specifying why that might be the case is not a basis for enforcing a subpoena.[15] Feathers does not explain how the information he seeks from the FDIC is relevant to any of the factors set forth in *Steadman v. SEC* (which we typically consider when determining whether imposing a suspension or bar would be in the public interest).[16]

Commission here found, the evidence sought to be produced was not shown to be generally relevant and material").

[12] *San Francisco Mining Exch.*, 378 F.2d at 169 (holding "that an indiscriminate subpoenaing of Commission members would lead to an unreasonable and unnecessary delay of the administrative process"); *see also Foxy Lady*, 347 F.3d at 1238 (holding that "it makes perfect sense . . . to control the issuance of subpoenas . . . . For if it were otherwise, one can easily imagine the process becoming cumbersome and potentially unmanageable").

[13] *See, e.g.*, *SEC v. Finazzo*, 360 F. App'x 169, 170–71 (2d Cir. Oct. 8, 2009) (explaining that an agency must make a *prima facie* showing, including relevance, that judicial enforcement of an administrative subpoena is proper (citing *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 96–97 (2d Cir. 1997)); *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989) (same).

[14] To the extent Feathers wishes to obtain materials from the FDIC not because they are relevant to this proceeding but for the sake of transparency or some other reason, the Freedom of Information Act provides a potential avenue for him to do so. *See Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 895 F.3d 770, 783 (D.C. Cir. 2018) (stating that "Congress's purpose in enacting FOIA was to achieve greater transparency in support of open government").

[15] *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 699–700 (1974) (holding that, to obtain a subpoena, the application must be made in good faith and not be "intended as a general 'fishing expedition'"); *Peters v. United States*, 853 F.2d 692, 700 (9th Cir. 1988) (holding that an administrative subpoena "may not be so broad so as to be in the nature of a 'fishing expedition'"); *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1066 (6th Cir. 1982) (same).

[16] *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see also Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1268–73 (7th Cir. 1982) (affirming refusal to enforce an adjudicatory subpoena based in part on requestor's lack of need for the

Feathers also claims that the "FDIC vetted [him], his personal financial affairs, [and] his business financial affairs (including his investment funds and their audited financial statements and their offering documents)." Again, Feathers does not explain how this alleged "vetting" is relevant to this follow-on proceeding based on the fact that a district court enjoined him from further antifraud and registration violations. Feathers instead contends that the FDIC's "vetting" shows that the Division's pursuit of the civil action underlying this administrative proceeding that resulted in the injunction against him was improper and harmed him and his investors. We have repeatedly held that evidence designed to attack the underlying district court judgment in a follow-on proceeding is not relevant.[17] Although Feathers claims he is not seeking to collaterally attack the district court's finding, his filings belie that claim. Feathers argues that the FDIC documents will "show entirely different findings on Respondent and his companies than those findings that SEC submitted under seal to [the] civil court [underlying this proceeding]."

We thus conclude that Feathers has not provided any grounds for finding that the information he seeks from the FDIC is relevant or material to these proceedings. Without such a *prima facie* basis for enforcing the subpoena,[18] we conclude that asking a court to do so would be

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information and observing that the "bounds of relevance" tend to be less broad in an adjudicative context than in an investigative context); *FTC v. Anderson*, 631 F.2d 741, 745–46 (D.C. Cir. 1979) (stating that one factor for determining whether to enforce an administrative subpoena is whether "'the information sought is reasonably relevant'" and that "the relevancy of an adjudicative subpoena is measured against the charges specified in the complaint" (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))).

[17] *See, e.g.*, *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").

[18] *See supra* note 13.

an abuse of process.[19] Therefore, it is ORDERED that the Commission will not exercise its authority to seek judicial enforcement of the subpoena requesting documents from the FDIC.[20]

By the Commission.

Vanessa A. Countryman
Secretary

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[19] *See, e.g., SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 125 (3d Cir. 1981) (stating that the enforcing court's "ultimate inquiry . . . is whether enforcement of the administrative subpoena would constitute an abuse of the court's process"); *FTC v. Bisaro*, 757 F. Supp. 2d 1, 7 (D.D.C. 2010) (observing in an action to enforce an administrative subpoena that "[t]he Supreme Court has recognized . . . that when administrative agencies seek the aid of the courts in enforcing investigative powers, courts should not permit their process to be abused" (citing *United States v. Powell*, 379 U.S. 48, 58 (1964))); *cf. United States v. Carrozzella*, 105 F.3d 796, 800 (2d Cir. 1997) (observing that "abuse of process" in the context of sentencing "includes any serious misuse of judicial or administrative proceedings intended to inflict unnecessary costs or delay on an adversary or to confer undeserved advantages on the actor," which includes "baseless complaints, motions, or defenses").

[20] The Division asks that we revoke the subpoena. But in arguing that the Commission decline to seek judicial enforcement of the subpoena, the Division explains that "Respondent could pursue judicial enforcement and bear the burden of establishing a *prima facie* case for enforcement." Accordingly, we decline to revoke the subpoena to leave open that possibility.