UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 6927 / February 20, 2025

Administrative Proceeding
File No. 3-20828

In the Matter of

Gregory Lemelson[1]

Order Denying Certification for Interlocutory Review

The Commission instituted this proceeding to determine whether any sanctions under Section 203(f) of the Investment Advisers Act of 1940 are in the public interest. The order instituting proceedings alleges that a district court enjoined Respondent from violating the securities laws for five years following a mixed jury verdict finding Respondent liable for three false and misleading statements in violation of the securities laws. The jury also found Respondent not liable for other claims. The Commission denied the Division of Enforcement's motion for summary disposition and ordered a hearing before an administrative law judge.

The Division of Enforcement requested a subpoena requiring Respondent to provide 18 categories of documents. Respondent opposed the subpoena. I granted Respondent's motion in part and ordered that the subpoena be limited to 4 categories of documents. Respondent now requests that I certify the subpoena order for interlocutory review by the Commission. For the reasons below, I decline to certify the subpoena order for interlocutory review.

Standards for Interlocutory Review

Rule 400 of the Commission's Rules of Practice provides the "exclusive remedy for review of a hearing officer's ruling prior to Commission consideration of the entire proceeding." 17 C.F.R. § 201.400(a). The Commission may review any matter at any time on its own motion or when

[1] Respondent goes by his ecclesiastical name, Father Emmanuel Lemelson.

petitioned by a party. *Id.* Such petitions are "disfavored" and will be granted only in "extraordinary circumstances." *Id.*

A party may, as is the case here, ask an administrative law judge to certify his or her ruling for interlocutory review. A ruling cannot be certified unless the administrative law judge finds that (1) "the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion" and (2) "immediate review of the order may materially advance the completion of the proceeding." 17 C.F.R. § 201.400(c). A controlling question of law "typically involves a 'pure' question of law that can be decided 'quickly and cleanly without having to study the record.'" *Gary L. McDuff*, Exchange Act Release No. 78066, 2016 WL 3254513, at *4 n.29 (June 14, 2016) (quoting *Ahrenholz v. Bd. of Trustees*, 219 F.3d 674, 676–78 (7th Cir. 2000)).

Even if the administrative law judge declines to certify a ruling for interlocutory review under Rule 400(c), a party may seek interlocutory review directly from the Commission, and the Commission may accept such a petition. *McDuff*, 2016 WL 3254513, at *4. However, issues that do not satisfy Rule 400(c) "will almost never be appropriate for interlocutory consideration," and the Commission's determination about whether interlocutory review is appropriate is aided by the administrative law judge's Rule 400(c) analysis. *Id.* at *5–6.

The decision to issue a subpoena is not a controlling question of law.

My ruling limiting the Division's subpoena to four categories and allowing it to be issued does not present a controlling question of law. The rules instruct the administrative law judge to consider "all the circumstances" and refuse to issue a subpoena that is "unreasonable, oppressive, excessive in scope, or unduly burdensome" or to issue the subpoena "only upon such conditions as fairness requires." 17 C.F.R. § 201.232(b). This requires balancing the probative value against the burden of compliance and is not a pure question of law. For this reason, the Commission does "not grant petitions for interlocutory review of 'pre-trial discovery orders,' and 'complaints about production of documents' will not ordinarily 'warrant … interference with the orderly hearing process.'" *McDuff*, 2016 WL 3254513, at *5 (quoting *John Thomas Capital*, Exchange Act Release No. 71021, 2013 WL 6384275, at *3 (Dec. 6, 2013)); *see Benjamin G. Sprecher*, Exchange Act Release No. 36574, 1995 WL 735903, at *2 (Dec. 12, 1995) (finding that interlocutory review of an order declining to issue subpoenas "is not warranted or appropriate"); *Michael Sassano*, Exchange Act Release No. 56874, 2007 WL 4699012, at *3 (Nov. 30, 2007) (declining the Division's request to immediately review a discovery order and rejecting the argument that the burden of complying made the circumstances extraordinary).

Interlocutory review would not materially advance the completion of the proceeding.

The subpoena order is not dispositive. Even if the Commission reversed my ruling, a hearing would still be necessary. Immediate review is more likely to cause delay than advance the proceeding. *See Lynn Tilton*, Advisers Act Release No. 4495, 2016 WL 4447011, at *3 n.21 (Aug. 24, 2016) ("[I]mmediate Commission review of the law judge's pre-hearing decisions is more likely to delay the proceedings further."). The subpoena order can be effectively reviewed following the initial decision. *Id.*; *see* 17 C.F.R. § 201.411(a) (providing that the Commission, on review of an initial decision, may "reverse, modify, set aside or remand for further proceedings" and "may make any findings or conclusions that in its judgment are proper and on the basis of the record"); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) ("That a ruling 'may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment ... has never sufficed [to justify interlocutory review].'" (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872 (1994))).

Respondent's other arguments for certification are unavailing.

Respondent raises additional issues,[2] but these primarily implicate the Commission's order instituting proceedings and not the subpoena order. Respondent argues that the proceeding itself violates the Constitution and several recently issued executive orders and argues that, upon interlocutory review of the subpoena order, the Commission may "belatedly realize the unlawfulness of the proceeding and/or exercise discretion to dismiss it for other reasons." Mot. at 3; *see* Notice of Suppl. Authority.[3] But the Commission retains the authority to dismiss the proceeding at any time, and this power is

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[2] In raising these issues, Respondent relies on "prior pleadings in this proceeding." Mot. at 1. Respondent did not specify which pleadings are being referenced, and incorporating all pleadings would exceed the length limitation for motions. 17 C.F.R. § 201.154(c) (motion length limitation is "inclusive of pleadings incorporated by reference").

[3] Respondent gave notice that the Department of Justice is no longer defending the constitutionality of the tenure protection for administrative law judges in 5 U.S.C. § 7521 in the collateral district court case. Notice of Suppl. Authority at 1. This change in position does not affect this administrative proceeding. The Department of Justice continues to argue that Lemelson "has not shown entitlement to injunctive relief under the remaining preliminary injunction factors." Notice of Change in Position, *Lemelson v. SEC*, No. 24-cv-2415 (D.D.C. Feb. 18, 2025), ECF No. 16.

not affected by my decision on whether to certify the subpoena order. *See, e.g.*, *Global Digital Sols., Inc.*, Exchange Act Release No. 85364, 2019 WL 1274911, at *2 (Mar. 19, 2019) (dismissing proceeding as a matter of discretion); *cf. Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."). To the extent that Respondent argues the subpoena order itself violates the Constitution, "[a] party is not entitled to an interlocutory appeal merely because he or she presses a claim premised on a constitutional right or guarantee." *John Thomas Capital Mgmt.*, 2013 WL 6384275, at *4.

Respondent also argues that the subpoena order authorized a subpoena requiring the production of documents that have "neither temporal nor subject-matter relevance." Mot. at 2. The subpoena order explained why Respondent's post-injunction conduct is relevant to the public-interest factors at issue in this proceeding. Order on Subpoena Request, at 3, Admin. Proc. Rulings Release No. 6921 (ALJ Jan. 30, 2025), https://www.sec.gov/files/alj/aljorders/2025/ap-6921.pdf. Disagreement with those conclusions is not grounds for immediate review. *See Montford & Co.*, Adviser's Act Release No. 3311, 2011 WL 5434023, at *3 (Nov. 9, 2011) ("Respondents may disagree with the law judge's determination, but that is not an issue appropriate for interlocutory review.").

Order

Respondent's motion to certify the subpoena order for interlocutory review is denied. The compliance deadline for the subpoena is reset to March 5, 2025.

/s/ Jason S. Patil
Administrative Law Judge