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

Administrative Proceedings Rulings
Release No. 6949 / June 30, 2025

Administrative Proceeding
File No. 3-20828

In the Matter of

Gregory Lemelson[1]

Order on Motions in Limine

The Division of Enforcement and Respondent each filed motions in limine objecting to various exhibits, witnesses, and lines of questioning. This order rules on some of those objections and defers others to the prehearing conference or hearing.

Under Rule 320 of the Rules of Practice, "the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unreliable." 17 C.F.R. § 201.320(a). The scope of relevance under this rule is "much broader than that concept under the Federal Rules of Evidence." *City of Anaheim*, Exchange Act Release No. 42140, 1999 WL 1034489, at *2 (Nov. 16, 1999) (vacating ALJ's ruling excluding evidence before the hearing). Administrative law judges "should be inclusive in making evidentiary determinations." *Id.*; *see Multi-Med. Convalescent & Nursing Ctr. of Towson v. NLRB*, 550 F.2d 974, 978 (4th Cir. 1977) ("[W]e strongly advise administrative law judges: if in doubt, let it in."). Evidence with "limited or slight probative" value can be admitted if there is "some logical relevance." *Clinton Engines Corp.*, Securities Act Release No. 4585, 1963 WL 62733, at *3 (Mar. 4, 1963). The administrative law judge can appropriately weigh such evidence without undue prejudice. *City of Anaheim*, 1999 WL 1034489, at *2.

Evidence Related to the District Court Trial and Jury Verdict

Both parties seek to exclude certain evidence about the underlying district court case. Respondent believes the Division "may be seeking to relitigate the

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

underlying proceeding." Resp't Mot. in Limine, at 1. The Division argues that Respondent's filings show he intends "to relitigate the district court action." Div. Mot. in Limine About Underlying Liability, at 1. It is not proper for either side to "relitigate" the district court case. *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1109 (D.C. Cir. 1988); *see Sherwin Brown*, Advisers Act Release No. 3217, 2011 WL 2433279, at *4 (Jun. 17, 2011) ("The doctrine of collateral estoppel precludes the Commission from reconsidering the injunction as well as factual and procedural issues that were actually litigated and necessary to the court's decision to issue the injunction."). The jury's verdict—of nonliability on some counts and of liability on other counts—and any factual findings necessary to the verdict are preclusive in this proceeding. Likewise, the injunction issued by the district court cannot be challenged here.

The Division raised these preclusive findings before the Commission in its motion for summary disposition. The Commission nevertheless determined that an evidentiary hearing on the public interest factors[2] was warranted. *Gregory Lemelson*, Advisers Act Release No. 6755, 2024 WL 4555152 (Oct. 23, 2024). Evidence about the public interest factors may be similar to evidence that was adduced at trial, but that does not mean introducing it again in this proceeding is impermissible relitigation.

For example, on the public interest factors, the Division may attempt to prove that Respondent's conduct was egregious and not isolated by calling witnesses who testified in the trial and reusing trial exhibits. Conversely, Respondent may attempt to prove that his conduct was not egregious or recurrent with such witnesses or exhibits. The Division raises a particular concern with Respondent's proposed exhibits 29, 30, and 31, which it argues are an attempt to relitigate materiality. The jury's finding of materiality cannot be challenged; however, those exhibits may also bear on egregiousness and are therefore admissible. The Division also challenges exhibits and testimony about the background of the investigation into Respondent, including the original complaint. That line of evidence could have some bearing on the public interest factors. These exhibits and topics will not be excluded in limine, but the Division may renew its objection at the hearing, and I may require an offer of proof from Respondent about what each exhibit is intended

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[2] In weighing whether an associational suspension or bar is in the public interest, the Commission must consider at least six factors: (1) the egregiousness of the conduct, (2) the isolated or recurrent nature of the infraction, (3) the degree of scienter involved, (4) the sincerity of assurances against future violations, (5) the recognition of the wrongful nature of the conduct, and (6) the likelihood of future violations. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

to establish with respect to the public interest factors, or any other issue he maintains must be decided or preserved in this proceeding.

In its remedies order, the district court found that one of Respondent's statements was "particularly egregious." *SEC v. Lemelson*, 596 F. Supp. 3d 227, 233 (D. Mass. 2022). The Division argues that this finding of egregiousness "need not be relitigated." Div.'s Opp'n to Resp't's Mot. in Limine, at 2. The district court's finding is entitled to respect and consideration. But as just one of several non-dispositive factors the district court used to assess the likelihood of recidivism, this is not a finding "necessary to the court's decision to issue the injunction." *Brown*, 2011 WL 2433279, at *4. Collateral estoppel thus does not preclude me from my own weighing of the *Steadman* factors, and the parties may present evidence on the egregiousness or non-egregiousness of that statement.

Evidence of Respondent's Public Statements

Respondent argues that under the First Amendment, I should bar the Division from introducing evidence of Respondent's public statements on several topics. Respondent has cited no case law for this proposition, and I am unaware of any that would prevent his statements from being admitted on free speech grounds.

Respondent has a right to defend himself against the government through vigorous advocacy, *see NAACP v. Button*, 371 U.S. 415, 429 (1963) ("[T]he First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion."), and he cannot be punished for simply mounting a vigorous defense, *compare SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1229 (D.C. Cir. 1989) ("The securities laws do not require defendants to behave like Uriah Heep in order to avoid injunctions. They are not to be punished because they vigorously contest the government's accusations. We think 'lack of remorse' is relevant only where defendants have previously violated court orders, or otherwise indicate that they did not feel bound by the law. As such, it is really only another indication as to whether it is 'reasonably likely' that future violations will occur in the absence of an injunction." (internal citations omitted))); *SEC v. Johnson*, No. 03-cv-177, 2006 WL 2053379, at *6 (S.D.N.Y. July 24, 2006) (agreeing with the defendant that "he should not be penalized for simply mounting a vigorous defense" in the context of analyzing the sincerity of defendant's assurances against future violations and recognition of his wrongful conduct), *with SEC v. Sabrdaran*, 252 F. Supp. 3d 866, 909 (N.D. Cal. 2017) ("A person's 'lack of remorse' can be 'apparent in' the person's 'continued insistence on the validity of his' conduct that has been found to be in violation of the Securities and Exchange Act." (partially quoting *SEC v. Fehn*, 97 F.3d 1276, 1296 (9th Cir. 1996))). Here, however, Respondent cites no

authority for the proposition that the First Amendment categorically shields his public statements from any consideration in this proceeding or why such consideration would result in an impermissible chilling effect on protected speech.

In many contexts, statements may be used as evidence without violating the First Amendment.[3] For example, courts have held that statements may be used as evidence to show "state of mind, intent, predisposition, lack of reluctance to commit the offense, and absence of mistake." *United States v. Wolf*, 691 F. App'x 438, 439 (9th Cir. 2017); *cf. Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) ("The First Amendment ... does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."). The same is true in the civil context. *See Gonzales v. Madigan*, 990 F.3d 561, 564 (7th Cir. 2021) (concluding that the district court's grant of summary judgment, based on a political candidate's campaign speech that refuted his own equal protection claim, did not violate the First Amendment by penalizing speech); *Burton v. E.I. du Pont de Nemours & Co.*, 994 F.3d 791, 831 (7th Cir. 2021) (concluding that the district court's admission of evidence regarding defendants' commercial speech and associations to establish liability did not violate the First Amendment).

This motion in limine is denied, without prejudice. Respondent may raise a First Amendment objection to a particular statement being considered for a particular purpose at the hearing or in his post-hearing briefing.[4]

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[3] The Supreme Court has noted that "exchange of information about securities" is among "communications that are regulated without offending the First Amendment," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), and that "neither the First Amendment nor 'free will' precludes … laws [that] regulate what sellers of securities may write or publish about their wares," *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 64 (1973). *See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985) (plurality opinion) (noting that "certain kinds of speech" receive no or less protection under the First Amendment and that, in accordance with *Ohralik*, content-based regulation of securities-related speech consistent with the First Amendment).

[4] Although Respondent did not raise this in his motion in limine, in arguing against the issuance of several subpoenas, Respondent asserted that his conduct after the district court case is not relevant to this proceeding. As I previously noted, such conduct can be relevant to the public interest factors, including the sincerity of assurances against future misconduct, the recognition of misconduct, and opportunities for future violations. *See* Order

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Testimony of Trial Counsel and Other SEC Employees

Respondent filed a witness list designating the two Division trial counsel as witnesses, along with "To-be-identified SEC Staffers." Resp't Witness List, at 1 (Jun. 9, 2025). The Division opposed this request on June 16. Div. Reply, at 5-6. Respondent did not file a reply.

The Supreme Court has long cautioned against calling opposing counsel as witnesses. *See Hickman v. Taylor*, 329 U.S. 495, 512–13 (1947); *see also id.* at 517 (Jackson, J., concurring). In *Hickman*, the Supreme Court "alluded to a presumption that trial counsel should not be forced to testify because doing so compromises the standards of the legal profession." *Nocal, Inc. v. Sabercat Ventures, Inc.*, No. 04-cv-240, 2004 WL 3174427, at *2 (N.D. Cal. Nov. 15, 2004) (discussing *Hickman*, 329 U.S. at 513). While "opposing trial counsel" are not "absolutely immune" from testifying,

> those circumstances should be limited to where the party seeking to take the [testimony][5] has shown that (1) no other means exist to obtain the information … ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.

Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986).[6] In other words, "[t]he practice of calling opposing counsel as a witness is to be

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on Subpoena Request, at 3, Admin. Proc. Rulings Release No. 6921 (Jan. 30, 2025), https://www.sec.gov/files/alj/aljorders/2025/ap-6921.pdf (citing *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *5 & n.39 (July 26, 2013); *Robert Bruce Lohmann,* Exchange Act Release No. 48092, 2003 WL 21468604, at *5 & n.20 (June 26, 2003)).

5 While *Shelton* concerned deposition testimony, "it would be an anomalous holding to say that the trial court was within its discretion in preventing the deposition of opposing counsel and on the other hand to hold that the trial court exceeded its discretion in protecting opposing counsel from being called as a witness at trial." *Boughton v. Cotter Corp.*, 65 F.3d 823, 831 n.12 (10th Cir. 1995). "[W]here the *Shelton* criteria are not all met during trial it will ordinarily be permissible to protect opposing counsel from being compelled to testify at trial as well." *Id.*

6 *Shelton* has been applied in administrative proceedings to prevent testimony by Division counsel. *See, e.g.*, *Edward M. Daspin*, Admin. Proc. Rulings Release No. 3416, 2015 WL 13548962, at *2–3 (ALJ Dec. 18, 2015); *Stanley J. Fortenberry*, Admin. Proc. Rulings Release No. 1801, 2014 WL 11309788, at *1–2 (ALJ Sept. 12, 2014). "[T]he First Circuit has not explicitly

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discouraged in all instances, save those where no other avenue is available." *Elmwood Vill. Ctr. v. Kmart Corp.*, No. 94-cv-2840, 1994 WL 500945, at *1 (E.D. La. Sept. 9, 1994) (citing *Shelton*, 805 F.2d at 1327). In the rare instance when opposing counsel must testify, the tribunal must then address whether they should be disqualified in light of restrictions on an attorney appearing both as an advocate and witness.[7]

(1) *Other means existed to obtain non-privileged information.*

By January 6, 2025, the Division made "available for inspection and copying … documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings." 17 C.F.R. § 201.230(a)(1) (requiring the production of six significant, collectively broad categories of investigative documents).[8] Respondent's exhibit list reflects that he had access to such documents. *See, e.g.*, Resp't's Exhibit List Nos. 1–14, 19. Respondent raised no challenge to the Division's compliance with this requirement. Rule 230 further provides that "[n]othing in … paragraph (a) … shall limit the right of a respondent to seek access to or production pursuant to subpoena of any other document, or shall limit the authority of the hearing officer to order the production of any document pursuant to subpoena." 17 C.F.R. § 201.230(a)(2). Notably, by the January 10, 2025, deadline, Respondent did not submit, or move for an extension to submit, any requests for subpoena with regard to the history of the SEC investigations, the original complaint, or press releases from the SEC. Since any non-privileged information could have been available to Respondent on these topics through these means he could have exercised, I have determined that this factor weighs against permitting any SEC attorney's testimony.

In addition, with regard to Respondent's request for information on the more recent subpoena enforcement action and transmission of emails to a

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adopted the *Shelton* test but has used a similar test for purposes of deciding whether opposing counsel can be required to testify at trial." *Ham IV Realty, LLC v. USRoofcoaters, Inc.*, No. 3:22-CV-30142, 2024 WL 4145766, at *3 n.1 (D. Mass. Sept. 11, 2024) (citing *Bogosian v. Woloohojian Realty Corp.*, 323 F.3d 55, 66 (1st Cir. 2003)). *Bogosian* adds to the Shelton factors whether "the subpoena was issued primarily for purposes of harassment." 323 F.3d at 66. I find it unnecessary to address that factor here.

7 *See United States v. Perry*, 30 F. Supp. 3d 514, 529 (E.D. Va. 2014).

8 *See* Scheduling Order, Admin. Proc. Rulings Release No. 6912 (Nov. 14, 2024), https://www.sec.gov/files/alj/aljorders/2024/ap-6912.pdf.

Division attorney on detail to the Chairman's office, I granted Respondent's subpoena request. Order Denying Postponement and Granting Subpoena Request, Admin. Proc. Rulings Release No. 6944 (June 11, 2025), https://www.sec.gov/files/alj/aljorders/2025/ap-6944.pdf.

(2) *The information sought is privileged.*

SEC attorney testimony would be permeated with privilege. For attorneys who participated in the investigation, filed federal court actions, and worked behind the scenes staffing press releases, any testimony by them would be infused with work-product privilege, since the "history" of the subjects, from any attorney's perspective, necessarily implicates their impressions of each activity. Division attorneys' mental impressions are precisely the sort of protected work product that animates the Supreme Court's admonition against attorney testimony. *See Hickman*, 329 U.S. at 510–12 ("[T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy ….").
In addition to work product privilege, Division attorney communications within the SEC on the issues in question would be invariably subject to attorney-client privilege. *See, e.g.*, *Hicks v. Ass'n of Apartment Owners of Makaha Valley Plantation*, No. 14-cv-254, 2016 WL 3676106, at *4 (D. Haw. July 7, 2016) ("Any additional information the [Defendant's] attorneys could provide about Defendants' submissions will almost certainly elicit a claim of attorney-client privilege.").

In addition, seeking to question SEC officials on the "history" of internal agency deliberations concerning each of the agency actions taken seeks the internal, pre-decisional activity of Commission staff, which is protected by the deliberative-process privilege. The Commission denied a request for testimony of the SEC's former Chief Accountant as "largely protected by the Commission's deliberative process privilege," and highlighted "the Commission's strong interest in protecting its deliberative process from discovery, especially when considered against what we fear would be the substantial chilling effect upon future Commission deliberations if the internal decision-making process of the Commission and its staff is not protected." *Fannie Mae Sec. Litig.*, Exchange Act Release No. 60772, 2009 WL 3163213, at *3–4, *7 (Oct. 2, 2009). In another case, the Commission rejected testimony of "Commissioners and staff members having knowledge of the case," noting that "if unbridled discovery into the thought processes of every Commission decisionmaker was possible, the Commission could not fulfill its Congressional mandate to function as a collegial body and render final decisions only upon the conclusion of all internal discussion on a matter." *David Checkosky*,

Exchange Act Release No. 31094, 1992 WL 211479, at *3 (Aug. 26, 1992), *remanded on other grounds*, 23 F.3d 452 (D.C. Cir. 1994).

For the foregoing reasons, the testimony sought is sufficiently entwined with privileged information to disallow it. *See Carr v. Double T Diner*, 272 F.R.D. 431, 435 (D. Md. 2010) ("[C]ourts view skeptically efforts to depose an opposing party's attorney, especially when the subject matter of the deposition may be intertwined with potentially privileged information ….").

(3) *The information is not crucial to Respondent's case.*

In his request to call SEC witnesses, Respondent has not shown how the testimony requested is "crucial" given that he will be afforded a full opportunity to seek the admission of any non-privileged evidence to address the truth of the allegations in the order instituting proceedings, what remedial action, if any, is warranted, and to support his various contentions concerning constitutional violations.[9]

With regard to the history of the SEC investigation, Respondent has disclosed that own testimony can address that subject, and as noted above, Respondent has already included documents from the investigation on his exhibit list.

With regard to the other subjects he sought SEC employee testimony on, I will admit Respondent's exhibits on those issues, including exhibits 16–17 and 20–23. These exhibits, without the need for SEC employee testimony, enable Respondent to argue the pertinent issues at or after the hearing. The admission of these exhibits does not preclude either party from seeking the admission of additional, nonprivileged information on the preceding topics.

Conclusion

For the foregoing reasons, Respondent has not met the burden of establishing the need for testimony from SEC attorneys and other unidentified SEC witnesses. He had other means to request any non-privileged information on the relevant subjects, the SEC testimony would be replete with privilege, and there has been no showing such testimony would be crucial to his case. *See Wilson Rd. Dev. Corp. v. Fronabarger Concreters, Inc.*, No. 1:11-cv-84, 2015 WL

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[9] For the reasons set forth in the order granting Respondent's subpoena request regarding the Division's subpoena enforcement action and transmission of emails to a Division attorney on detail to the Chairman's office, I will admit evidence related to that conduct. Order Denying Postponement and Granting Subpoena Request, Admin. Proc. Rulings Release No. 6944 (June 11, 2025), https://www.sec.gov/files/alj/aljorders/2025/ap-6944.pdf.

269795, at *1 (E.D. Mo. Jan. 21, 2015) ("[G]ood cause exists … to issue a protective order preventing the party from calling the opposing counsel to testify unless that party produces evidence to satisfy each of the three prongs of the *Shelton* rule.").

/s/ Jason S. Patil
Administrative Law Judge