UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6000 / May 8, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-20828

In the Matter of **GREGORY LEMELSON,** **Respondent.**	**RESPONDENT'S ANSWER TO THE ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940**

Father Emmanuel Lemelson (Fr. Lemelson),[1] by and through his attorneys, hereby responds to the Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940 dated April 20, 2022 ("OIP"), and pursuant to 17 C.F.R. § 201.220 answers as follows.

INTRODUCTION

Following a seven-day trial, the jury returned a split verdict following multiple days of deliberations. The jury found Fr. Lemelson ***not liable*** for (1) engaging in a scheme to defraud in violation of Rule 10b-5(a) and (c); (2) violating the Investment Advisors Act intentionally or recklessly; (3) violating the Investment Advisors Act negligently; and (4) making untrue statements of a material fact or omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of Rule 10b-5(b) with respect to Defendants' five challenged statements concerning

[1] Named in the Order Instituting Administrative Proceedings as "Gregory Lemelson."

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Ligand's insolvency. The jury found Fr. Lemelson liable for a violation of Rule 10b-5(b) based ***solely*** on a statement he attributed to Ligand's Investor Relations representative during a June 19, 2014 Benzinga interview, and two statements he made about a different, pre-operational start-up company called Viking Therapeutics in his July 3, 2014 report.

It is not in the public interest for the Commission to institute any remedial actions against Fr. Lemelson pursuant to Section 203(f) of the Advisers Act in this case. The Commission's sanction will be overturned if it is "'unwarranted in law or … without justification in fact.'" *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 112-13 (1946)). And any permanent or indefinite exclusion from the industry is "'without justification in fact' unless the Commission specifically articulates compelling reasons for such a sanction." *Steadman*, 603 F.2d at 1140.

The jury's decision not to find a "short-and-distort" scheme, as this action has been characterized, should have come as no surprise. The Commission's enforcement action against Fr. Lemelson was unprecedented and lacked all of the traditional hallmarks of a short-and-distort scheme. Notably, Fr. Lemelson (1) published all his reports under his own name; (2) expressly disclosed at the beginning of each report that he took a short position in the company he was discussing; (3) expressly disclosed that he was rendering his own personal opinion; (4) specifically cited all source materials giving rise to his commentary, allowing the reader to draw their own contrary conclusions (in fact, he included contrary opinions in his report); and (5) held onto his short position four months after issuing the reports. As stated repeatedly before the District Court—and never rebutted by the Commission's litigation counsel—no prior short-and-distort or pump-and-dump claim has been brought under remotely similar circumstances.

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Fr. Lemelson maintains that all the statements he made were either true or made in good faith. Accordingly, Fr. Lemelson has filed a motion for a new trial and, if that is denied, plans to file an appeal. A motion to stay the injunction pending the determination of the motion for new trial and/or appeal has also been filed and remains pending. As laid out in more specificity in those aforementioned motions, the Commission's unprecedented claims in this case are not supported by the weight of the evidence. There is scant evidence about the materiality of the three statements (made on two separate days) and significant evidence supporting a finding that the statements were immaterial. Most notably, the stock price for the company, Ligand Pharmaceuticals, actually rose on the days the statements were made—which under Third Circuit law would preclude a finding of materiality and is an issue yet to be resolved by the First Circuit.

Additionally, First Amendment precedent dictates that the two Viking statements, which were expressly based on public filings identified in Fr. Lemelson's reports, were protected free speech. And one of these statements was objectively true, with the Commission arguing that an omission made it misleading. However, the fact allegedly omitted was disclosed in the public filings cited by Fr. Lemelson, so, as a matter of law, such an omission cannot have been material.

Indicative of the unprecedented nature of this action and supportive of a finding that any censure of Fr. Lemelson is not in the public interest, Fr. Lemelson's former and current investors support Fr. Lemelson being allowed to continue to serve as an investment manager. In fact, every investor that was able submitted a letter in support of Fr. Lemelson to the District Court. To this day, Fr. Lemelson continues to diligently operate Spruce Peak Fund LP to the benefit of his investors. Fr. Lemelson was extremely candid and forthcoming about the litigation and has always strived to serve the interests of his clients and operate within the bounds of the law. Fr. Lemelson has never been accused of violating the securities laws any other time in his decades of

working as an entrepreneur, over a decade of operating a hedge fund, and nearly 13 years of publishing analysis regarding financial securities. Therefore, it is not within the public interest for the Commission to censure Fr. Lemelson under Section 203(f) of the Advisers Act.

SPECIFIC RESPONSES TO ALLEGATIONS OF THE OIP

1. *Gregory Lemelson, 45, resides in Shelburne, Vermont. He is the Chief Investment Officer of Lemelson Capital Management LLC ("LCM"), a private investment firm. He managed The Amvona Fund LP and, subsequently in 2021, The Spruce Peak Fund LP. At all relevant times, Lemelson was and remains an "investment adviser" within the meaning of Section 202(a)(11) of the Advisers Act [15 U.S.C. §80b-2(a)(11)].*

Response: Respondent admits the allegations contained in paragraph 1 of the OIP.

2. *On March 30, 2022, final judgment was entered against Lemelson, enjoining him for a period of five years from future violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Lemelson, et al., Civil Action Number 1:18-cv-11926-PBS, in the United States District Court for the District of Massachusetts. Entry of the injunction followed a jury trial in the District Court, in which, on November 5, 2021, the jury found that Lemelson made three materially false and misleading statements about Ligand in violation of Exchange Act Section 10(b) and Rule 10b-5. The jury found that Lemelson was not liable as to a fourth statement, as well as to charges that they violated of Exchange Act Rule 10b-5(a) and (c) and Advisers Act Section 206(4) and Rule 206(4)-8 thereunder.*

Response: Respondent admits the allegations contained in the first sentence of paragraph 2 of the OIP. By way of further response, Respondent notes that currently pending before the District Court are: (1) Defendants' motion for new trial and to alter or amend the judgment; and

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(2) Defendants' motion to stay the injunction pending the motion for new trial and/or appeal. Both of these motions could potentially impact the judgment and/or the injunction. With regard to the second sentence of paragraph 2 of the OIP, Respondent objects to the characterization of the statements being "about Ligand," as two of the statements related to a company called Viking Therapeutics that was not public and non-operational at the time the statements were made. Respondent admits the remaining allegations in the second sentence of paragraph 2 of the OIP. With regard to the third sentence of paragraph 2 of the OIP, Respondent states that while characterized as a "fourth statement," the Commission actually alleged five different statements from Fr. Lemelson regarding Ligand's insolvency—for all of which the jury returned verdicts of *not* liable. Respondent admits the remaining allegations in the third sentence of paragraph 2 of the OIP.

3. *The Commission's complaint against Lemelson alleged that he, acting with LCM, made false and misleading statements to drive down the price of San Diego-based Ligand Pharmaceuticals Inc. ("Ligand"). The complaint alleged that after establishing a short position in Ligand through his hedge fund, The Amvona Fund LP, Lemelson made a series of false statements to shake investor confidence in Ligand and lower its stock price, thereby increasing the value of his fund's position. The complaint further alleged that the false statements included assertions that Ligand's investor relations firm had agreed that Ligand's most profitable drug was "going away" and that Ligand had entered into a sham transaction with an unaudited shell company in order to pad its balance sheet. The complaint also alleged that Lemelson boasted about bringing down Ligand's stock price through his "multi-month battle" against the company.*

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Response: Respondent admits the allegations contained in paragraph 3 of the OIP, to the extent those allegations are a recitation of the allegations contained in the Commission's Amended Complaint. To the extent the allegations contained in paragraph 3 of the OIP are claimed to be true, Respondent denies the allegations contained in paragraph 3 of the OIP. By way of further response, to the extent that some of the allegations recited in paragraph 3 relate to the Commission's rejected scheme liability theory, Respondents note that the jury rejected this theory at trial.

RESERVATIONS

1. Respondent reserves the right to supplement and amend this Answer as permitted pursuant to 17 C.F.R. § 201.220(e).

2. Except as expressly set forth herein in this Answer, Respondent denies every allegation contained in this OIP pursuant to 17 C.F.R. § 201.220(c).

3. Respondent requests a hearing requiring the Commission to prove its allegations pursuant to 17 C.F.R. § 201.300.

AFFIRMATIVE DEFENSES

Without assuming the burden of proof for such defenses that they would not otherwise have, Respondent asserts the following affirmative defenses:

First Affirmative Defense

The OIP fails to state a claim upon which relief can be granted.

Second Affirmative Defense

The underlying verdict upon which the Commission relies is barred by the First Amendment to the United States Constitution.

Third Affirmative Defense

The underlying verdict upon which the Commission relies is barred because it was not supported by adequate evidence.

Fourth Affirmative Defense

The underlying verdict upon which the Commission relies is barred because of errors in various evidentiary rulings at trial.

Fifth Affirmative Defense

The Commission's claims are barred by the doctrine of unclean hands.

Sixth Affirmative Defense

The Commission's claims are barred, in whole or in part, by the doctrine of laches.

Seventh Affirmative Defense

The Commission's claims are an illegal retaliation in response to Respondent's whistleblower complaint and public criticism of the Commission.

Eighth Affirmative Defense

The Commission's claims are barred, in whole or in part, because Respondent acted in good faith, at all times and in conformity with all applicable federal statues, including the Exchange Act and the Investment Advisors act, and all applicable rules and regulations promulgated thereunder.

Ninth Affirmative Defense

The Commission's claims are barred because, *inter alia*, there has been no violation of the Exchange Act or the Investment Advisors Act, and, even if there had, there is no reasonable likelihood that any violation will be repeated.

Tenth Affirmative Defense

The Commission's claims are barred because the adverse effects of an injunction far outweigh any benefit form an injunction.

Eleventh Affirmative Defense

The Commission's claims are barred because, inter alia, any alleged violation was isolated and/or unintentional.

Twelfth Affirmative Defense

The Commission's claims are barred, because Respondent always acted in good faith and with honesty in fact.

Thirteenth Affirmative Defense

The Commission's claims are barred, because the Commission was unduly influenced in its investigation by Ligand, which discriminated against Respondent based on his religion and exerted undue political influence.

Fourteenth Affirmative Defense

The Commission's claims are barred by the doctrine of res judicata.

Fifteenth Affirmative Defense

The Commission's claims are barred by the statute of limitations.

Sixteenth Affirmative Defense

Respondent reserves the right to assert additional defenses.

Respectfully Submitted,

REV. FR. EMMANUEL LEMELSON,

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Dated: May 11, 2022

CERTIFICATE OF SERVICE

I hereby certify that pursuant to the OIP instructions, the foregoing document was served via email to Alfred A. Day, Esq. (DayA@sec.gov) on May 11, 2022 in lieu of paper service and filed electronically through the Commission's Electronic Filings in Administrative Proceedings (eFAP) system.

/s/ Douglas S. Brooks
Douglas S. Brooks