UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20828

In the Matter of
GREGORY LEMELSON,
Respondent.

DIVISION OF ENFORCEMENT'S MEMRORADUM IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

Respectfully submitted,

/s/ Marc J. Jones

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Respondent Gregory Lemelson, a/k/a Father Emmanuel Lemelson, should be barred from association with investment advisers and other securities-related firms. The undisputed record shows that Lemelson should be barred from the securities industry and that barring him would be in the public interest. His multiple fraudulent misrepresentations, his unrepentant denial of any responsibility for those violations, his conduct during and after the civil litigation, and his current ability to violate the securities laws again as a hedge fund manager and investment adviser all point to the necessity of imposing a bar.

Pursuant to Rule 250 of the Securities and Exchange Commission's Rule of Practice, 17 C.F.R. §201.250, the Division of Enforcement ("Division") submits this Memorandum in Support of its Motion for Summary Disposition against Respondent Gregory Lemelson, a/k/a Father Emmanuel Lemelson ("Lemelson" or "Respondent"). All facts necessary for summary disposition have been resolved in the district court in the civil enforcement action against Lemelson. *See SEC v. Lemelson*, Civil Action No. 1:18-cv-11926-PBS, 2022 WL 952264 (D. Mass. Mar. 30, 2022) [Ex. A]. Accordingly, the Division of Enforcement ("Division") asks that the Commission issue an Order barring Lemelson from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or national recognized statistical rating organization based on the injunction entered against him by the district court.

I. STATEMENT OF UNDISPUTED FACTS

A. The Underlying Facts of the Case

Lemelson has served as Chief Investment Officer of investment adviser Lemelson Capital Management ("LCM"), from at least 2014 to the present. [Ex. A (Parties' Agreed-to Facts for Trial), ¶ 2.] Both Lemelson and LCM are investment advisers, subject to the Investment

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Advisers Act of 1940 ("Advisers Act"). [*Id.*, ¶ 1.] Through LCM, Lemelson managed a hedge fund called the Amvona Fund LP, and he "made all investment decisions for that fund." [*Id.*, ¶ 5.] Lemelson and LCM took short positions on behalf of The Amvona Fund on thirteen dates between May 2014 and October 2014. The total short position from this period was $5,082,334.60. [*Id.*, ¶ 8.]

Between June and August of that year, Lemelson published five reports concerning Ligand. [*Id.*, ¶ 9.] In a report published July 3, 2014, Lemelson represented that Viking Therapeutics, Inc., ("Viking"), a company that signed a licensing deal with Ligand, "does not intend to conduct any preclinical studies or trials and does not own any products or intellectual property or manufacturing abilities and leases space from Ligand." [Ex. B at 7.] Lemelson wrote that "Viking appears to be a single-purpose vehicle created to raise more capital from public markets for its sponsor, Ligand Pharmaceuticals;" that "Ligand appears to be creating a shell company through Viking to generate paper profits to stuff its own balance sheet;" that "the legality of such a transaction [the Viking-Ligand licensing deal] may one day be challenged by shareholders;" and likened the transaction to "a common game of three-card Monte." [*Id.* at 8-9.] In the same report, Lemelson mused that Viking had a "curious relationship" with its accounting firm and stated that Viking "has not yet even consulted with the firm on any materials issues" and "[t]he financial statements provided on the S1 accordingly are unaudited." [*Id.* at 9-10.] The jury found that these statements violated Exchange Act Section 10(b) and Rule 10b-5(b).

Between June and October 2014, Lemelson also gave four interviews on an online radio show, Benzinga Premarket Prep Show ("Benzinga"). During his June 19, 2014 Benzinga interview, Lemelson described a phone call with Bruce Voss, Ligand's investor relations firm

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representative concerning Promacta, Ligand's largest revenue generating drug. During the interview, Lemelson said, "It's literally going to go away, I mean, I had discussions with [Ligand] management just yesterday – excuse me, their [Ligand's] IR [investor relations] firm. And they basically agreed. They said, 'Look, we understand Promacta's going away.'" [Ex. A, ¶ 14.] The jury likewise found that this statement violated Exchange Act Section 10(b) and Rule 10b-5(b).

Lemelson and LCM covered the short position on five dates, for a total of $3,785,690.19. [*Id.*, ¶ 11.] The Amvona Fund profited $1,296,644.41. [*Id.*, ¶¶ 8, 11.]

B. Jury Trial and Final Judgment

In September 2018, the Division sued Lemelson and LCM alleging that they reaped more than $1.3 million in illegal profits by making false and fraudulent statements to drive down the price of Ligand. The Division charged Lemelson and LCM with violations of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("Exchange Act") and Section 206(4) and Rule 206(4)-8 of the Advisers Act. [Ex. C (Amended Complaint).] The charges included Lemelson's misrepresentations described above about the Ligand representative's statements about Promacta and those about Viking's audited financials and its intent to conduct clinical trials.

On November 5, 2021, after a nine-day trial, the jury found that Lemelson (and by extension LCM) made three materially false and fraudulent statements about Ligand in violation of Exchange Act Section 10(b) and Rule 10b-5.[1] The jury determined that the SEC proved by a preponderance of the evidence that Lemelson "intentionally or recklessly made untrue statements

[1] The jury found that Lemelson was not liable under Exchange Act Rule 10b-5(a) and (c) and Advisers Act Section 206(4) and Rule 206(4)-8, and also that he was not liable under Rule 10b-5(b) for one of his four statements (the statement regarding insolvency).

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of a material fact or omitted 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" as to the Benzinga interview, the Viking audit statement, and the Viking preclinical trial statement. [Ex. D (Verdict Form) at 1-2.]

The District Court later summed up the evidence at trial:

> The evidence at trial showed 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 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 evidence also showed that Lemelson boasted about bringing down Ligand's stock price through his "multi-month battle" against the company.

[Ex. E (Memorandum and Order on remedies) at 4.]

Following the jury verdict, the parties proceeded to the remedies phase of the litigation. In its Memorandum and Order on remedies, the Court found, among other things, that:

- One of the three fraudulent statements made by Lemelson "was particularly egregious" [*Id.* at 9];
- Lemelson would be in a position to violate again "as he continues to work as an investment adviser and recently started a new fund, Spruce Peak Fund. Investors will continue to look to his advice and rely on the truthfulness of his reports" [*Id.*]; and
- "Lemelson continues to unabashedly defend his actions. [He] does not recognize the wrongfulness of his conduct or acknowledge when he was clearly wrong . . . . His pugilistic approach to the litigation . . . indicated he has not learned his lesson." [*Id.* at 10.]

The District Court enjoined Lemelson from violating Exchange Act Section 10(b) and Rule 10b-5 for five years,[2] and ordered him to pay a Tier III civil penalty of $160,000. [Ex. E; Ex. F (Judgment).]

C. The Follow-On Administrative Proceeding

The Commission issued an Order Instituting Proceedings "OIP" in this matter on April 20, 2022. [Ex. G (OIP).] Lemelson answered on May 11, 2022. [Ex. H (Answer).] In that Answer, Lemelson admitted the following:

a) At all relevant times, Lemelson was and remains an "investment adviser" under Section 202(a)(11) of the Advisers Act [15 U.S.C. §80b-2(a)(11)];

b) On March 30, 2022, final judgment was entered against Lemelson, enjoining him for five years from future violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 , 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;

c) 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 in violation of Exchange Act Section 10(b) and Rule 10b-5;

d) The Commission's complaint against Lemelson alleged that he, acting with LCM, made false and misleading statements to drive down the price of 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.[3]

[2] The District Court wrote that it was imposing a five-year injunction, instead of a permanent one, because "Lemelson's conduct warrants an injunction, but his violation was not as severe as in many of the cases where courts ordered permanent injunctions." Ex. E at 10.

[3] Lemelson admitted that these were the allegations of the Complaint, but not that the allegations were true.

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Lemelson also admitted that the jury found him liable for violating Exchange Act Section 10(b) and Rule 10b-5(b) based on the statement he attributed to Ligand's investor relations representative during the June 19, 2014 Benzinga interview and the two statements he made about Viking in his July 3, 2014 report. (Ex. H at 2.)

II. ARGUMENT

As discussed below, the undisputed record shows that the Commission should conclude that remedial sanctions are in the public interest.

A. Standard for Summary Disposition

Rule 250(b) of the Commission's Rules of Practice permits a party to move for summary disposition on any or all of an OIP's allegations and any asserted defenses. A motion for summary disposition should be granted when "there is no genuine issue with regard to any material fact and . . . the movant is entitled to summary disposition as a matter of law." 17 C.F.R. § 201.250(b). To defeat summary disposition, the opposing party must show with specificity a genuine issue for a hearing and "may not rest upon the mere allegations or denials of its pleadings." *Currency Trading Int'l, Inc., et al.*, Release No. 263, 2004 WL 2297418, at *2 (Oct. 12, 2004).

The Commission has repeatedly upheld use of summary disposition in cases such as this, where the respondent has been enjoined and the sole determination concerns the appropriate sanctions. *See Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *5-6 & nn.21-24 (Feb. 4, 2008) (collecting cases), pet. denied, 561 F.3d 548 (6th Cir. 2009); *Conrad P. Seghers*, Release No. 2656, 2007 WL 2790633 (Sept. 26, 2007) pet. denied, 548 F.3d 129 (D.C. Cir. 2008); *Sherwin Brown & Jamerica Fin., Inc.*, Release No. 3217, 2011 WL 2433279, at *5 (June 17, 2011). Under Commission precedent, the circumstances in which summary disposition

in a follow-on proceeding involving fraud is not appropriate "will be rare." *John S. Brownson*, Exchange Act Release No. 46161, 2002 WL 1438186, at *9 n.12 (July 3, 2002), pet. denied, 66 F. App'x 687 (9th Cir. 2003).

B. Lemelson Qualifies for an Associational Bar

At the threshold, Lemelson meets the requirements for an associational bar. Advisers Act Section 203(f) authorizes the Commission to impose an associational bar against Lemelson if: 1) at the time of the alleged misconduct, he was associated with an investment adviser; 2) he is "temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction . . . from engaging in or continuing any conduct or practice in connection with . . . the purchase and sale of a security." 15 U.S.C. §80b-3(e)(4), (f). Lemelson has admitted both these requirements in his Answer. [*See* Ex. H. and Section I.C., *supra*]

C. Imposing an Associational Bar on Lemelson is In the Public Interest

It serves the public interest to impose an associational bar on Lemelson. "The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business." *Robert Burton*, Rel. No. 1014, 2016 WL 3030850, *4 (May 27, 2016) (quoting *Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, *5 n. 26 (Apr. 20, 2012).

The appropriateness of any remedial sanction in this proceeding is guided by the *Steadman* factors: the egregiousness of the respondent's actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the respondent's assurances against future violations; the respondent's recognition of the wrongful nature of his conduct; and the likelihood that the respondent's occupation will present opportunities for future violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91

(1981); *see Gary M. Kornman*, Release No. 2840, 2009 WL 367635, at *6 (Feb. 13, 2009). The Commission's inquiry into the appropriate sanction to protect the public interest is flexible, and no one factor is dispositive. *See Gary M. Kornman*, 2009 WL 367635, at *6.

1. Lemelson's Actions Were Repetitive and Egregious

Lemelson's conduct was repetitive and egregious. The jury found that Lemelson made three separate fraudulent statements, one about Promacta and two about Viking. [Ex. D.] And the District Court, in imposing the injunction and a Tier III penalty, found that "one of the three statements"—Lemelson's misrepresentation that Ligand's investor relations representative said Ligand's main product was going away—"was particularly egregious." [Ex. E at 9.]

The jury found that Lemelson made fraudulent statements to the investing public on two occasions: *First*, the June 19, 2014 Benzinga interview, which reiterated and sought to bolster, via a false statement of fact, prior statements made by Lemelson about the alleged demise of Promacta, Ligand's most profitable product [Ex. I (Interview Transcript) at 16; *see also* Ex. J (June 16, 2014 report describing "[s]evere competitive threat to key royalty program"]; and, *second*, Lemelson's July 3, 2014 report, which contained false statements of fact about Viking [Ex. A]. Lemelson never corrected his false statement that Ligand's investor relations representative, Bruce Voss, agreed that Promacta was "going away" and never acknowledged publicly that Mr. Voss denied his claim. [Ex. K.] The District Court reviewed and credited this evidence when deciding to enter the injunction and penalty.

These fraudulent misrepresentations become more egregious when considered in context. *First*, as the jury heard at trial, Lemelson fraudulently misrepresented that Ligand's investor relations representative had affirmatively stated that Ligand agreed that its most profitable drug was "going away." The evidence at trial showed that Lemelson used this misrepresentation as

the tent-pole for their assertion that Ligand was worth $0 per share. *Second*, Lemelson fraudulently misrepresented that Ligand's partner, Viking, had not consulted its auditor on any material issues and its financial statements were unaudited. Lemelson used this misstatement as a key part of his assertion that Ligand had entered into a sham transaction with an unaudited shell company, Viking, to pad its balance sheet. This misrepresentation was also significant because, without audited financial statements, Viking would not have been able to obtain approval for a public offering of its stock. *Third*, Lemelson fraudulently misrepresented that Viking did not intend to conduct preclinical studies or clinical trials—that it was not really going to develop drugs at all despite that being its stated purpose. Lemelson used this misrepresentation to advance his story that Viking was an empty shell that Ligand was using to engage in an illegal transaction (in what Lemelson called a game of three-card Monte). [Ex. A; Ex. I; Ex. J.]

Lemelson's conduct was also egregious because, as the evidence at trial showed, Lemelson took credit for the decline in Ligand's stock price and boasted that he had "erased" $500 million of Ligand's market capitalization. [*E.g.*, Ex. L; Ex. M at 11; Ex. N at 1; Ex. O at 7.]).[4] And Lemelson's underlying allegation about Ligand—that it was a fraud, engaged in fraud, and worth nothing—compounds the egregious nature of his misrepresentations. [Ex. P.]

Finally, Lemelson continued his campaign against Ligand well after the period addressed in the trial (Summer 2014). For instance, he continued to republish his false and misleading reports about Ligand. In fact, Lemelson continued to assail Ligand for years, hurling baseless allegations at the company while again shorting the company in 2015 and 2019. For example:

[4] During the period of the Commission's allegations, from May 2014 to October 2014, Ligand's share price dropped from about $67 to $45, roughly a 33% drop from the opening share price before Lemelson published his first report.

- Lemelson appeared on the Benzinga radio show and stated that Ligand had created a "pyramid scheme of shell companies," echoing his statements about the Ligand-Viking partnership. (June 7, 2015.)

- Lemelson made false and misleading statements about Ligand through LCM's Twitter account where he called Ligand an "extensive fraud," and invited people to review all of Lemelson's prior false statements about Ligand beginning with his first report in June 2014. (March 13 and March 21, 2017.)

- Lemelson hurled additional, baseless invective at Ligand, including claiming that Ligand has committed "abuses [that] jeopardize lives" and "fleece[d] taxpayers + shareholders." (March 21, 2017.)

- Lemelson repeated the false and misleading allegation about the "existential threat" from the "momentous impairment of its largest royalty generating asset, Promacta" (from the June 16, 2014 report)—the day Ligand announced that it was selling the royalty rights to Promacta for $827 million. (March 7, 2019 – well after the district court case was filed.)

[Exs. W, X, Y, and Z.] In short, both before and after being charged by the Commission with securities fraud, Lemelson continued his assaults on Ligand by republishing, referencing, and repeating the same statements and reports that the jury found contained fraudulent misrepresentations. His conduct was repetitive and egregious.

2. Lemelson Acted with Scienter

The jury found that Lemelson acted with scienter—a "conscious intent to defraud" or an "extreme departure from the standards of ordinary care [that] presents a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." [Ex. D; Ex. Q (jury instructions) at 105-06.] The District Court also found that Lemelson's "fraud is not in question." [Ex. E at 14.] Lemelson acted with the level of scienter that warrants a finding that imposing the associational bar is in the public interest.

3. Lemelson Refuses to Recognize the Wrongful Nature of His Conduct and Has Given *No* Assurances against Future Violations

Lemelson has taken no responsibility for his misconduct. He continues to assert that he did nothing wrong, and has given no assurances that he will not repeat his conduct and again violate the federal securities laws. As the District Court found:

> Lemelson continues to unabashedly defend his actions. Lemelson does not recognize the wrongfulness of his conduct or acknowledge when he was clearly wrong (like the statements about Viking). His pugilistic approach to the litigation (e.g., the tweets and the leaked documents) indicates that he has not learned his lesson.

[Ex. E at 10.]

In part, the district court was referring to evidence at trial that refuted Lemelson's statements that he refused to acknowledge. For instance, the evidence showed that Ligand thrived after Defendants' 2014 campaign against it, even selling the royalty rights to Promacta for about $827 million in March 2019. Yet Lemelson steadfastly and unreasonably claimed that Ligand was and remains a "fraud." In a portion of deposition played at trial, Lemelson testified:

> Q. What kind of company is Ligand?
>
> A. Fraud.
>
> Q. What does Ligand do for business?
>
> A. Commit fraud.
>
> Q. Anything else?
>
> A. Defraud their shareholders, make money for investment banks, enrich their executives.

[Ex. R (Lemelson Dep.) at 146).] He wouldn't even admit that Ligand is a pharmaceutical company. [*Id.* at 146-47.] At trial, Lemelson maintained his position despite extensive evidence that his statements were false. [Ex. P at 19-21.]

The district court's reference to "tweets" is about tweets Lemelson sent out (from three accounts) that he had beaten the short-and-distort claims and been absolved of fraud claims at trial, knowing that neither of those statements were true. [Ex. S; Ex. T; Ex. U.] He tweeted only part of the first line of a Law360 article, falsely claiming that he was found not liable: "A Boston federal jury on Friday *absolved* a Greek Orthodox Priest of *fraud claims* in a U.S. SEC suit alleging he launched a short and distort scheme through his hedge fund…" [*E.g.*, Ex. S (emphasis supplied).]

Lemelson then amplified his "not liable" message on his blog and on the investor website, Seeking Alpha, under the headline, "Jury Verdict Finds Fr. Emmanuel 'Not Liable' For Key Allegations" stating, "We would like to thank the jury for their service, and verdict of 'Not Liable' for the key allegations contained in the Complaint." Lemelson's social media efforts to spread the word that he (supposedly) did not commit fraud are grossly misleading. [Ex. V.] And when the Commission informed defense counsel of misleading nature of these statements, Lemelson refused to revise them.

The district court's reference to leaked documents refers to Lemelson's improper conduct during the litigation of the district court case, when Lemelson violated the district court's

protective order by leaking 50 pages of confidential and privileged discovery materials to the press. Lemelson admitted his breach of the protective order, but tried to excuse his violations by asserting that this case was "unfair" and that he provided the discovery materials to a reporter to counter a "false public narrative about this litigation." [Ex. AA at ¶¶7-9.] The Court held Lemelson in contempt, sanctioned him $100 per page of materials he leaked, and prohibited him from taking any position in Ligand stock or its derivatives for the duration of the District Court action. [Ex. BB.]

The district court's reference to Lemelson's "pugilistic attitude" includes an incident when Lemelson, through his counsel, threatened a priest who had provided information about Lemelson to the Commission. [Ex. CC.] Specifically, Lemelson's counsel emailed the General Counsel of the Greek Orthodox Archdioceses of America. The email conveyed Lemelson's "demand" to the Chancellor of the Greek Orthodox Metropolis of Boston, related to certain statements the Chancellor made to the Commission. Through counsel, Lemelson demanded that the Chancellor (i) swear under oath in writing to a set of nine statements provided by Lemelson, (ii) acknowledge under oath that any statements made to the Commission that are inconsistent with Lemelson's nine statements were false, and (iii) pay Lemelson $10,000. If the Chancellor did not accede, Lemelson, through counsel, threatened to launch a defamation suit as to which he would "spare no expense." The district court, after reviewing this conduct, stated:

> Because it [Lemelson's status in the Greek Orthodox Church] matters to me in terms of the letter that you sent to that Greek Orthodox priest threatening him with a lawsuit unless he answered ten things correctly. I found that extremely troubling. There may be nuances here that none of us understand, but it was a pretty hardball tactic.

[Ex. DD at 27; *see id.* at 28 (the Court: "I was deeply, deeply troubled by that letter.").]

Finally, the district court's reference to Lemelson's pugilistic attitude also concerns his statements at the remedies hearing in the District Court action. Lemelson decried the Commission and Ligand and denied any responsibility. Lemelson stated,

> ...I always spoke the truth. I revealed the fraud that I saw … Literally *everyone involved in this case is a criminal on the other side* [referring to the Commission], and I think that time will reveal truth and justice in this case, and I have no doubt about anything that I did … They [Ligand] co-opted the U.S. government to carry out that dirty business. I'll never regret the things I did.

[Ex. EE (emphasis added).] Lemelson refuses to recognize or take responsibility for his actions, a strong indication that he is likely to engage in similar behavior in the future.

4. Lemelson's Hedge Fund Management Presents Opportunities for Future Violations

Lemelson is still the Chief Investment Officer for LCM, an active investment adviser. And even after apparently losing all the money in The Amvona Fund in 2020, Lemelson has raised money again in a new fund called Spruce Peak Fund. [Ex. FF (Spruce Peak Fund, LP SEC Form D).] The District Court agreed that Lemelson would be in a position "to violate again, as he continues to work as an investment adviser and recently started a new fund . . . ." [Ex. G (Order) at 9.] This factor also supports the imposition of an associational bar.

5. Summary

Lemelson's conduct was repetitive, egregious, undertaken with a high degree of scienter, and continued after the relevant period. Lemelson made three different fraudulent statements, never corrected any of the false statements, and continued to repeat falsehoods about Ligand for years. And he took credit for driving down Ligand's stock through at least 2017. Lemelson's misconduct then continued after the period in the Complaint, including republishing reports about Promacta's supposed demise and the Ligand-Viking relationship. This is egregious

behavior, which the jury found Lemelson engaged in knowingly or so recklessly that he must have known his conduct was likely to mislead investors. Despite this, Lemelson raised new money from investors to run another hedge fund during the District Court action, giving him new opportunities to violate the securities laws.

The Commission considers fraud to be "especially serious and to subject a respondent to the severest of sanctions." *Karen Bruton and Hope Advisors, LLC*, Release No. 1386, 2019 WL 4693573, at *8 (Sept. 16, 2018); *Conrad P. Seghers*, 2007 WL 2790633, at *7. In fact, as the *Bruton* court pointed out, from 1995 to 1999, there have been over fifty litigated follow-on proceedings based on anti-fraud injunctions (like this one) or convictions in which the Commission issued opinions. In every one of those cases, the respondent was barred – at least fifty "unqualified" bars and three bars with a right to reapply after five years. And in each of those cases that followed the statutory provision of collateral bars, full collateral bars were imposed. *Bruton*, 2019 WL 4693573, at *8.

In sum, Lemelson's efforts to minimize and mislead the public (and his investors and prospective investors) about the seriousness of the jury's finding and the fraudulent nature of his conduct spotlights the need to bar Lemelson from associating with an investment adviser or any other securities-related firm, to the fullest extent permitted by Advisers Act Section 203(f).

D. Lemelson Cannot Re-Litigate the District Court Case

Lemelson's Answer makes clear that he wishes to re-litigate the facts that underlie this motion and that served as the basis for the jury's finding of three violations of Exchange Act Section 10(b) and Rule 10b-5. He challenges the unanimous jury verdict, the weight of the evidence, and the supposedly "unprecedented claims in this case." Answer at 3. He asserts inapplicable affirmative defenses. *Id.* at 6-8. While Lemelson may pursue motions and appeals

in his district court case, the Commission does not permit a respondent to re-litigate issues that were addressed in a previous civil proceeding against a respondent, whether resolved by consent; by summary judgment; or (as here) after a trial. *See Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717 (Feb. 4, 2008) (injunction entered by consent); *John Francis D'Acquisto*, Advisers Act Release No. 1696, 1998 WL 34300389, at *2 (Jan. 21, 1998) (injunction entered by summary judgment); *James E. Franklin*, Exchange Act Release No. 56649, 2007 WL 2974200, at *4 (Oct. 12, 2007) (injunction entered after trial); *Demitrios Julius Shiva*, Exchange Act Release No. 38389, 1997 WL 112328, at *2 & nn.6-7 (Mar. 12, 1997). As the Commission has held, a respondent "is collaterally estopped from challenging in this administrative proceeding the decisions of the district court in the injunctive proceeding. 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 appropriate forum for [Respondent's] challenge to the validity of the injunction and the district court's evidentiary rulings is through an appeal to the United States Court of Appeals." *James E. Franklin,* 2007 WL 2974200 at *4.

Lemelson should not be permitted to revisit the necessary elements underlying the jury's verdict and the court's imposition of the injunction. In particular, Lemelson's sixteen affirmative defenses all seek to re-litigate or invalidate that verdict. Not one applies to the requisites here: that he was associated with an investment adviser at the time of the charged conduct; that he was enjoined by the district court from future violations of Exchange Act Section 10(b) and Rule 10b-5; and that it is, under the *Steadman* factors, in the public interest to impose the full associational bar set forth in Advisers Act Rule 203(f). This is not the forum for Lemelson to try to undo the jury's verdict.

III. CONCLUSION

The Division respectfully submits that summary disposition is appropriate, that the proceeding should be resolved in favor of the Division and against Lemelson, and that the Commission should issue an Order barring Lemelson from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or national recognized statistical rating organization based on the injunction against him.

Dated: June 30, 2022

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CERTIFICATE OF SERVICE

I, Marc J. Jones, hereby certify that on June 30, 2022, the foregoing was filed through the electronic filing system, and accordingly, the document will be sent electronically to all participants registered to receive electronic notice in this case.

/s/ Marc J. Jones
Marc J. Jones

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