UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

IN THE MATTER OF **GREGORY LEMELSON** **Respondent.**	)	ADMINISTRATIVE PROCEEDING FILE NO. 3-20828

RESPONDENT'S UPDATE TO TRIBUNAL REGARDING
FIRST CIRCUIT PROCEEDING

Counsel for Respondent Fr. Emmanuel Lemelson (identified in the Order Instituting Administrative Proceedings as "Gregory Lemelson"), submits the following update regarding the First Circuit proceeding challenging the findings of liability and injunction upon which this proceeding is premised.

On October 14, 2022, Respondent submitted his reply brief in support of his appeal. A copy of the reply brief is attached hereto as Exhibit A. This completes the briefing process before the First Circuit. Respondent will update this Tribunal when oral argument is scheduled, which is estimated to be in December as this appeal is being heard on an expedited basis.

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Respectfully Submitted,

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Dated: October 17, 2022

CERTIFICATE OF SERVICE

In accordance with Rules of Practice 150 and 151, 17 C.F.R. §§ 201.150 & 201.151, I certify that a copy of the foregoing document was served on the following on October 17, 2022, via email at the email addresses indicated below:

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EXHIBIT A

No. 22-1630

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

US SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

GREGORY LEMELSON, a/k/a Father Emmanuel Lemelson;
LEMELSON CAPITAL MANAGEMENT, LLC,

Defendants-Appellants,

THE AMVONA FUND, LP,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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October 14, 2022

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INTRODUCTION

To read the SEC's brief, one would think the only comments Father Lemelson ever made about Ligand were the Viking and Benzinga statements, this case was only about those statements, all the materiality evidence at trial related to those statements, and the SEC won entirely. Its brief remarkably *never* acknowledges that the jury *exonerated* Father Lemelson on the SEC's headline claims: that he had engaged in a "short-and-distort" scheme to drive down Ligand's stock price, violated Rule 10b-5 by repeatedly characterizing Ligand as insolvent, and violated the Investment Advisors Act. Equally remarkably, the SEC's brief *never* mentions the rest of Father Lemelson's critical commentary about Ligand—his numerous statements across 56 pages of analyst reports and more in media interviews that the SEC never alleged were fraudulent. This history that the SEC glosses over matters tremendously. The SEC's brief keeps referring to Father Lemelson's "campaign" to drive down Ligand's stock price, but that was the "scheme" theory that the jury *rejected*. There was no evidence the Viking and Benzinga statements would have mattered to investors—no evidence investors thought them important in light of the "total mix" of available information or that they impacted stock prices. Instead, the evidence was that investors only possibly considered the insolvency statements for Father Lemelson was exonerated, and other statements the SEC never alleged to be fraudulent, as important.

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For the reasons given in Father Lemelson's opening brief, the evidence at trial did not support the jury's finding of liability with respect to the three statements. And on these facts no injunction should have entered under 15 U.S.C. § 78u.

The SEC's brief does not offer any meritorious argument in response. The SEC instead takes enormous liberties with the record, repeatedly mischaracterizing witness testimony and the documents, just as it did before the jury. For example, the SEC's single materiality witness *did not even remember* the Viking statements, a fact the SEC's brief flagrantly mischaracterizes by saying he considered them important. The SEC claims Father Lemelson specifically credited the three alleged misstatements (not the rest of his commentary) with driving down Ligand's stock price, an assertion with no record support. Relatedly, the SEC tries to attribute investor concerns over Father Lemelson's insolvency and other uncharged statements—again, dozens of pages of commentary the SEC's brief completely fails to acknowledge—to the three alleged misstatements specifically, which is remarkably misleading. Rule 50 exists for situations like this one, in which careful scrutiny of the record demonstrates that the jury went astray.

The SEC's brief is replete with legal error too. It asks the Court to consider the materiality of the three alleged misstatements in isolation, an approach directly contrary to *Basic*'s "total mix" of information standard. The SEC never tried to meet the "total mix" standard below and never actually addresses the total mix of

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information on appeal either. For example, it argues that the disclosures in Viking's Form S-1 should be ignored and fails to acknowledge admissions by Viking's CEO that investors would have had enough background knowledge to avoid being misled by the Viking statements. The SEC argues that SEC filings only matter to materiality in cases of omission, not affirmative misstatements, but that is not the law. And the SEC urges the Court to cabin the protections the First Amendment provides for speakers who disclose their underlying assumptions and sources to defamation cases. The district court rejected the SEC's legal argument (though it ultimately misapplied the law) and this Court should too.

Finally, even if the liability verdict stands, the career-destroying injunction under 15 U.S.C. § 78u should be vacated. Such injunctions are not supposed to be automatic and this is an especially weak case for one. The evidence of materiality and scienter in this case was (at most) incredibly thin. Father Lemelson pointed investors to the publicly-available Form S-1 containing the correct information for the Viking statements, and the Benzinga statement concerned a "he said/he said" dispute about a telephone call. The events in question occurred eight years ago, the SEC has identified no other violations, and the SEC never tried getting an injunction before now. Under these circumstances the injunction was an abuse of discretion.

For these reasons, the Court should either direct the district court to enter judgment for Father Lemelson or order a new trial, or at least vacate the injunction.

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ARGUMENT

I. The SEC's Brief Repeats The Mischaracterizations Of The Record The SEC Advanced Before The Jury

While "jury findings" are entitled to considerable deference, that deference is not "blinded abdication." *Senmed, Inc. v. Richard-Allan Med. Indus., Inc.*, 888 F.2d 815, 818 & n.6 (Fed. Cir. 1989); *cf. Porter v. Coyne-Fague*, 35 F.4th 68, 75 (1st Cir. 2022) (in the context of review of state court factual determinations, observing that "deference does not imply abandonment or abdication of judicial review"); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("Deference does not by definition preclude relief."). Juries cannot decide cases for the party bearing the burden of proof based on a "mere scintilla of evidence" or "conjecture or speculation." *Achille Bayart & Cie v. Crowe*, 238 F.3d 44, 46 (1st Cir. 2001). And Rule 50 exists for a reason. In some cases, sober reflection shows the trial evidence did not exist to support the verdict—"juries make mistakes." *United States v. Morrison*, 220 F. App'x 389, 397 (6th Cir. 2007). When that happens, it is the court's duty to overturn the verdict, so that lives are not upended based on a jury's misperception of the facts or misunderstanding of the law.

Consistent with the appellate standard of review, Father Lemelson's opening brief relied on undisputed evidence to explain how the jury went astray. This included documentary evidence, much of it introduced by the Commission or from Ligand, including Ligand's and Viking's SEC filings; emails among Ligand

employees and between Ligand employees and investors; Father Lemelson's reports and the reports of other analysts; and the transcript of the Benzinga interview. He relied upon the testimony of the *SEC's own witnesses*, including Ligand's CEO, Mr. Higgins; Ligand's President, Mr. Foehr; Viking's CEO, Dr. Lian; Ligand's outside investor relations representative, Mr. Voss; and Ligand investor Mr. Fields. And he relied upon the *absence* of evidence: the failure of any witness to testify that the three alleged misstatements would be important to them given the "total mix" of information available to investors, and the absence of any other evidence of materiality such as a demonstrated stock price impact.

The SEC's brief emphasizes the jury's verdict against Father Lemelson with respect to the three statements while wholly ignoring the claims as to which it lost, in a manner that is incredibly misleading. Again and again (*e.g.*, at 8-9, 18, 27, 33), the SEC describes the three alleged misstatements as constituting a "campaign" by Father Lemelson to "sink" Ligand's stock price. This supposed "campaign," however, is the very same "short-and-distort scheme" the SEC pressed below, as to which the jury *specifically exonerated* Father Lemelson. The SEC equated the "scheme" and the "campaign" throughout the case below, starting with its opening statement: "We'll show you by a preponderance of the evidence that the defendant engaged in a scheme, a dishonest campaign, to drive down the price of Ligand stock." JA2035; *see also* JA2016 (referring to "defendant's scheme, this dishonest

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campaign to drive down Ligand's stock.") And in closing the SEC asked the jury to answer the "scheme" question yes by finding a "fraudulent scheme … with the intent to drive the price of the stock down." JA3162. The jury, of course, answered "no." Reading the verdict form as a whole, the jury found Father Lemelson did not make the three statements as part of some intentional "scheme" or "campaign," and so must have found they constituted isolated errors. It is grossly misleading for the SEC to pretend otherwise on appeal in arguing materiality and scienter.

The SEC also never addresses or tries to justify the misleading arguments it made to the jury to secure a verdict with respect to the three alleged misstatements. For example, the SEC never introduced evidence tying the three statements *specifically* to any stock price decline, but instead misleadingly focused the jury on evidence of stock price declines over a period of months in 2014. Lemelson Br. 39. During that period Ligand's stock price would have been impacted by numerous factors, including Father Lemelson's many other comments about Ligand in his five reports and media interviews—including most notably the insolvency comments as to which the jury *exonerated* him—and also negative comments from other Ligand analysts and from Janet Yellen, all of which go completely unmentioned in the SEC's brief. The SEC's brief never acknowledges or tries to defend its misleading argument below. Instead, the SEC now cites the Second Circuit for the proposition that "whether a public company's stock price moves up or down or stays the same

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… does not establish the materiality of the statements made." SEC Br. 20 (*quoting United States v. Bilzerian*, 926 F.2d 1285, 1298 (2d Cir. 1991)). That certainly is not what the SEC wanted the jury to think, when it repeatedly told jurors during closing argument to focus on a $500 million decline in Ligand's market capitalization, and to speculate that the handful of alleged misstatements caused it all. Lemelson Br. 20-21.

Father Lemelson's opening brief also noted the SEC's repeated argument to the jury during closing that investors would never read Viking's publicly-available Form S-1—"Nobody's going to go read it"—which is contrary to the materiality precedent of this and every other court. Lemelson Br. 37-38. The impact on jurors of *the SEC* telling them investors do not read *SEC filings* is manifest. The SEC never addresses this in its brief, but instead tries to wave the entire issue away by arguing SEC filings only are relevant to materiality in cases involving omissions by issuers. That is not the law and the SEC cites no case in support. *See infra*, pp. 14-16.

In several instances, the SEC tries to hoodwink this Court using the same mischaracterizations of the record that worked for it below. Perhaps the worst example is this: "Lemelson took credit for his *misstatements* driving down Ligand's stock price." SEC Br. 32 (emphasis added). For reasons previously given (Lemelson Br. 21), that is flatly untrue. While Father Lemelson stated that his commentary *generally* impacted Ligand's stock price, he published five reports

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totaling 56 pages harshly criticizing Ligand, including repeatedly calling the company insolvent. Lemelson Br. 9-11, 15. Again, the SEC *never* alleged that the vast majority of that commentary about Ligand was fraudulent, and the jury *rejected* the SEC's fraud claim with respect to the many insolvency comments. In contrast to all that the three alleged misstatements were entirely trivial. Put simply, it does not matter if Father "Lemelson repeatedly took credit" for a decline in Ligand's stock price, if investors were reacting to statements that were *not* found to be misleading—such as the insolvency statements. The SEC's mischaracterization of the evidence on this point is egregious.

As another example: The SEC claims it presented evidence from "one Ligand investor testifying that the implications of Lemelson's misstatements"—*plural*—"would have been important to him as an investor." SEC Br. 9. That too is false. Mr. Fields testified *only* concerning the Benzinga statement, *not* the Viking statements. In fact, as Father Lemelson's opening brief observed (and the SEC's brief never acknowledges), Mr. Fields *did not even remember* the two Viking statements, testifying instead about a different Viking statement that the SEC did not claim was fraudulent. Lemelson Br. 21-22. This is a crucial point, because the SEC had *no* witness (expert or lay) to testify that the Viking statements would have been important to investors. Yet rather than address Mr. Fields's actual testimony, the SEC mischaracterizes it.

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Relatedly, the SEC repeatedly contends that Father "Lemelson's public campaign against Ligand, *bolstered by his three material misstatements*, mattered to Ligand and its investors," and that "multiple witnesses testified that they received inquiries from worried Ligand investors." SEC Br. 8-9, 17. But the great majority of the SEC's record citations on this point do not mention the three alleged misstatements at all. Instead, investors focused on different statements that either the SEC did not allege, or the jury did not find (*i.e.,* the insolvency statements), to be fraudulent. Lemelson Br. 20-21. The record is clear: not a single investor *ever* mentioned the Viking statements to *anyone*. With respect to the Benzinga statement, this is the entirety of the SEC's evidence of investor reactions: One investor emailed to say he did not believe it, and Mr. Fields testified at trial he did not believe it. Lemelson Br. 22. That is evidence investors were *not* "worried" about the statement given the "total mix" of available information. The impropriety of the SEC's misleading reliance on investor concerns about Father Lemelson's commentary *other than* the three alleged misstatements cannot be overstated. Father Lemelson obviously cannot be punished because investors considered his *non-actionable* statements to be material. Yet that is how the SEC misleadingly backfilled its materiality case below and is trying again on appeal.

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II. The SEC's Materiality Arguments Are Meritless

A. The SEC's Brief Never Addresses The "Total Mix" Standard

The SEC's brief never actually explains how a reasonable jury could have found the three alleged misstatements to be material under the "total mix" of information standard. Indeed, the SEC's brief mentions the "total mix" standard only twice in passing (at 17, 27), and never actually applies it. That is no surprise, because the SEC had no expert or lay witness to testify that the three statements would have been important to investors' decisionmaking *given other available information*. All the SEC had was speculative attorney argument about how investors might have interpreted the three statements in isolation. The SEC's materiality case thus contained all the methodological and evidentiary faults that caused the Ninth Circuit to overturn a jury verdict in *United States v. Bingham*, 992 F.2d 975, 976 (9th Cir. 1993). *See* Lemelson Br. 46.

The SEC's brief asks this Court too to improperly focus on Father Lemelson's statements in total isolation. There is no other way to read the SEC's affirmative materiality argument at pages 17-19 of its brief, which consists entirely of speculative attorney argument about how a reasonable investor might have found the three alleged misstatements important *without once* mentioning other information available to investors about Viking's audit status, Viking's clinical study and testing plans, or Promacta's future.

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The materiality of statements *in insolation* is not the correct legal standard. Under the "total mix" standard, even an alleged misstatement about a company's core product is immaterial "if there is [not] a *substantial likelihood* that a reasonable shareholder would consider it important to the investment decision," taking into account the "total mix" of information available to investors. *Milton v. Van Dorn Co.*, 961 F.2d 965, 969 (1st Cir. 1992) (quotation marks omitted). Materiality cannot be established through "isolation of [a challenged] statement from its context and from the wealth of other information publicly available when it was made." *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 615 (4th Cir. 1999) (affirming dismissal of complaint based on lack of materiality under the "total mix" standard). This Court and others therefore have held that alleged misstatements concerning, as here, a pharmaceutical company's key product were not material as a matter of law, in light of other information available to investors. *E.g.*, *Thant v. Karyopharm Therapeutics Inc.*, 43 F.4th 214, 222-25 (1st Cir. 2022) (affirming grant of motion to dismiss on materiality grounds, where alleged omission of adverse events had already been disclosed in previously-filed 10-Ks); *In re Nektar Therapeutics Sec. Litig.*, 34 F.4th 828, 832, 838 (9th Cir. 2022) (finding no materiality on a motion to dismiss, where alleged misstatements concerned company's "flagship drug candidate").

For the Viking statements, application of the "total mix" standard would require consideration of, at a minimum, the disclosures found in Viking's Form S-

1, Dr. Lian's admission that "no one would ever think" that a pharmaceutical company would not have clinical studies and trials conducted, and Dr. Lian's admission that "[e]verybody understands an S-1 has audited financials." Lemelson Br. 13-15. That is all direct evidence of the "total mix" of relevant information available to investors. Yet the SEC's brief nowhere acknowledges Dr. Lian's two admissions, much less address them under the "total mix" standard. The SEC's only materiality argument (at 26) about the Form S-1 is that it does not mandate judgment for Father Lemelson; the SEC never actually addresses how the Form S-1 otherwise impacts the "total mix" of information. In fact, the Form S-1 is absolutely fatal to the SEC's materiality case. Lemelson Br. 36-37; *infra*, pp. 14-17.

For the Benzinga statement, application of the "total mix" standard would need to address, at a minimum, Ligand's own optimistic disclosures concerning Promacta's prospects (quoted extensively in the SEC's own brief at 4, but then subsequently ignored), as well as Ligand's own risk disclosures; the rest of Father Lemelson's critical commentary in his five reports concerning Promacta; and comments from other analysts—positive and negative—concerning Ligand and Promacta. Lemelson Br. 9-11. Yet this is the entirety of the SEC's argument with respect to all that other information: despite evidence "that investors were aware that Promacta faced risks from competition," the jury "concluded that … the Promacta misstatement was nonetheless material." SEC Br. 25. That is not an argument from

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the evidence under the "total mix" standard, it is an improper appeal for "blinded abdication," *Senmed*, 888 F.2d at 818 n.6, which further ignores that "[n]o shortage of cases … make clear that materiality may be resolved by a court as a matter of law." *Greenhouse v. MCG Cap. Corp.*, 392 F.3d 650, 657 (4th Cir. 2004). The SEC's paper-thin materiality argument is unsurprising, however, because no expert or lay witness testified that the Benzinga statement would be important to investors' decisionmaking in light of other available information about Promacta. Mr. Fields only testified that he would have considered it important if he believed it, but he did not believe it. That is evidence of *immateriality* under the "total mix" standard. Lemelson Br. 22.

Rather than confront its own evidentiary failings, the SEC disparages Father Lemelson's materiality argument as imposing a "reliance" requirement. *E.g.*, SEC Br. 20, 27. Not so. While actual reliance is not required, the "total mix" standard still requires consideration of a statement's likely impact on hypothetical investors—information only is material "'if there is a *substantial likelihood* that a reasonable shareholder would consider it important' to the investment decision," taking into account the "total mix" of information available. *Milton*, 961 F.2d at 969 (quotation marks omitted). The problem for the SEC is that it never attempted to show with *evidence* a "substantial likelihood" that the three alleged misstatements would have

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been important to reasonable investors' decisionmaking given what else investors knew about Ligand, Promacta, and Viking.

At bottom, the SEC's focus on the challenged statements about Viking and Promacta in isolation departs dramatically from the "total mix" standard the Supreme Court adopted in *Basic*. Even then, the SEC is relying on attorney speculation about how investors might think in lieu of any actual evidence, expert or otherwise. But this Court's precedents demonstrate that *evidence* is required. *See* Lemelson Br. 36 (discussing cases). If the jury engaged in the sort of myopic, speculative reasoning the SEC asks this Court to accept, that would explain its mistaken verdict. The Court should reaffirm the "total mix" standard and hold that the SEC failed to meet it burden of proof on materiality.

B. The Viking Form S-1 Forecloses Any Finding Of Materiality For The Viking Statements

The SEC's brief acknowledges that an investor looking at Viking's Form S-1 quickly would have learned that Viking would be having third parties conduct preclinical studies and trials for it, and that its financials were at least partially audited, because the Form S-1 "expressly and repeatedly" stated such. SEC Br. 7-8. Under the precedent of every court applying the "total mix" of information standard, the ready availability of the ostensibly correct information to the public, such as in an SEC filing, is fatal to materiality. Lemelson Br. 35-38.

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The SEC tries (at 26) to distinguish that principle as applying only to an "issuer's duty to affirmatively disclose information to the investing public"—to an issuer's omissions—and not to affirmative misstatements. That is not the law. As the Seventh and Fourth Circuits have stated, "*even lies* are not actionable" when an investor "possesses information sufficient to call the [mis]representation into question." *Teamsters Loc. 282 Pension Tr. Fund v. Angelos,* 762 F.2d 522, 529-30 (7th Cir. 1985) (emphasis added); *Phillips*, 190 F.3d at 617 (same). Under the "total mix" standard for determining materiality, "[t]he investor cannot ask a court to focus on the lie and ignore the remaining pieces of information already available to him[.]" *Teamsters Loc. 282*, 762 F.2d at 530. The SEC is, at a minimum, asking the Court to create a circuit split with the Fourth and Seventh Circuits.

In addition, certain of the cases—including from this Court—discussed in Father Lemelson's opening brief with respect to this point concern affirmative misleading statements. *E.g., Thant*, 43 F.4th at 225 (holding that, in light of the total mix of information, "it is difficult to imagine that any investor would read the defendants' statements that Karyopharm had a 'predictable,' 'manageable,' and 'consistent' tolerability profile to indicate that selinexor was benign"); *Greenhouse*, 392 F.3d at 653, 658 (stating that "[t]his suit arises from a CEO's lie about finishing college," and holding the statement to be immaterial as a matter of law based on

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"information found in MCG's publicly filed statements and elsewhere"). The SEC's argument fails to address or distinguish these cases.

The SEC does not cite a single case from any court limiting this principle only to issuers' omissions. It cites *SEC v. Johnston*, 986 F.3d 63, 73 (1st Cir. 2021), but proffers no explanation of *Johnston's* relevance. It has none. In *Johnston* a company executive allegedly misrepresented discussions with the FDA, and his defense was that the company's broad disclosure of FDA-related risks insulated his specific misstatements of fact. *Id*. at 73. Under this Court's precedents, such boilerplate risk disclosures do not grant such immunity. *Id*. *Johnston* says nothing about a situation in which specific information is "expressly and repeatedly stated" in an SEC filing, as here.

In any event, the SEC's allegations with respect to the Viking statements ultimately concern alleged omissions. Viking's Form S-1 stated that Viking itself would not be performing clinical studies and trials, and even identified that as a bolded risk factor; Father Lemelson's statement to that effect was therefore literally true. Lemelson Br. 42. The SEC's theory has been that even if Viking *itself* was not performing them, Father Lemelson's statement was misleading because it omitted that Viking was hiring third parties to perform them. SEC Br. 8. And with respect to the Viking audit statement, the SEC has never argued that the section of the Viking Form S-1 Father Lemelson block quoted and specifically characterized in his report

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disclosed the existence of an audit; the SEC's theory was that Father Lemelson misled investors by omitting mention of the partial audit disclosed later in the Viking Form S-1. SEC Br. 7. For this reason too the SEC's argument lacks merit.

Relatedly, in arguing scienter, the SEC suggests (at 34) the Form S-1 does not matter because investors could have relied on Father Lemelson to accurately report the document's content. That too flies in the face of precedent. "[A] 'reasonable investor' is [not] an ostrich, hiding her head in the sand from relevant information," *Greenhouse*, 392 F.3d at 656, and reasonable investors take a short seller's statements "with a healthy grain of salt," *Nektar Therapeutics*, 34 F.4th at 840. Reasonable investors do not trade based on a short seller's description of an SEC filing they can read themselves.

For these reasons, the SEC cannot avoid the fatal implications of the Viking Form S-1 for its claim with respect to the two Viking statements.

C. The SEC's Argument That The Three Statements Are "So Obviously Important To An Investor" That Materiality Should Be Irrebuttable Is Frivolous

Lacking any *evidence* of materiality, the SEC argues that the three alleged misstatements were "so obviously important to an investor … that reasonable minds cannot differ on the question of materiality." SEC Br. 18 (*quoting TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976)). The suggestion that the jury was *required* to find the three statements material without any supporting evidence

beggars belief, especially given that the evidence actually demonstrates their *immateriality*. The SEC argues (at 25) that evidence undermining a finding of materiality must be disregarded on appeal. But that is not correct. Again, "[n]o shortage of cases … make clear that materiality may be resolved by a court as a matter of law." *Greenhouse*, 392 F.3d at 657. And courts have identified the types of evidence on which Father Lemelson relies as supporting a judgment for the defendant as a matter of law.[1]

With respect to the two Viking statements, even putting aside the Form S-1 discussed above, the evidence of immateriality as a matter of law under the "total mix" standard includes:

- The contemporaneous reaction of investors and Viking employees, *none* of whom were concerned by the statements. Lemelson Br. 22;

[1] For a discussion of information in SEC filings and other public sources, *see supra*, pp. 14-17, and Lemelson Br. 35-37; *see also, e.g., Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) (Alito, J.) (in affirming dismissal, explaining that "the materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price of the firm's stock"); *Nektar Therapeutics*, 34 F.4th at 840 (in affirming dismissal of lawsuit involving statements by a short seller, observing that investors "would likely have taken their contents with a healthy grain of salt"); *cf. SEC v. Rorech*, 720 F. Supp. 2d 367, 412 (S.D.N.Y. 2010) (explaining, in decision following a bench trial, that "where there is a question of whether certain information is material, courts often look to the actions of those who were privy to the information in determining materiality," and finding information immaterial on that basis).

- The testimony of Viking's CEO that "no one" could have been misled about the studies and trials and that "[e]verybody understands" a Form S-1 contains audited financials. *Id*. at 13-15.
- Ligand's failure to mention the statements in its two lobbying pitches to the SEC. *Id*. at 18, 38.
- The lack of any evidence of impact on stock price. *Id*. at 39.
- Father Lemelson's disclosed status as a short seller. *Id*. at 39-40.

And with respect to the Benzinga statement, the evidence of immateriality as a matter of law includes the following:

- The admission by Ligand's CEO, Mr. Higgins, that Mr. Voss gave Father Lemelson the impression of "tacit agreement." As explained in Father Lemelson's opening brief (at 41), the SEC's materiality case thus turns on the strained assumption that reasonable investors would consider it "important to the investment decision" whether Mr. Voss made the Promacta statement affirmatively or instead tacitly agreed with it, and the SEC has no *evidence* investors would. The SEC's brief offers no rebuttal.
- Evidence that the only investors who were aware of the Benzinga statement did not believe it. Lemelson Br. 46-47.
- The fact that Ligand did not mention the Benzinga statement in its first lobbying pitch to the SEC. *Id*. at 18, 47.

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- The lack of any evidence of impact on stock price. *Id*. at 44.
- Father Lemelson's disclosed status as a short seller. *Id*. at 47.

Given all this recognized evidence of immateriality, the SEC's assertion that the materiality of the three alleged misstatements is so "obvious" that materiality must be conclusively presumed is frivolous.

The SEC also sometimes suggests (*e.g.*, at 18) that the alleged misstatements must have been material otherwise Father Lemelson would not have made them. This argument is meritless for at least three reasons. First, it would collapse the materiality element into the question whether the defendant made the statement—if a statement was made, then QED it was material. That is not the law. *See City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Waters Corp*., 632 F.3d 751, 757 (1st Cir. 2011) ("A plaintiff must provide evidence showing *not only* that a statement or omission was false or misleading, but also that it was made in reference to a matter of material interest to investors.") (cleaned up; emphasis added). Second, it is inconsistent with the "total mix" standard, under which a statement's materiality cannot be determined in isolation. And third, it ignores that the jury found Father Lemelson not liable on the SEC's scheme theory (again, history the SEC never mentions), and so might have found Father Lemelson liable under Rule 10b-5 for only reckless, not intentional misstatements. The jury's verdict therefore says

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nothing about whether Father Lemelson believed his statements were material when he made them.

III. The Viking Statements Are Unactionable Protected Opinions

The SEC does not dispute that Father Lemelson's two Viking statements were comments on Viking's publicly-available Form S-1; that Father Lemelson identified the Form S-1 for readers; and that Father Lemelson never claimed to have non-public information about Viking. Nor does the SEC dispute that under this Court's precedents, such as *McKee v. Cosby*, 874 F.3d 54 (1st Cir. 2017), and *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724 (1st Cir. 1992), the First Amendment protects speakers for their conclusions when they disclose their underlying assumptions or sources. This is true even if an assertion is "provable as true or false," so long as the speaker gives "full disclosure of the facts underlying his judgment." *Phantom Touring*, 953 F.2d at 729-31.

Father Lemelson's opening brief (at 29-32) recounted how the district court agreed this body of constitutional law applies to Rule 10b-5 cases, but then misapplied it, incorrectly reasoning that because the Viking statements were disprovable they were not opinions. The SEC (at 41-43) extensively quotes the district court's decision below, but offers no actual argument in support of the district court's reasoning. The SEC does argue (at 40) that this First Amendment protection extends only to defamation cases, but the district court rejected the SEC's argument

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when it instructed the jury that the First Amendment defense applied, JA3200-3202, and this Court should do the same. The First Amendment protects opinions about publicly-traded firms as much as any other kind of opinion. *E.g.*, *Lowe v. SEC*, 472 U.S. 181, 210 n.58 (1985). There is no reason why a stock analyst who "outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions," *McKee*, 874 F.3d at 61, should be denied the First Amendment protections accorded to, *e.g.*, a celebrity gossip columnist.

The Viking statements also are separately unactionable as opinions within the meaning of the securities laws, which apply only to statements of fact. *See* Lemelson Br. 32-34. Again, Father Lemelson was expressly commenting on the disclosures in Viking's publicly-available Form S-1, not purporting to disclose any personal knowledge concerning Viking. This is most clearly seen with respect to the audit statement, where Father Lemelson block quoted the language he was relying on, paraphrased it, and then based his ultimate conclusion on the block-quoted language ("Accordingly …"). *Id*. at 14, 33. The SEC's arguments to the contrary make no sense and would leave all stock analysts open to lawsuits over their comments on a company's public disclosures, with obvious chilling effects.

IV. The SEC Failed To Prove Scienter

As explained in Father Lemelson's opening brief, the evidence in this case did not support an inference of scienter with respect to any of the three alleged misstatements. The evidence of materiality is extraordinarily weak and under this Court's precedents weighs against scienter as a matter of law. Lemelson Br. 41 (discussing cases). Father Lemelson put his name to everything he published and pointed readers to the Viking Form S-1 that would have immediately revealed his supposed fraud, an odd tactic for a purported fraudster. *Id*. at 40-41. The clinical trials and studies statement was literally true and Viking's CEO agreed that "no one" would ever accept the SEC's misleading spin on it. *Id*. at 13-14, 42. The Benzinga statement was a "he said/he said" issue about what was said during a phone call, where Father Lemelson could not check his memory against a transcript or recording, Ligand's CEO admitted Mr. Voss provided the impression of "tacit agreement," and Father Lemelson's contemporaneous notes support his version of the call.

The SEC relies (at 33) on "Lemelson's public campaign against Ligand … to drive down Ligand's stock price" as supporting an inference of scienter. As explained above, that ignores that the jury expressly *rejected* the SEC's claim that Father Lemelson had engaged in a "short-and-distort" scheme (or "campaign) to defraud. *See supra*, pp. 5-6. Again, the SEC's brief fails ever to acknowledge that

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history, and it is extraordinarily misleading for it to make this scienter argument while burying the lead. The SEC also argues (at 35) that "none of the cases on which Lemelson relies" for the proposition that a weak materiality case undercuts scienter "overturn the denial of judgment as a matter of law." But as the SEC acknowledges, two of the cases involved *dismissals* at the pleadings stage, meaning the cases were not allowed to go to the jury *in the first place*.

With respect to the Viking statements, the SEC focuses (at 31-33, 37-38) on how obvious it was from the Viking Form S-1 that third parties would be conducting clinical trials and studies and that the financials were audited. *But that is precisely the point*; it is absurd to infer Father Lemelson acted with scienter to mislead investors on those points when his own report directed investors to the Viking Form S-1. The SEC's argument with respect to the audit statement never argues that Father Lemelson was mischaracterizing the portion of Viking's Form S-1 that he block quoted and interpreted, and ignores that the Form S-1 expressly refers *54 times* to unaudited numbers, including in numerous financial tables. *E.g.*, JA983-984 ("Our unaudited financial statements …").

The SEC's response with respect to the Promacta statement (at 29, 35-36) collapses scienter into the underlying violation: because the jury believed Mr. Voss about who said what during the phone call, the jury could have believed that Father Lemelson was acting with scienter in providing his version of events. That is not a

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response to Father Lemelson's points that any such inference is unreasonable: (a) "tacit agreement" easily could be misremembered as an affirmative statement, (b) Father Lemelson lacked a transcript or recording of the call against which to check his memory, and (c) the SEC presented no evidence that the difference between tacit agreement and an affirmative statement even matters. The SEC (at 33) emphasizes that after Mr. Voss denied to Father Lemelson having made the affirmative statement, Father Lemelson did not correct the record or publicly acknowledge the denial. But: (a) Ligand never issued a public denial either, (b) Ligand considered but decided against asking Father Lemelson to issue a correction, and (c) this punishes Father Lemelson for standing by his version of events. Lemelson Br. 47-48, 55-56.

V. The Injunction Should Be Vacated

Even if the jury verdict stands in full, but especially if it is vacated with respect to one or more of the alleged misstatements, then the injunction under 15 U.S.C. § 78u should be vacated. At best, the SEC showed three trivial misstatements that occurred in a short period eight years ago, with no evidence of violations before or since. Section 78u injunctions are not supposed to be automatic and this is an especially weak case for one. *See* Lemelson Br. 50-57.

The SEC's own articulation of the district court's reasoning (at 42-43) shows the errors: the SEC emphasizes the district court's finding that Father Lemelson "is

in a position to violate again"—a statement true of *anyone* working in the funds industry—and the SEC admits the district court held Father Lemelson's denial of liability against him. With respect to the supposed egregiousness of the Promacta statement, the SEC makes only two arguments (at 43): that the statement was material, and that Father Lemelson supposedly "fabricated an express statement by Voss out of Voss's silence." The SEC is wrong about materiality for all the reasons given elsewhere, and the SEC offers no explanation why allegedly characterizing "tacit agreement" as an affirmative statement—a single time, in response to a question during an online interview—is, within the universe of securities law violations, "especially egregious." It obviously is not.

The SEC argues (at 46-47) that Father Lemelson has waived his argument, based on *SEC v. Monarch Fund*, 608 F.2d 938, 943 (2d Cir. 1979), that an injunction is unwarranted given the SEC's failure to seek one for seven years after the alleged violations. That is wrong; as the SEC admits (at 46 n.17), Father Lemelson always emphasized that seven years have passed since his alleged violations, and he presented the *Monarch Fund* case in his motion to amend the judgment below without the SEC asserting waiver at the time. The SEC addresses the substance of *Monarch Fund* only in a footnote (at 47 n.18), and its argument ignores that the Second Circuit identified the SEC's languorous pacing as an *independent* basis for denying an injunction: "*[E]ven if* a violation of Section 10(b) and Rule 10b-5 had

been shown … we do not believe that an injunction was appropriate." *Monarch Fund*, 608 F.2d at 943 (emphasis added). For its part, the SEC's suggestion that the 2020 COVID pandemic is to blame for its waiting until 2021 to seek an injunction in response to violations that occurred in 2014, under a standard that requires a finding that defendant is "about to engage in a substantive violation," is absurd.

VI. Father Lemelson Is Entitled To A New Trial

Finally, the SEC argues that Father Lemelson waived any prayer for a new trial. Not so. His opening brief (at 28) recited the relevant standard of review—whether "the jury's verdict was against the great weight of the evidence"—and requested (at 57) a new trial. All the evidentiary arguments Father Lemelson makes as to why judgment should enter in his favor under Rule 50 are equally applicable to the "great weight of the evidence" standard.

CONCLUSION

The Court should vacate the judgment and order that judgment enter in favor of Father Lemelson, or else order a new trial. At a minimum, the Court should vacate the injunction.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned, Kevin P. Martin, counsel for Defendants-Appellants, hereby certifies pursuant to Fed. R. App. P. 32(a)(7)(C) that the Reply Brief of Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) as it contains: (i) 6,488 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and (ii) has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14.

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2022, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all parties and counsel of record are registered as ECF filers and that they will be served by the CM/ECF system.

/s/ Kevin P. Martin
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