

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

IN THE MATTER OF

GREGORY LEMELSON

Respondent.

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)
) ADMINISTRATIVE PROCEEDING
) FILE NO. 3-20828
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**RESPONDENT’S MOTION FOR STAY OF PROCEEDING PENDING THE OUTCOME
OF LAWSUIT**

Respondent Rev. Father Emmanuel Lemelson respectfully moves for a stay of this proceeding pending the outcome of a lawsuit he recently filed against the Commission in the United States District Court for the District of Columbia. A copy of the complaint in that lawsuit is attached as Appendix A.

PRELIMINARY MATTERS AND CONTEXT

Before filing this motion, undersigned counsel contacted counsel for the Division of Enforcement to determine whether the Division might either join the motion, consent to the requested stay, or at least not oppose it. Counsel responded that the Division does not agree to the stay “since the case is fully briefed and awaiting Commission decision, after which Lemelson can seek judicial review if he so chooses.”

The Division’s premise is both wrong and presumptuous. This proceeding is far from over. The only briefing that has occurred so far is on the Division's motion seeking, through summary disposition, to preemptively avoid further proceedings, including oral argument and the hearing on the merits explicitly required by both the Investment Advisers Act and the Administrative Procedure Act. *See* 15 U.S.C. § 80b-3(f); 5 U.S.C. §§ 554(b)(1), 554(c)(2), 556(d). While the Division may assume summary disposition is a foregone conclusion—based on its uncanny 100%

success rate with the Commission on such motions in prior follow-on proceedings like this one, according to academic research, *see* Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 963, 967 (2016), and at least one former Commission ALJ, *see In re Maher F. Kara*, SEC Initial Decision Rel. No. 979, 2016 WL 1019197, at *7 (Mar. 15, 2016)—surely the Commission as adjudicator cannot assume such inevitability.

At a minimum, we presume the Commission will at least schedule oral argument and/or an evidentiary hearing before ruling on the pending summary disposition motion, as Respondent has requested. Indeed, even if it denies a stay, given the stakes involved, we respectfully suggest that the Commission might consider inviting supplemental briefing to help it assess: (1) whether, in light of the Supreme Court's recent decision in *Loper-Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Dep't of Commerce*, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron* deference), the Commission's summary disposition rules are permissible interpretations of the Commission's powers under the Advisers Act and (2) whether, more fundamentally, in light of the Supreme Court's recent decision in *SEC v. Jarkesy*, 144 S. Ct. 2117, 2132 (2024), the Commission would act unconstitutionally if it punished Father Lemelson with an industry bar or suspension, thereby depriving him of his private liberty and property rights, outside of an Article III court and without a jury trial—whether through summary disposition or otherwise.

For these reasons and those that follow, we respectfully submit the Commission exercise prudence and humility by staying this proceeding until all these weighty issues (and more) can first be resolved in the venue demanded by the constitution: an Article III court of law.

ADDITIONAL REASONS FOR STAY

Father Lemelson's federal court lawsuit seeks declaratory and injunctive relief to prevent the Commission from adjudicating this "follow-on" administrative proceeding on several

constitutional and statutory grounds. Those grounds are set forth in detail in the complaint, and are summarized below:

1. *Openly hostile and biased adjudicator in violation of due process of law under the Fifth Amendment.* For nearly the past decade, the Commission has been a hostile adversary against Father Lemelson. The Commission publicly sued him in Massachusetts federal court for allegedly conducting a manipulative scheme to defraud not only the market but also his own investors, and then issued an incendiary press release that included false statements to maximize public media coverage of those charges, going so far as to issue another press release, following the trial, declaring victory—emblazoned with the false headline “SEC Wins Jury Trial Against Hedge Fund Adviser Who Ran Manipulative Short Scheme”—which omitted any reference to the highly material fact that the jury in fact *rejected* most of the Commission’s case, including all of its most incendiary charges. The Commission’s decade-old adversarial relationship against Father Lemelson obviously precludes it from now pretending to be an objective and neutral adjudicator of its own follow-on administrative proceeding against him, especially given that Father Lemelson’s adversary in this proceeding—the Division of Enforcement—has simultaneously been serving as the Commission’s fiduciary legal counsel in connection with the Massachusetts enforcement litigation against Father Lemelson.

2. *Usurpation of judicial power in violation of Article III.* The Commission is not a court of law, and its Commissioners are not independent judges with life tenure. The Commission therefore has no lawful power to decide cases or controversies, especially ones like this one, in which it cannot plausibly be fair and impartial.

3. *Deprivation of jury trial in violation of the Seventh Amendment.* This follow-on proceeding seeks to bar or suspend Father Lemelson from the securities industry, thereby depriving

him of his personal liberty and property rights. The Commission cannot lawfully do so without affording him a jury trial in which the factors relevant to a bar or suspension are decided by a jury of his peers. *Cf. SEC v. Jarkesy*, 144 S. Ct. 2117, 2132 (2024).

4. *Deprivation of hearing required by the Investment Advisers Act and the Administrative Procedure Act.* Both of these statutes prevent the Commission from adjudicating this follow-on proceeding without affording Father Lemelson a hearing to present evidence and to challenge the evidence proffered against him. *See* 15 U.S.C. § 80b-3(f); 5 U.S.C. §§ 554(b)(1), 554(c)(2), 556(d). But the bar or suspension sought by the Division of Enforcement in this case stems from events and transactions that occurred a decade ago. This follow-on proceeding has been pending before the Commission since April 2022 and was fully briefed—on the Division of Enforcement’s motion for summary disposition—more than two years ago, and the Commission has given no indication that it intends to conduct any hearing before deciding the matter.

5. *Res judicata.* The Commission had a full and fair opportunity to litigate its differences with Father Lemelson in the Massachusetts enforcement case. It could have sought an injunction in that case to prevent him from participating in the securities industry either permanently or temporarily, but it chose not to seek such relief. Well-settled principles of res judicata preclude the Commission from using a new adjudicative forum to seek relief it could have sought in the Massachusetts enforcement case.

Father Lemelson’s complaint against the Commission raises serious constitutional objections of national importance and public interest, with one recent article calling the case “Jarkesy 2.0.” *See, e.g.,* Jessica Corso, *'Jarkesy 2.0': SEC Sees New Attack On In-House Courts*, Law360, Aug. 26, 2024. The Commission should pause its follow-on proceeding against Father Lemelson to allow our Article III courts to decide whether this proceeding complies with the

constitution and the rule of law. *See, e.g., SEC v. Cochran*, 143 S. Ct. 890 (2023) (affirming propriety of federal court challenge to constitutionality of SEC administrative proceeding before entry of SEC final order, pending which SEC had stayed the proceeding). This proceeding is based on decade-old events and has been pending without Commission action for more than two years, so there is obviously no urgency or other reason why it cannot be formally stayed in the interests of justice. Absent a stay, Father Lemelson will seek appropriate preliminary injunctive relief in his federal court lawsuit, but burdening the Court with such an emergency request should not be necessary.

CONCLUSION

The Commission should stay this proceeding pending federal court resolution of his lawsuit challenging its constitutionality.

Respectfully submitted,

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