

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
OPPOSITION TO RESPONDENT'S MOTION FOR STAY OF PROCEEDING
PENDING THE OUTCOME OF LAWSUIT

Respondent Gregory Lemelson provides no good reason to stay this administrative proceeding. More than two years into this proceeding, Lemelson challenged it in federal district court and now asks the Commission to stay the proceeding pending resolution of his lawsuit. But Lemelson falls far short of making the strong showing of prejudice required to justify a stay. Because Lemelson can seek judicial review in a court of appeals from any final Commission decision adverse to him, staying the administrative proceeding now serves no legitimate purpose. Indeed, doing so now would only undermine the strong public interest in the prompt enforcement of the federal securities laws. The Commission thus should deny Lemelson's motion.

BACKGROUND

In September 2018, the Commission brought a civil enforcement action for securities fraud against Lemelson and his advisory firm. *See* Ex. C to Division of Enforcement's Motion for Summary Disposition (Amended Complaint). After a trial, a jury returned a verdict finding Lemelson liable for three false statements in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5. Ex. D

to Division of Enforcement’s Motion for Summary Disposition (Verdict Form) 1-2. The district court ordered Lemelson to pay a \$160,000 civil penalty and enjoined Lemelson from violating Section 10(b) and Rule 10b-5 for five years. Ex. E to Division of Enforcement’s Motion for Summary Disposition (Remedies Order) 9-10, 24.

The Commission then instituted this follow-on administrative proceeding to determine whether, in light of that injunction, any “remedial action is appropriate in the public interest against [Lemelson] pursuant to Section 203(f) of the Advisers Act.” Order Instituting Adminstrating Proceedings 2 (Apr. 20, 2022) (“OIP”). The Division of Enforcement (“Division”) filed a motion for summary disposition, arguing that the undisputed facts demonstrate that it is in the public interest to bar Lemelson from the securities industry. *See* Division of Enforcement’s Motion for Summary Disposition (June 30, 2022). Briefing on the Division’s summary disposition motion was complete as of August 12, 2022. Since then, the First Circuit affirmed the underlying liability findings and injunction (*SEC v. Lemelson*, 57 F.4th 17 (1st Cir. 2023)), and the Supreme Court denied Lemelson’s petition for certiorari (*Lemelson v. SEC*, No. 23-98 (U.S. cert. denied Dec. 11, 2023)).

On August 21, 2024, Lemelson sued the Commission in federal district court in the District of Columbia, seeking to enjoin the Commission from continuing this proceeding. *Lemelson v. SEC*, No. 24-cv-2415 (D.D.C.). In his complaint, Lemelson alleges that the proceeding violates his “Fifth Amendment right to due process of law,” “Article III of the [C]onstitution and the constitutional separation of powers,” and Lemelson’s “Fifth and Seventh Amendment Rights” to a jury trial. Ex. A to Respondent’s Motion for Stay of Proceeding (Complaint), ¶¶21- 31. Lemelson also alleges that the administrative proceeding is “barred by *res judicata*” and that resolving the administrative proceeding through summary disposition

would deprive Lemelson of a “hearing” that he claims is “required by the Advisers Act and the [Administrative Procedure Act].” *Id.* ¶¶ 32-39. Lemelson acknowledges that his due process and statutory hearing claims are “in tension with” controlling precedent. *Id.* ¶¶ 25 n.1, 39 n.2.

Nearly a month later, on September 20, 2024, Lemelson filed the instant motion requesting that the Commission “stay this proceeding pending federal court resolution of his lawsuit.” Respondent’s Motion for Stay of Proceeding at 5 (“Mot.”).

ARGUMENT

The Commission should deny Lemelson’s motion. The Commission generally construes a “request for a stay as one for postponement under Rule of Practice 161.” *Eric Christopher Cannon*, Exchange Act Release No. 99858, 2024 WL 1327397, at *2 (Mar. 27, 2024); *see also* Postponement Order at 1 (Aug. 17, 2022) (construing Lemelson’s previous stay request as a “request to postpone the proceeding under Rule of Practice 161(b)”). Postponements are “strongly disfavor[ed],” and a party seeking a postponement must show “good cause.” 17 C.F.R. § 201.161(a), (b)(1). In particular, the requesting party must “make[] a strong showing that the denial of the request ... would substantially prejudice their case.” *Id.* § 201.161(b)(1); *see also id.* (providing that the Commission shall consider, *inter alia*, “[t]he length of the proceeding to date” and “[t]he stage of the proceedings at the time of the request”). Lemelson has failed to make such a showing.

For one thing, staying this proceeding pending resolution of Lemelson’s district court action would only serve to delay a final Commission ruling that would provide the path to judicial review that Congress supplied by statute. The Commission instituted this administrative proceeding more than two years ago, and the Division’s motion for summary disposition is fully briefed. Moreover, the liability findings and injunction upon which this proceeding is premised have become final. *See supra* p. 2. The “strong public interest in the prompt enforcement of the

federal securities laws” thus supports resolution of this proceeding—not the delay that would result from a stay. *Anita Sgarro*, Exchange Act Release No. 97040, 2023 WL 2351154, at *2 (Mar. 3, 2023).

Nor has Lemelson “articulated any countervailing prejudice substantial enough to justify a stay of proceedings.” *Id.* Lemelson asserts that his constitutional and other challenges to this administrative proceeding should be resolved by “an Article III court.” Mot. 2; *see id.* at 4-5 (similar). But Congress provided the proper channel for review of adverse Commission decisions in Section 213(a) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-13(a). Lemelson does not explain why that avenue for raising his claims is inadequate, nor does he identify any prejudice that he would suffer if a court does not adjudicate his claims *before* the Commission resolves this administrative proceeding. And if the Commission were to decline to take any remedial action against Lemelson, Lemelson does not claim that he will have suffered any prejudice. Lemelson thus offers no sound basis for the Commission to stay this proceeding so that he can raise his challenges in a collateral district court action rather than through the statutory review scheme that Congress provided.

Finally, the Commission should reject Lemelson’s effort to further delay resolution of this proceeding through his alternative request for “supplemental briefing.” Mot. 2. Lemelson proposes supplemental briefing on (1) whether “the Commission’s summary disposition rules are permissible interpretations of the Commission’s powers under the Advisers Act” after the Supreme Court overruled the *Chevron* deference framework in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), and (2) whether, in light of the Supreme Court’s decision in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), the Commission “would act unconstitutionally” if it imposed an “industry bar or suspension ... outside of an Article III court and without a jury

trial.” Mot. 2. Lemelson does not explain why he waited nearly three months since the Supreme Court decided *Loper Bright* and *Jarkesy* to request supplemental briefing on the import of those decisions. Regardless, if the Commission determines that supplemental briefing on those issues is warranted, the Division stands ready to submit such briefing.

CONCLUSION

The Commission should deny Lemelson’s motion for a stay of this proceeding.

Dated: September 27, 2024

Respectfully submitted,

/s/ Alfred A. Day

Marc J. Jones

Alfred A. Day

Senior Trial Counsel

DIVISION OF ENFORCEMENT

Boston Regional Office

33 Arch Street

Boston, MA 02110

(617) 573-8900

daya@sec.gov

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that the foregoing document and its attachments were served on Respondent's counsel via electronic mail on September 27, 2024.

/s/ Alfred A. Day
Alfred A. Day