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 TO QUASH SUBPOENA TO PRODUCE DOCUMENTS

The Division of Enforcement ("Division") opposes Respondent's Motion to Quash Subpoena to Produce Documents. The Division's subpoena seeks documents relevant to the public interest factors it must prove at hearing. Because Respondent fails to identify sufficient grounds to quash all or any part of the subpoena, his Motion should be denied.

The Commission has ordered an evidentiary hearing ("Hearing") to assess whether barring Respondent from the securities industry is in the public interest. "In assessing the public interest element, the Commission considers 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 the conduct, and the likelihood that the respondent's occupation will present opportunities for future violations." *Lemelson*, IA Release No. 6755 (Oct. 24, 2024) (citing *Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)).

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The Division's subpoena requests documents concerning Respondent's professional investment adviser activities. The subpoena requests only documents created after the Division received documents from the Respondent in the underlying District Ct litigation, *SEC v. Lemelson, et al.,* 1:18-cv-11926-PBS (D. Mass.). The topics requested by the Division fit into five categories:

(1) Respondent's investment activities and performance of the funds managed by him, including any short selling and any reports written by Respondent about those short positions. (Requests 1, 13, 14, 16).

(2) The identity of investors and prospective investors in funds managed by Respondent since the conclusion of the District Court action and communications with those investors and prospective investors. (Requests 2, 3).

(3) Documents relating to statements to the public or prospective investors about the Respondent's investments, investment services, and the District Court action. (Requests 3, 12, 15-18).

(4) Documents concerning complaints received by Respondent about his provision of investment advisory services. (Request 4).

(5) Litigations or enforcement actions brought against Respondent, including documents related to a FINRA arbitration in which Respondent appears to have been cited for sending "threatening and harassing emails" to his adversary's employees. (Requests 5-11).

Respondent claims these requests are "entirely irrelevant to this proceeding." Respondent's Motion ("Mot.") at 3. But each of these categories seeks documents closely related to the subject of the upcoming Hearing and the *Steadman* factors. Details about the Respondent's current investment activities, including whether the Respondent is involved in any activities like those for which he was previously found liable (Topic 1), probe whether his prior fraudulent activity was isolated or recurrent and whether his current activities present the opportunity for future violations. Communications to clients and to the public (Topics 2 and 3) would demonstrate the isolated/recurrent factor, the opportunity for future violations, and whether Respondent has recognized the wrongful nature of his conduct. Identification of the

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Respondent's current clients would also identify potential Hearing witnesses. Complaints, litigations, and enforcement actions (Topics 4 and 5) would probe whether Respondent's wrongful conduct was recurrent and whether Respondent may have engaged in other violations or related conduct since the resolution of the District Court action. The Division's document requests hew to the heart of the issues to be resolved at the Hearing.

Respondent fails to support his claim that the Division's requests are improperly burdensome. Respondent's complaint is mainly that he had to produce documents (and sit for testimony) during the investigation and litigation of this matter, and now is being asked to produce more documents. But (a) this is a separate proceeding and (b) the Division seeks documents created *after* the period that Respondent last produced documents. The Division could not have requested these documents in the earlier proceedings. And the current proceeding covers issues that were not the subject of the District Court litigation.

Nor does Respondent make any specific claims about the burden to produce the requested documents. He provides no information about the potential volume of responsive documents or any difficulty in obtaining and producing them.[1] To sustain a claim of undue burden, the Respondent should offer some evidence of what that burden is. *See Thong v. Andre Chreky Salon*, 247 F.R.D. 193, 197 (D.D.C. 2008) ("This Court only entertains an unduly burdensome objection when the responding party demonstrates how the document request is 'overly broad, burdensome, or oppressive, by submitting affidavits or offering evidence which reveals the nature of the burden.'" (citing *U.S. ex rel. Fisher v. Network Software Assocs.*, 217 F.R.D. 240, 246 (D.D.C. 2003); *Athridge v. Aetna Cas. & Sur. Co.*, 184 F.R.D. 181, 191 (D.D.C. 1998))); *see*

[1] Respondent complains that the request for client communications since the District Court action would "sweep[] in all communications Fr. Emmanual has had with his wife, who had an investment in his fund." If Respondent's counsel had contacted Division counsel before he filed his motion, the Division would have negotiated a limit to the request to keep from seeking communications outside the client relationship. And the Division would do so now if Respondent's motion is denied.

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also Horizon Holdings, LLC v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002) (the party claiming undue burden in response to a discovery request bears the "burden to show facts justifying their objection by demonstrating that the time or expense involved in responding to the requested discovery is unduly burdensome"). Respondent fails to make this showing.

Besides his unavailing burden claim, Respondent makes several other undeveloped arguments. First, he asserts, vaguely, that to authorize the document subpoena would violate the Fourth and Fifth Amendments to the United States Constitution. Mot. at 4-5. The cases he cites however, concern administrative searches, not subpoenas. *See City of Los Angeles, Calif. v. Patel,* 576 U.S. 409, 420-21 (2015). And even if somehow these cases applied to subpoenas in administrative proceedings, the cited cases require only "precompliance review before a neutral decisionmaker." *Id.*; *see also Spirit AeroSystems, Inc. v. Paxton*, No. A-24-CV-472-DII, 2024 WL 4947290, at *1 (W.D. Tex. Nov. 1, 2024), *report and recommendation adopted,* No. 1:24-CV-472-DII, 2024 WL 5046345 (W.D. Tex. Dec. 9, 2024). Respondent's opportunity to file this motion before producing documents amounts to that precompliance review. Respondent's abstract 4th and 5th Amendment claim establishes no constitutional infirmity in the issuance of document subpoenas in Commission administrative proceedings.

Next, Respondent claims that the Division has been investigating him for "more than a decade." Not so. While the Division may have started investigating Respondent in 2015, it effectively stopped in 2020 with the last discovery request to Lemelson during the District Court litigation. The Division has had little visibility into Respondent's investment advising activities since then. Thus, the need for the subpoena and its requests for documents about Respondent's professional investment advising activities during that time.

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Respondent also makes arguments related to the administrative proceeding process and the speed of the adjudication here. Those complaints do not provide any concrete reason to quash the Division's subpoena.

Finally, Respondent claims that discovery should be delayed because of his pending federal district court action and his request there to enjoin this proceeding. But this argument is merely a plea for reconsideration of the Commission's denial of his request to stay this proceeding pending the outcome of his district court challenge. The Commission denied that request (*In the Matter of Lemelson*, IA Rel. No. 6755, Oct. 23, 2024 at 2), and Respondent adds nothing new to in his motion to quash to warrant reversing that denial by the Commission.

In the end, Respondent provides no reason to quash the subpoena. His Motion to Quash should be denied.

Dated: January 22, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marc J. Jones, hereby certify that on January 22, 2025, the above was filed through the electronic filing system, and accordingly, the document will be sent electronically to all participants registered to receive electronic notice.

/s/ Marc J. Jones
Marc J. Jones