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 APPLICATION TO CERTIFY SUBPOENA ORDER FOR INTERLOCUTORY REVIEW

The Division opposes Respondent's Application to Certify Subpoena Order for Interlocutory Review.

I. Failure to Identify Extraordinary Circumstances

"Petitions by parties for interlocutory review are disfavored, and the Commission ordinarily will grant a petition to review a hearing officer ruling prior to its consideration of an initial decision only in extraordinary circumstances." SEC Rule of Practice 400 [17 C.F.R. §201.400 ("Rule 400")]. Respondent nevertheless seeks interlocutory review of a routine discovery order limiting the Division's document subpoena from eighteen to four categories of documents—far from what can be considered an extraordinary circumstance.

Respondent does not make the required showings or meet the standards for interlocutory review. In fact, Respondent does not truly seek review of the Subpoena Order. Instead, he misuses Rule 400 to try to get the Commission to reconsider this entire action, which he demonstrates by the dearth of references to the Order's decision or text. Respondent's

OS Received 02/12/2025

Application is, in reality, a pretext for Commission reconsideration of this action, and should be denied on that basis.

II. Failure to Identify a Controlling Question of Law

Rule 400(c) states that a hearing officer "shall not certify a ruling unless" the hearing officer finds that "(i) The ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and (ii) An immediate review of the order may materially advance the completion of the proceeding." 17 C.F.R. §201.400(c). Respondent establishes none of these prerequisites to certification.

A controlling question of law exists where resolution of a question could result in dismissal, significantly alter the conduct of the action, or where the issue has precedential value for a large number of cases. *See SEC v. Rio Tinto PLC*, 2021 WL 1893165, *2 (S.D.N.Y. 2021). None of those conditions exist here, where the issue is merely the scope of a document subpoena.

Respondent first tries to find a controlling question of law by obliquely referring to principles of separation of powers, "related limits on executive agency powers, due process of law, and Respondent's jury trial rights and other individual constitutional civil liberties." (App., p. 1.) He also invokes the First, Fourth, and Fifth Amendments to the Constitution. Rather than explain how these principles relate to the Subpoena Order or present controlling questions of law, Respondent relies on "prior pleadings in this proceeding and … cross-motions now pending before the federal court…." (App., p. 1.) While Respondent invokes several legal principles here, he identifies no "controlling question of law" as required by Rule 400(c)(2)(i).

Next, Respondent suggests that inherent to the Order on the Motion to Quash, there is a potential contravention of Executive Orders 13891, 13892, and 13924. Again, Respondent fails to identify a controlling question of law, a difference of opinion on that question, or even explain how the Order supposedly violates those Executive Orders. Executive Order 13891 (84 FR

OS Received 02/12/2025

55235) concerns agency guidance documents and makes a policy that "agencies may impose legally binding requirements on the public only through regulations and on a case-by-case basis through adjudications …." Respondent fails to show the relevance of this Executive Order. Nor does he show how it conflicts with the Subpoena Order.

Respondent's appeal to Executive Order 13892 (84 FR 55239) meets the same fate. E.O. 13892 has 11 sections, but Respondent leaves the Division and this tribunal to guess which ones he thinks apply here. Of the two that deal specifically with administrative proceedings, neither appears to apply: Section 4 calls for applying standards of conduct in administrative proceedings that have been publicly stated and avoiding unfair surprise. Section 6 requires an opportunity to contest an agency decision. Neither of these have been violated here.

Executive Order 13924 calls for "fairness in administrative enforcement and adjudication" in light of "the economic consequences of COVID-19." (85 FR 31353, §1). Its Section 6 calls for fairness and due process in administrative proceedings. Once again, Respondent does not explain the controlling question of law here, and it is impossible to discern.

Respondent's Application then cites two more Executive Orders, "Restoring Freedom of Speech and Ending Federal Censorship" (E.O. 14149, 90 FR 14149) and "Ending Weaponization of the Federal Government" (E.O. 14147, 90 FR 8235). The former states that Federal agencies may not act to unconstitutionally abridge a citizen's right of free speech. Nothing about the Subpoena Order limiting the Division's document subpoena topics appears to touch on Respondent's free speech rights.[1] The "Weaponization" Executive Order requires the Attorney

[1] Respondent does claim that the District Court's follow-the-law injunction improperly restrains him from "utter[ing] a false word of criticism about any publicly traded corporation." App., p. 2 n.1. But (i) Respondent is merely enjoined from violating Section 10(b) of the Exchange Act, and (ii) to "utter a false word" against a corporation is not, in fact, protected speech where it is material and done with the intent to defraud (as the jury here found and as the statute prohibits).

General and the Director of National Intelligence to take certain specified actions in certain circumstances not present here. But it is unrelated to an administrative order on a subpoena.

In addition, each of the Executive Orders cited by Respondent explicitly state that they do not create any new legal claims by individuals against the government: "This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, entities, its officers, employees, or agents, or any other person." (E.O. 14147, §4(c); *see also* E.O. 13891, §7(c); E.O. 13892, § 11(c); E.O. 13924, §9(d); E.O. 14149, §4(c)). Simply put, the Executive Orders, by their own terms, do not create any substantive or procedural rights. In a similar vein, the Executive Orders explicitly permit adjudications like this proceeding, removing any conflict between the Order and the Executive Order. Indeed, the Executive Orders explicitly state that they do not "impair or otherwise affect … the authority granted by law to an executive department or agency." (E.O. 13891 §7(a)). Commission administrative proceedings are statutorily authorized, and the rules that govern them are regulations. So no controlling question of law is created by these Executive Orders.

Respondent next suggests that the hearing officer has no authority to issue the Division's subpoena as limited by the Order. But the subpoena is expressly authorized by SEC Rule of Practice 232, which has the force of law as 17 C.F.R. § 201.232. Nor does the scope of that subpoena involve any controlling question of law.

Finally, Respondent suggests that the controlling issue of law is what consequences would be imposed if he were to ignore this tribunal's subpoena. That self-created potential future circumstance (*i.e.*, Respondent's contempt of the Subpoena Order) does not qualify as a controlling question of law.

OS Received 02/12/2025

Respondent has identified no issue that constitutes a controlling issue of law. His Application must therefore be rejected.

III. Failure to Identify Any Substantial Ground for Difference of Opinion

Even if Respondent had identified a controlling question of law, he makes no effort to establish any substantial ground for difference of opinion. In fact, apart from citing the standard, the Application does not mention the "difference of opinion" requirement. It does not discuss conflicting precedent or authority. Nor is there any suggestion that "fair-minded jurists might reach contradictory conclusions" about a novel issue. *Cf. In re Trump*, 874 F.3d 948, 953 (6th Cir. 2017). Respondent's failure to address this requirement for certification also compels the denial of his Application.

IV. Failure to Identify Any Acceleration of the Completion of this Proceeding

Interlocutory review of the Subpoena Order would in no way accelerate the completion of this proceeding. The most that Respondent could gain from review of the Subpoena Order is the complete quashing of the Division's subpoena. No time would be gained in the completion of this administrative proceeding. Respondent's argument that "the Commissioners might belatedly realize the unlawfulness of this proceeding and/or exercise discretion to dismiss it for other reasons" reveals that this Application has little to no relation to the Subpoena Order. Instead, it is just a pretext, a request that the Commission review its previous authorization to institute an administrative proceeding upon the imposition of a district court injunction, based on Respondent having perpetrated securities fraud.

Respondent also urges this tribunal to ignore any concerns about the delay caused by his Application and any resulting interlocutory appeal because this proceeding has already taken a long time. But he ignores the plain language of Rule 400(c)(2)(ii), requiring for certification that "an immediate review of the order may materially advance the completion of the proceeding." If

OS Received 02/12/2025

anything, the application will *delay* resolution of this matter. And Respondent states that he will likely refuse to comply with the subpoena if interlocutory review is granted, and he does not prevail. (App. pp. 3-4.) Yet more delay, this time deliberately caused by the Respondent. Thus, Respondent has not met the "material advancement" requirement of Rule 400(c).

For these reasons, Respondent's Application should be denied.

Dated: February 12, 2025

Respectfully submitted,

/s/ Marc J. Jones
Marc J. Jones
Alfred A. Day
Senior Trial Counsel

DIVISION OF ENFORCEMENT
Boston Regional Office
33 Arch Street
Boston, MA 02110
(617) 573-8900
jonesmarc@sec.gov

CERTIFICATE OF SERVICE

I, Marc J. Jones, hereby certify that on February 12, 2025, the above was served via electronic mail pursuant to Rule 150(c) on the following counsel of record for Respondent:

Douglas S. Brooks
Libby Hoopes Brooks, P.C.
399 Boylston Street
Boston, MA 02116
Tel. (617) 338-9300
dbrooks@lhblaw.com

/s/ Marc J. Jones
Marc J. Jones