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 DISMISS

One month before the public hearing to determine if it is in the public interest to bar him from association with investment advisers, and six days before his pre-hearing materials are due, Respondent Lemelson wants to delay. He attempts to turn some unread inadvertently delivered emails and a now-dismissed attempt to get him to comply with an order of this tribunal into "irreparable taint [of the] appearance of Commission neutrality and impartiality." [Mot. p. 5.] And from that imagined taint, he concludes that this tribunal and the Commission can no longer make a determination of whether it is in the public interest to bar him. This tribunal should see Respondent's motion for what it is: an attempt to avoid the potential outcome of the public hearing and to retread old grievances about the case against him, the jury's verdict, the District Court-fashioned remedies, and this proceeding. His motion to dismiss should be denied.

I. Nothing About the Subpoena Enforcement Proceeding Warrants Dismissal

Respondent's first claim is that this proceeding should be dismissed because the Division brought a subpoena enforcement action in federal district court, allegedly without sufficient authorization from the Commission. That proceeding, however, has been dismissed. So,

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Respondent's arguments about what authority was necessary to bring that action and whether that authority was delegated to the Director of the Division of Enforcement are moot. At best, those arguments were relevant to whether the Division could maintain the federal court subpoena enforcement action. What remains of Respondent's argument is that, somehow, the Division has invalidated this administrative proceeding by bringing that action. He fails to give this tribunal any legal reason to dismiss this proceeding.

Respondent claims that a line in the Commission's Order Denying Respondent's Petition for Interlocutory Review and Motion to Stay, Investment Advisers Rel. No. 6869 (Apr. 1, 2025), shows that the Commission expected the Division to apply to the Commission for permission to file the subpoena enforcement action. Even if that were true, that would not entitle him to dismissal. Respondent identifies no procedural right or legal precedent that warrant that result. At best, Respondent could argue that the District Court subpoena enforcement action was unauthorized and therefore could not go forward. But that argument is moot now that the Division voluntarily dismissed that action, in favor of moving forward with the July 7, 2025, hearing and requesting related sanctions from this tribunal.

Still, Respondent tries to make more of that supposedly erroneous authorization, boosting its status to a fatal flaw so severe that he gets to avoid his hearing and its possible consequences. He states that the Division's filing of the subpoena enforcement action "irreparably destroyed any plausible appearance of Commission objectivity and impartiality in adjudicating this administrative proceeding." But he never explains why, much less does he provide any authority for that proposition.

To be sure, Respondent claims this whole proceeding—and administrative proceedings generally—are unfair and legally infirm. He has made these claims for the duration of this

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administrative proceeding. And he has made them in the federal district court, where they were recently dismissed. On those points, Respondent has no claim now that he didn't have before the subpoena enforcement action was filed, and thus no new reason to ask for dismissal.

So, at best, Respondent has an argument about a supposed appearance of taint. But there is perhaps no better evidence of the unseriousness of Respondent's claims about taint coming from the subpoena enforcement action than his claim that the "Division … publicly affixed the Commission's imprimatur to numerous inaccurate and incendiary public representations" by "falsely, gratuitously, and repeatedly alleg[ing] that a … jury found Lemelson liable for making three 'fraudulent' statements." [Mot. p. 9.] Respondent claims that the jury's finding of three separate violations of Exchange Act Section 10(b) (and Rule 10b-5(b)) cannot be correctly characterized as "fraud" or the statements as "fraudulent." This argument strains credulity and ignores all legal authority on the matter. The Supreme Court in *Lorenzo v. SEC* characterizes Rule 10b-5 as "a general proscription against fraudulent and deceptive practices." 587 U.S. 71, 80 (2019). It said the same in *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980) ("Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud.") and reiterated that point last year in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257, 265 (2024) (*quoting Chiarella*). *See also SEC v. Nat'l Secs., Inc.*, 393 U.S. 453 (1969) ("Section 10(b) and Rule 10b-5 together constitute one of the several broad anti-fraud provisions contained in the securities laws."). Courts apply the heightened pleading standards in Federal Rule of Civil Procedure 9(b) to Rule 10b-5(b) claims because those claims involve "allegations of fraud." *SEC v. Tambone*, 550 F.3d 106, 118 (1st Cir. 2008).

Certainly, Respondent knew the Rule 10b-5(b) violations constituted fraud at the time of his trial. The jury that found Lemelson liable was instructed that they were looking for "fraudulent conduct" when analyzing the Rule 10b-5(b) claim:

> What's the second kind of *fraudulent conduct*? The SEC must prove that the defendant made untrue statements of material fact or omissions of material fact. The SEC must prove that Father Lemelson *committed fraud* by making one or more statements that were not true when made. For the SEC to prevail on the second type of *fraudulent conduct*, that is, untrue statements of material fact….

Trial Tr., Day 7, 7-107:9-15 (emphasis added) (attached as Ex. A). And Lemelson sought to avail himself of the need for Rule 10b-5(b) violations to be "fraudulent." His proposed jury instructions state, "The SEC has alleged that the Defendants made four fraudulent statements," *see* ECF No. 176, p. 8 (attached as Ex. B), and "that the SEC must prove by a preponderance of the evidence that [Lemelson] (1) engaged in fraudulent conduct … (4) with the intent to defraud or with reckless disregard of the truth." (p. 9). *See also id.,* p. 34 ("If you find that the SEC failed to prove … that [Lemelson] made a fraudulent statement…."), p. 36, 38 (referring several times to a "fraudulent statement"). Indeed, Respondent's counsel told the jury, "your job is to determine if the four challenged statements are fraud." Trial Tr. 7-23:17-18 (Ex. A).

And there is an even more fundamental flaw with Respondent's argument: the notion that the Commission would be unfairly and improperly biased if, prior to its final ruling, it recognized that Respondent had committed and been found liable for three fraudulent misrepresentations by a jury in a federal district court proceeding. Respondent misapprehends the Commission's current role and the topic of this proceeding. The facts of Respondent's fraud were established in the District Court and may not be relitigated in the administrative proceeding. *See Blinder, Robinson, & Co. v. SEC*, 837 F.2d 1099, 1108 (D.C. Cir. 1988) (refusing to entertain respondent's collateral attacks on the validity of the underlying district court injunctive proceeding); *Sherwin Brown*, Investment Advisers Act Release No. 3217, 2011

WL 2433279, at *4 (June 17, 2011) (Commission opinion) (explaining that "a respondent in a follow-on proceeding may not challenge the findings made by the court in the underlying proceeding"). Those facts may be taken as given by the parties, this tribunal, and the Commission. Here, the simple question is *as a result* of Respondent's fraudulent conduct, should he be barred from association with various securities-related entities.[1]

Other than Respondent's contrived confusion about Rule 10b-5(b) violations being fraud, he gives no reason why the now-dismissed subpoena enforcement action was "false and incendiary." [Mot., p. 4.] The allegations in that action—that there was a district court action that ended with a liability finding, penalties, and an injunction; that there was an administrative proceeding; that a subpoena had issued; that the subpoena had been quashed in part and then re-issued; and that Lemelson had refused to produce documents under that subpoena—are true and nothing about them is "incendiary."

Respondent claims that "in no fair and logical world would the Commission ever appoint the very same Division personnel" to pursue the administrative proceeding and the subpoena enforcement action. [Mot., p. 7-8.] There are two flaws in this argument. The first is that it ignores that Division of Enforcement attorneys regularly litigate the district court action establishing liability and then pursue the follow-on proceeding. There is no conflict of interest in that, and there is no conflict of interest inherent in those Enforcement attorneys pursuing the subpoena enforcement action. Second, a subpoena enforcement action is a vindication of the power of this tribunal. In the federal district court context, the party seeking the subpoena is the one who pursues a civil contempt action for failure to comply with the *court's* Rule 45 subpoena.

[1] Given all this, Respondent's statement that "[t]he *Division's* refusal to accept the jury's verdict is troubling" (Mot. p. 10 (emphasis added)) is irresponsible and clear evidence that Respondent has failed to accept responsibility—one of the *Steadman* factors to be considered at the hearing.

The party seeking the subpoena acts to vindicate the court's power without rendering the court biased. There is no difference with the administrative subpoena: the party requesting the subpoena requests the power of the Commission to compel the production of documents and, if necessary, pursues the remedy for non-compliance on behalf of the body that issued it—the Commission. The Commission is not taking sides; it is upholding its statutorily granted power to subpoena documents, and it is doing so in the same way a federal court does when its subpoenas are ignored: through a proceeding brought by the subpoena requestor.

In sum, Respondent fails to establish how the now-dismissed subpoena enforcement action has prejudiced him such that this proceeding should be dismissed.

II. Nothing about the Inadvertently Delivered, Unread Emails Requires Dismissal

Having failed to establish anything dismissal-worthy about the subpoena enforcement action, Respondent stretches again to try to make something of some inadvertently delivered emails. In May 2025, the Division learned and notified Respondent that an SEC staff member who had recently been temporarily assigned from the Division to the SEC Chairman's Office received emails (via a Division of Enforcement distribution list) concerning the subpoena enforcement action. Respondent's Motion opportunistically leaves out the crucial fact about these emails: *they remained unread and were deleted.* The Division told Respondent this when disclosing the existence of the emails:

> We have confirmed that during the period the staff member was receiving these emails, she did not read and deleted any email she received from that distribution list. The staff person was not consulted, received no briefs or memos, did not provide input on the subpoena enforcement, and did not relay any information or emails about the subpoena enforcement action to any Commissioner.

Division Ltr. to Lemelson Counsel, May 19, 2025.

Lemelson leaves out those details because they show that there was no prejudice from the emails, and thus no reason for dismissal. Lemelson never explains how some unread emails

should prevent a proceeding to determine whether he should be barred. He can't—neither the Commissioners nor their staff received any information they shouldn't have. Once again, Respondent fails to give an adequate reason why dismissal is warranted.

For these reasons, Respondent's Motion to Dismiss should be denied.

Dated: June 10, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marc J. Jones, hereby certify that on June 10, 2025, the above was served via electronic mail pursuant to Rule 150(c) on the following counsel of record for Respondent:

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