UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of GREGORY LEMELSON	:	Admin. Proc. File No. 3-20828

RESPONDENT REV. FR. EMMANUEL LEMELSON'S OPPOSITION TO DIVISION'S MOTION IN LIMINE SEEKING EVIDENCE EXCLUSION AND ADVERSE INFERENCES

Having already trampled on Rev. Fr. Emmanuel Lemelson's First, Fifth, and Seventh Amendment rights over the past decade, the Division has now filed a motion in limine seeking the ALJ's assistance in trampling on Lemelson's Fourth Amendment rights. The Division knows that the ALJ-issued subpoena directed to Lemelson was and remains *completely unenforceable* unless and until its reasonableness and legality are first approved by *both* the SEC Commissioners *and* a federal court. Yet the Division has willfully abandoned all efforts to seek either of these required statutory and constitutional pre-approvals.

The Division now absurdly asks the ALJ to *reward* its chicanery by enforcing the subpoena through punitive evidentiary sanctions that would preclude Lemelson from offering any evidence regarding topics purportedly covered by the subpoena and draw adverse inferences against him. That's upside-down in addition to being unconstitutional. If anyone should be sanctioned and precluded from offering evidence due to the Division's fiasco surrounding the subpoena at issue, it should be the Division, which willfully disregarded the Commissioners' clear directive and filed a fake lawsuit over the subpoena without any lawful authority to do so. For purposes of this proceeding, the Division's subpoena should be considered a legal nullity—and treated as such.

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Lemelson had an absolute constitutional and statutory right to ignore it unless and until the Commissioners approved it and an Article III court ordered him to comply with it, neither of which ever happened.

The Division's motion should be denied in its entirety for at least five independent reasons:

First, the subpoena was *ultra vires*. As previously briefed, it sought information wholly unrelated to this narrowly focused follow-on proceeding, and thus it represented a transparent effort to launch an entirely new investigation without any prior consultation with or any formal order approved by the Commissioners.[1] Only the presidentially appointed and Senate-confirmed Commissioners have lawful statutory power to commence new investigations under the Investment Advisers Act. 15 U.S.C. § 80b-9(a). The Commission has never delegated that power to its ALJs, and earlier this year the Commission revoked its temporary delegation of that power even from the Director of Enforcement. Without a Commission-approved formal order authorizing an investigation into Lemelson's private communications and activities from 2020 to the present—an outlandishly capacious five-and-a-half-year period that spans from six to 11 years removed from anything remotely relevant to this case or the investigation and litigation that led to it—there was no lawful power to issue the subpoena.

Second, the subpoena was unprecedented, and as such it is entitled to no presumptive validity. As previously briefed, Lemelson is aware of no prior SEC follow-on proceeding in which

[1] *See, e.g.*, Lemelson Motion to Quash Lemelson Subpoena (Jan. 15, 2025); Lemelson Reply in Further Support of Motion to Quash (Jan. 27, 2025); Lemelson Application to Certify Subpoena Order for Interlocutory Review (Feb. 5, 2025); Lemelson Reply in Support of Certification (Feb. 18, 2025); Lemelson Motion to Stay (Mar. 26, 2025); Lemelson Motion to Quash Clear Street Subpoena (May 23, 2025); Lemelson Response to Clear Street Protective Order (June 10, 2025).

an ALJ has ordered *any* discovery at all, much less issued the kind of sweeping, *ultra vires* surveillance dragnet the subpoena would have imposed on Lemelson.[2]

Third, the subpoena is unintelligible. Directly under the heading "Documents to Be Produced," which prefaces four document categories below it, the subpoena purports to demand documents concerning "any accounts [connected with] the following entities or persons (including … any known account numbers listed below)," but none of the four itemized categories below this preface actually mentions any "accounts" or "account numbers," nor any "entities," and the only "person" mentioned is Lemelson himself. Adding to this muddled gibberish is the first document category seeking identification of "Respondent's present investor clients and former investors who had become clients … ," and the third category seeking, among other things, "communications from Respondent to investor clients." As the Division presumably knows from its decade-long pursuit of Lemelson, Lemelson does not have "investors" or "investor clients" (whatever the latter phrase means); he is employed by Lemelson Capital Management, which has been retained by the general partner of one or more funds, which funds in turn have had "investors," although not "clients" in any conventional understanding of that term. To the extent the Division wanted information about the current investors in one or more fund(s) (which is absolutely none of its business for purposes of this proceeding in any event, *especially* without a new formal order of investigation), it should have directed its subpoena to such fund(s), or used more care in articulating what it was demanding. In any event, had it done so it would have come up empty: *Lemelson is aware of no complaints from any investor in any such fund at any time*.

[2] The subpoena also purported to require Lemelson to format and produce responsive documents according to certain complex and expensive technical requirements, which would have significantly and unreasonably increased the burden and expense of compliance.

Similarly with category four of the subpoena, which demanded information about litigation and other legal proceedings since 2020 "to which Respondent was a party," and then specifically mentions a FINRA arbitration proceeding to which, it should have been obvious, Lemelson was *not* a party. Further, and more to the point, *there are no other proceedings "to which Respondent was a party*," which the Division could undoubtedly have determined with little effort using its infamous access to vast public and private databases as well as the Commission's other regulatory powers over various self-regulatory organizations.

Fourth, punishing Lemelson for asserting his Fourth Amendment right to resist an administrative search being demanded by ground-level, executive-branch employees would be blatantly unconstitutional. *See generally City of Los Angeles v. Patel*, 576 U.S. 409, 419-23 (2015) (noting that the Court has repeatedly held that searches conducted outside the judicial process, without prior approval by a judge or magistrate judge, are per se unreasonable under the Fourth Amendment). The subpoena at issue here was not just *ultra vires* when issued (see above), but it was never reviewed or approved by any Article III judge even *after* its issuance, much less before. Indeed, we now know that the subpoena was never even approved by the SEC Commissioners, so we don't even know whether they would have considered it reasonable or appropriate. And even after the Division rushed into federal court seeking after-the-fact judicial enforcement of the subpoena, it abruptly abandoned that effort. Under these circumstances, it would be outrageously unconstitutional to punish Lemelson for exercising his Fourth Amendment right to insist on a judicial assessment of the reasonableness of the subpoena (or ever an assessment by the Commissioners) before being forced to comply with it.[3]

[3] The Division's reliance on *UAW v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972), is badly misplaced. In discussing the kind of adverse inferences that are permissible in mine-run cases of failures to produce evidence, the D.C. Circuit in expressly acknowledged that "[o]f course, the adverse inference rule is inapplicable in situations where a party has a constitutional right to suppress the evidence in question." *Id.* at 1339 n.45. That is exactly what happened here.

Fifth, granting the Division's motion would absurdly *reward* the Division for engaging in its unprecedented *ultra vires* and illegal misconduct, rather than holding the Division to account. Recall that the Division initially asked the ALJ to issue an outlandishly oppressive subpoena that demanded 18 categories of private and personal papers having nothing whatsoever to do with this proceeding or the litigation that led to it.[4] After the ALJ excised 14 of the Division's 18 categories, Lemelson sought to quash the remaining four categories and ultimately sought interlocutory Commissioner review of the unprecedented and overbroad subpoena. In denying interlocutory review, the Commissioner cautioned the Division in no uncertain terms that before any subpoena enforcement lawsuit could be filed in court, the Division would need to convince the Commissioners that such a lawsuit would be appropriate.

> And the subpoena order could come before the Commission not only in any eventual appeal of an initial decision, but perhaps even sooner, in the event Lemelson refuses to comply with the order, *and the Commission considers whether to seek judicial enforcement* of the subpoena under Exchange Act Section 21(c).

Commission Order dated April 1, 2025, at 2 (emphasis added).

This explicit caution should have been unnecessary, because the Division has *never* possessed delegated authority to file subpoena enforcement lawsuits seeking judicial enforcement of ALJ subpoenas issued in connection with administrative adjudication proceedings. Yet the Division flouted the Commission's admonition and rushed ahead and filed its lawsuit without ever seeking Commissioner approval. It then abruptly dismissed the lawsuit, again apparently without seeking or obtaining Commissioner approval. And to adopt a concept familiar with proceedings like this one, the Division has never acknowledged its wrongdoing nor provided any assurances that it will not recur.

[4] The Division also requested a testimony subpoena despite the dozens of hours of testimony it had already taken from Lemelson. The ALJ rejected that request too.

Nor can all of this be dismissed as just a minor blunder by an unsupervised rookie staff attorney. In addition to the experienced trial counsel that initially sought the subpoena and filed the *ultra vires* lawsuit, the decision to flout the Commission's order and to file (and then dismiss) the lawsuit appears, from a privilege log recently produced by the Division, to have been personally vetted and supported by several of the Division's most senior officials, including its Acting Director/Chief Counsel and Chief Litigation Counsel. That apparently none of the many senior Division officials and staff who participated in this decision took any action to stop it should be shocking, rather than a reason to reward the Division.

This Division's motion in limine should be denied in its entirety.

Dated: June 23, 2025

Respectfully submitted,

/s/ *Douglas S. Brooks*

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CERTIFICATE OF SERVICE

I, Douglas S. Brooks, do hereby certify that I served the foregoing document on counsel for the Division, Marc Jones, Esq. and Alfred Day, Esq., by email on June 23, 2025.

/s/ *Douglas S. Brooks*

Counsel for Respondent Lemelson