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 MOTION IN LIMINE TO EXCLUDE EVIDENCE AND ARGUMENT BASED ON RESPONDENT'S REFUSAL TO PRODUCE DOCUMENTS AND MOTION FOR ADVERSE INFERENCE SANCTIONS

The Division moves in limine to exclude evidence and argument from Respondent based on his refusal to produce subpoenaed documents. Respondent should not be permitted to make claims related to the subpoenaed topics without participating in discovery about those topics. But that is precisely what he has done. This tribunal should preclude him from turning his contempt of the subpoena into a strategic advantage, by (1) preventing Respondent from entering evidence and making claims about the subpoenaed topics and (2) drawing adverse inferences about what the documents would have shown if they had been produced.

FACTS

On January 30, 2025, this tribunal issued an Order on Subpoena Request, after a Motion to Quash filed by Respondent. The Order approved a subpoena for four categories of documents, finding "Respondent's post-injunction conduct is relevant to several of the public interest factors, including the sincerity of assurances against future misconduct, the recognition of misconduct, and opportunities for future violations." [AP-6921 (Jan. 30, 2025) at 3.]. The

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narrowed subpoena was issued on January 31, 2025, and, after some extensions, had a return date of March 31, 2025. The subpoena included the following document requests:

1. "A list of names and contact information for Respondent's present investor clients and former investors who had been clients at some point from January 2020 to present;"

2. "All communications concerning any complaints by investors and prospective investors in any funds managed by Respondent from January 2020 to present;"

3. "All communications from Respondent to investor clients or the public concerning *SEC v. Lemelson* from January 2020 to present;" and

4. "A list of any litigation, arbitration, enforcement action by any state, federal, international or securities regulator, criminal authority, or self-regulatory agency, or other proceeding to which Respondent was a party from January 2020 to the present and all documents filed and served by Respondent in those proceedings, and the transcripts of Respondent's testimony in them. And, for the FINRA arbitration proceeding titled *The Amvona Fund, LP v. Clear Street, LLC*, No. 20-01555, Clear Street's exhibits 128, 130, 132, 134, 135, 136, 137, 138, and 139."

On April 3, 2025, Lemelson's counsel stated that Respondent would not comply with the subpoena,[1] and Respondent has continued to refuse production of those documents. The Division managed to obtain exhibits from the FINRA arbitration between Respondent's fund and its broker, Clear Street LLC, through a subpoena to Clear Street but has otherwise not obtained any of the information sought.

ARGUMENT

I. Respondent's Refusal to Produce Documents Justifies Excluding His Presentation of Certain Evidence and Arguments

The Division here seeks to exclude evidence and argument by Respondent on the topics below because of Respondent's non-compliance:

[1] Specifically, Respondent's counsel stated, "In light of the strong legal arguments we have presented regarding what we view as the unlawful nature of the administrative proceeding in general, and the subpoena in particular, my client will not produce any documents unless and until compelled by a court of competent jurisdiction to do so." Apr. 3, 2025 email from Respondent's Counsel to Division. The "strong legal arguments" referenced by Respondent had to do with his collateral challenge to the administrative proceeding process. That challenge was dismissed by the U.S. District Court for the District of Columbia and, yet, Respondent still has not produced the documents called for by this tribunal's subpoena.

1. Statements from past and current clients concerning Respondent, his provision of investment advisory services, and his character;

2. Respondent's Exhibit 34 and similar exhibits yet to be designated. Exhibit 34 is letters from clients and others at the time of the district court remedies hearing;

3. Client/investor witnesses (though none are currently designated);[2]

4. Statements from Respondent concerning (as he states in his Witness List) "the lack of investor complaints [and] the support of his investors;"[3] and,

5. Argument, testimony, and exhibits suggesting that Respondent has not been part of any litigations, enforcement actions, FINRA arbitrations, etc. with clients or others related to his work as an investment adviser.

Fairness requires that, if Respondent is not willing to produce information to the Division on these topics, he should be prevented from presenting cherry-picked evidence and argument on them during the hearing. In federal district court, Federal Rule of Civil Procedure 37(b)(2)(A)(ii) provides for "prohibiting the disobedient party [of a discovery order] from supporting or opposing designated claims or defenses, or *from introducing designated matters in evidence*." *See Santa Clarita Valley Water Agency v. Whittaker Corp.*, 99 F.4th 458, 470 (9th Cir. 2024) ("exclusion of evidence … for failure to disclose … is a tool that courts can use to sanction parties for failing to make discoverable evidence available or for failing to cooperate during discovery"); *Chicago Joe's Tea Room, LLC v. Village of Broadview*, 94 F.4th 588, 606 (7th Cir. 2024) (same).

The Division does not have information on the identity of Respondent's current and former investors since the investigative stage because Respondent has not produced that information pursuant to the January 31, 2025 subpoena. His refusal has prevented the Division from learning about the Respondent's interactions and communications with, and services

[2] As Respondent may supplement his witness and exhibit lists after the due date for motions in limine, this motion anticipates his designation of new evidence that should be excluded. In addition, the Division may ask the tribunal to permit additional motions in limine about newly designated witnesses and exhibits.

[3] Respondent testimony about what his clients have said about him would also be improper hearsay testimony.

provided to, investors since the investigation. And Respondent will not disclose complaints, if any, received from those investors or prospective investors, potentially concealing bad behavior by Respondent. In combination, this withholding of information leads to the very real possibility that Respondent could produce evidence from or relating to some investors who may be happy with him, while concealing evidence from or in relation to others who are not.

Add to this that Respondent has refused to produce information about what these investors have been told about the district court action and this proceeding. Given Respondent's recent statements to this tribunal that his Rule 10b-5(b) violations are not fraud findings, and his post-trial claims that he was exonerated, these investors may have been told the same, or similar, things. We also do not know what the purported investors who offered letters of support were told or who drafted the letters. Thus, Respondent should be prevented from introducing investor statements because the investors may well have based their opinions on inaccurate, false, or misleading information—a possibility that, because of Respondent's refusal to produce documents, the Division and this tribunal would have no way to check. As a result, Respondent should not be permitted to introduce evidence from his current and former investors, including statements by purported actual and prospective investors/clients (including Ex. 34), client witnesses, and statements by the Respondent about actual and prospective client statements and sentiment.

Similarly, Respondent should not be able to claim (either in testimony or argument) that he has a clean record since the events at issue in the district court litigation. He has refused to produce information on litigations, arbitrations, securities-regulator enforcement actions, criminal cases, and self-regulatory agency proceedings. Without producing information about those proceedings, if there were any, he cannot be allowed to claim that there have been none. He cannot claim guiltlessness and conceal documents that could show otherwise.

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II. Adverse Inferences Should Result from Defendant's Refusal to Obey the Subpoena

When addressing Respondent's subpoena noncompliance in its Order Granting Motion for Subpoena, this tribunal stated, "Absent an order from the district court excusing Respondent from complying with the subpoena, the parties should consider what steps are appropriate in this proceeding considering Respondent's noncompliance." [AP-6937 at 1 n.2.] In addition to the preclusion of evidence on the topics of the refused subpoena, the Respondent's refusal to produce documents should result in adverse inferences about the content of those documents.

In this administrative proceeding, the tribunal has the power to fashion discovery sanctions to remedy contempt of its discovery orders. *See Lucia v. SEC*, 585 U.S. 237, 248 (2018) (recognizing the power of SEC administrative law judges to enforce compliance with discovery orders in SEC administrative proceedings). "ALJs … have the power to enforce compliance with discovery orders [and] may punish all contemptuous conduct, including violations of those orders, by means as severe as excluding the offender from the hearing." *Id. (*internal citations and quotations omitted)[4]; *see also Freytag v Commissioner of Internal Revenue*, 501 U.S. 868, 882 (1991) (IRS special trial judges have power to enforce compliance with discovery orders).

As this tribunal previously recognized, "[t]he adverse inference rule plays a vital role in protecting the integrity of the administrative process in cases where a subpoena is ignored." *UAW v. NLRB*, 459 F.2d 1329, 1338 (D.C. Cir. 1972). Drawing adverse inferences is particularly appropriate here, where Respondent likely holds non-public information that is probative of the issues to be heard, and that the Division cannot get elsewhere. In other words, the Respondent should not get to decide what evidence the Division receives and what it is

[4] The Court also recognized an ALJ's power to issue document subpoenas. *Id.* ("They [ALJs] thus critically shape the administrative record (as they do when issuing document subpoenas.").

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refused, particularly where those decisions are made based on whether the information harms Respondent's case. In those circumstances, the proper remedy is an adverse inference.

The basic format of the Division's request for adverse inference is to draw the conclusion that, for each category of document Respondent has refused to produce, the documents would have shown evidence that established the *Steadman* factor to which it relates. So, the Division asks for the following adverse inferences:

1. That at least some of Respondent's present and former investors/clients would have reported statements and actions by Respondent that would contribute to establishing that Respondent had not recognized the wrongful nature of his prior actions or provided sincere assurances against future violations;

2. That withheld communications would include complaints about Respondent's conduct and provision of advisory services that would establish a likelihood of future violations;

3. That withheld communications from Respondent to his present and former investors/clients would have included false information about the outcome of the district court trial and the nature and seriousness of his violations of Rule 10b-5(b), that would contribute to establishing that Respondent had not recognized the wrongful nature of his prior actions or provided sincere assurances against future violations;

4. That withheld documents would have shown litigations, arbitrations, or enforcement actions by a securities regulator, criminal authority, or self-regulatory agency, contributing to a finding that there was a likelihood of future violations, that Respondent had not provided sincere assurances against future violations, and that Respondent had not recognized the wrongful nature of his conduct.

The Division believes these adverse inferences are narrowly tailored to Respondent's noncompliance with this tribunal's subpoena.

Respondent cannot shield himself from disclosure of probative information while making arguments from the favorable evidence he deigns to produce. For these reasons, the Division asks this tribunal to exclude Respondent from offering the evidence and arguments detailed above and to draw the adverse inferences described.

Dated: June 16, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marc J. Jones, hereby certify that on June 16, 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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