

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

GREGORY LEMELSON

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: Admin. Proc. File No. 3-20828
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**RESPONDENT LEMELSON’S REPLY IN FURTHER SUPPORT OF
HIS MOTION TO DISMISS THE PROCEEDING DUE TO *ULTRA VIRES*
DIVISION ACTION AND OTHER INTERNAL CONTROL IRREGULARITIES**

PRELIMINARY STATEMENT

The Division’s opposition to Respondent Rev. Fr. Emmanuel Lemelson’s Motion to Dismiss is more telling for what it elides than for what it says. In the face of two very serious breaches of Commission protocol and internal controls occurring just days apart in April—one resulting in a fake SEC lawsuit being filed in federal court against Lemelson (and then abruptly withdrawn), and the other involving the latest breakdown of what is supposed to be a wall separating the functions of Commission administrative prosecutors and adjudicators—the Division’s response is, essentially, *who cares?*

With respect to the fake lawsuit against Lemelson, the Division’s opposition makes no effort to defend what the Division perpetrated. The Division has now abandoned—as it must—its previous insistence that it had delegated authority to file the lawsuit purportedly on behalf of its client, the Commission. The Division likewise does not dispute that its *ultra vires* lawsuit was filed despite the Commission’s express expectation that no such lawsuit would be filed against Lemelson unless and until the Commissioners signed off. The Division’s only proffered excuse for its unprecedented and gravely serious usurpation of the Commission’s statutory powers is that

the matter is now somehow “moot” because the Division quietly and abruptly withdrew its lawsuit after it was caught red-handed.¹ Notably, the Division does not explain whether it sought or obtained its client’s authorization to *withdraw* the lawsuit, which, if not, would be just as troubling as filing the lawsuit without client authorization in the first place.

With respect to the separate internal control breakdown that allowed *ex parte* Division emails—*some explicitly referencing Lemelson’s case*—to flow freely from the Division into the Chairman’s office for approximately a month, the Division’s response is a similar yawn. This too, the Division assures us, is no big deal, because the Division has somehow already “confirmed” that there was no possible harm from this grave breach of the separation of functions and of the fairness and integrity of the Commission’s adjudicative processes. Yet the Division completely ignores what happened the last time the Commission confronted this type of internal controls breakdown just two years ago: the *en masse* dismissal of all affected cases, *despite the absence of any identifiable harm*.

These irregularities—whether viewed separately or in combination—warrant immediate dismissal of this proceeding, or at least a stay until the Commission can complete a thorough investigation of what happened, how it happened, and who was responsible. That these two unrelated control failures occurred simultaneously, just weeks before the impending hearing in this matter, with both failures sharing a direct connection to this proceeding against Lemelson, makes dismissal all the more imperative.²

¹ The Division and the Commission are notoriously less forgiving in finding mootness when regulated entities and other enforcement targets voluntarily cease their allegedly improper conduct only after regulators start asking question.

² Lemelson reiterates his requests that, given the seriousness of these overlapping irregularities and the rapidly approaching hearing date, this motion should be heard and decided—very promptly—in the first instance by the Commissioners rather than the ALJ.

ARGUMENT

I. The Division's *Ultra Vires* Federal Lawsuit Against Lemelson Warrants Dismissal

Although filing and/or compromising a lawsuits without client authorization is rare—indeed, courts have aptly described the scenario as “exceptional” and “bizarre”³—when it does happen, the consequences are typically severe. Those consequences can include not just dismissal of the case but any one or more of the following: (1) court-imposed monetary sanctions;⁴ (2) court- and/or bar-imposed disciplinary sanctions;⁵ (3) disqualification of counsel in related cases;⁶ and (4) liability in a subsequent tort lawsuit brought by the defendant who was sued without the plaintiff’s authorization.⁷ As one court aptly put it, “[a] complaint cannot be ‘well grounded in fact ... and warranted by existing law’ [within the meaning of Fed. R. Civ. P. 11] if a client does not authorize its filing.” *Cimeo v. East Whiteland-Tredyffrin Joint Transp. Auth.*, 151 F.R.D. 55, 58 (E.D. Pa. 1993). Such *ultra vires* lawsuits impose wholly unnecessary burdens on courts and defendants, and can result in “considerable inconvenience” even to the falsely named plaintiffs, who bear the “unenviable burden” of having to explain to others what happened and how. *In re Deep Vein Thrombosis*, 2008 WL 2568269, at *5 (N.D. Cal. June 24, 2008).

Counsel has identified no case in which any court has simply brushed off such a profound irregularity as being no big deal, as the Division would have it here. Quite the contrary. Moreover, in most cases, as might be expected, the named putative plaintiffs are none too pleased with those

³ *Cimeo v. East Whiteland-Tredyffrin Joint Transp. Auth.*, 151 F.R.D. 55, 58 n.5 (E.D. Pa. 1993); *In re Deep Vein Thrombosis*, 2008 WL 2568269, at *1 (N.D. Cal. June 24, 2008).

⁴ See, e.g., *Edwards v. Wells Fargo Bank NA*, 2023 WL 112451 (D.N.J. Jan. 5, 2023); *In re: Engle Cases*, 283 F. Supp. 3d 1174 (M.D. Fla. 2017); *Blowers v. Lerner*, 2016 WL 4575315 (E.D. Va. 2016); *Deep Vein Thrombosis*, 2008 WL 2568269; *Cimeo*, 151 F.R.D. at 58;

⁵ See, e.g., *Edwards*, 2023 WL 112451; *Cimeo v. East Whiteland-Tredyffrin Joint Transp. Auth.*, 151 F.R.D. 55, 58 (E.D. Pa. 1993); *In re Hiser*, 168 Ariz. 359 (1991); *In re Bender*, 704 N.E.2d 115 (Ind. Sup. Ct. 1998).

⁶ See, e.g., *Allred v. Pacificorp*, 2015 WL 12866208 (D. Utah 2015).

⁷ See, e.g., *Safeway Ins. Co. v. Spinak*, 267 Ill. App. 3d 513 (1994).

responsible for filing the *ultra vires* lawsuit on their purported behalf. The Commission should have a similarly troubled reaction here and publicly repudiate the Division's *ultra vires* lawsuit, rather than excusing the Division or, worse yet, rewarding the Division in this underlying proceeding. Especially so because the Commission's April 1 order denying Lemelson's petition for interlocutory review had expressly indicated the Commission's intent and expectation that the Division would seek Commissioner approval before filing any subpoena enforcement lawsuit against Lemelson, yet the Division simply disregarded the Commission's expressed wishes. At a minimum, the Commission should thoroughly investigate how this unprecedented embarrassment happened and hold accountable those found responsible. Regardless, the Commission should either dismiss this proceeding forthwith or postpone all proceedings until its internal investigation is completed.

Lemelson's motion to dismiss explained why the Division's *ultra vires* public allegations fatally cemented a public perception that the Commissioners—who are supposed to be the strictly neutral, impartial adjudicators of this proceeding—have been acting in concert with Division prosecutors in hostile litigation against Lemelson even as his professional fate and reputation hang in balance of this adjudicatory proceeding. The *ultra vires* Massachusetts subpoena enforcement case was just the latest public example of this continuing joint effort. Moreover, when staffing this follow-on case, the Division imprudently followed its usual practice of assigning—out the literally hundreds of other available Division attorneys who had no ongoing attorney-client relationship with the Commissioners in its long history of hostile litigation against Lemelson—the only two Division attorneys who, since at least 2015, have been advising and representing the Commissioners, under the cloak of a fiduciary attorney-client bond of mutual trust and loyalty, in connection with that federal court litigation against Lemelson. For obvious reasons, it is

impossible to maintain any plausible appearance of neutrality and impartiality when the final adjudicator of this proceeding—the Commission—has for many years been litigating hand in fiduciary glove against Lemelson in concert with the very same attorneys now prosecuting this related adjudicatory proceeding against him.

In fact, this case is at least as troubling as *Antoniu v. SEC*, 877 F.2d 721 (D.C. Cir. 1989). That case involved a follow-on SEC proceeding predicated on the respondent’s prior criminal conviction for insider trading. While the follow-on proceeding was pending, a single Commissioner gave a speech in which he mentioned the respondent by name as an example of an “indifferent violator” due to his predicate conviction for insider trading, and recounted that a month earlier the Commission had prevented a bid by that respondent to reassociate with a new firm, adding that “his bar from association with a broker-dealer was made permanent.” 877 F.2d at 724. Although it was just a speech (not a formal accusatory lawsuit in federal court), and although it was the handiwork of only a single Commissioner (not the Commission as a whole), and although that single Commissioner recused himself the day before the Commission issued its final order in the follow-on proceeding two years later, the D.C. Circuit “nullif[ied]” all Commission proceedings in which the outspoken Commissioner had participated after making his speech. *Id.* at 726.⁸ Here, it was not just a single speech attributed to a single Commissioner but rather a hostile federal court lawsuit ostensibly filed on behalf of the whole Commission.

⁸ *Accord Staton v. Mayes*, 552 F.2d 908, 914-15 (10th Cir.) (as amended) (“a due process principle is bent too far,” and the tribunal is “not meeting the demands of due process for a hearing with fairness and the appearance of fairness,” when those adjudicators make public statements on the merits of a dispute pending before them), *cert. denied*, 434 U.S. 907 (1977); *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591-92 (D.C. Cir. 1970) (speech in which FTC Chairman condemned as “deceptive” certain advertising practices at issue in adjudication then pending before the agency (without specifically naming the respondent company) required disqualification of Chairman and remand for reconsideration without him); *Texaco, Inc. v. FTC*, 336 F.2d 754, 759-60 (D.C. Cir. 1964) (invalidating FTC adjudicative order because, while proceeding alleging unfair competition was pending before an agency examiner, FTC Chairman made speech castigating the respondent for price fixing and price discrimination), *vacated on other grounds*, 381 U.S. 739 (1965).

The Division's effort to equate its *ultra vires* subpoena enforcement case with federal court subpoena practice under Rule 45 of the Federal Rules of Civil Procedure is specious, and easily debunked. Most obviously, if a third party ignores a Rule 45 subpoena, any motion to compel is filed in the name of the party whose attorney issued the subpoena or, in some cases, the party whose attorney requested that the clerk issue the subpoena. But in either case, any motion to compel is *not* filed on behalf of the issuing court or the clerk; that is, the caption of the motion is not *U.S. District Court v. Third Party*, and the attorney prosecuting the motion does *not* purport to represent or make an appearance as counsel on behalf of the court, the clerk, or any other adjudicator. In fact, unlike in SEC administrative practice, the attorney prosecuting the motion to compel has never had *any* prior attorney-client relationship at all with the issuing court or the clerk, much less one that's a decade long and ongoing.

Beyond that, subpoenas issued in federal court litigation have the virtue of being either issued or requested by attorneys acting under threat of *personal liability* for financial and other sanctions if their subpoena is later deemed unduly burdensome, vexatious, or otherwise improperly motivated—and an independent, Article III judge has ample power to wield that deterrent. In Commission proceedings, as demonstrated by the subpoena at issue in the Division's *ultra vires* federal lawsuit, there are no comparable guardrails to deter the Division from seeking, and the ALJ from issuing, burdensome and harassing subpoenas to respondents on all-new topics wholly unrelated to the proceeding. This effectively allows the Division, with the aid of an ALJ, to initiate and conduct an entirely new formal investigation under the faux auspices of an adjudicatory proceeding without first seeking or obtaining prior Commission approval of that new investigation—a nifty and expedient end-run around the Commission's recent revocation of the

Division Director’s previous delegated authority to commence formal investigations, and one the Division has taken and run with in this proceeding.⁹

II. The E-mail Internal Control Failure Also Warrants Dismissal

The Division’s remorselessness about its *ultra vires* federal court lawsuit is outdone only by its similarly casual indifference to the latest internal control deficiency that allowed an unspecified number of *ex parte* Division emails—including an unspecified number *about Lemelson*—to flow into the Chairman’s office (albeit presumably unsolicited). The Division baldly asserts that it has somehow already unilaterally “confirmed” that there’s nothing to worry about, and that we should all trust at face value the Division’s unsworn and unsupported hearsay assurance that the emails were sent “inadvertently” and that they were unread and deleted. Yet the Division fails to proffer any details or evidence to explain how it purportedly “confirmed” these things so quickly and conclusively—including whether additional *ex parte* communications may have been involved in the Division’s secret sleuthing of the matter.

Again, whether the Division recognizes it or not, this is a *very* big deal. The last time the Commission discovered a comparable internal control deficiency implicating its separation of functions and the integrity and fairness of its adjudication processes, “the Commissioners were notified, as was the Commission’s Office of Inspector General,” and the Commission thereafter released transparent, public disclosures about the matter. *Second Comm’n Statement Relating to Certain Administrative Proceedings* (June 3, 2023) (the “*Second Statement*”). After “immediately” notifying the other Commissioners, the Chair “directed the staff to undertake remedial measures and commence a comprehensive internal review to assess the scope and

⁹ Lemelson explained this wholly separate staff exercise of undelegated *ultra vires* action to circumvent Commissioner supervision at pages 2 through 4 of his Response to Clear Street LLC’s Motion for a Protective Order and Certification for Interlocutory Review by the Commission, filed on June 10.

potential impact of the issue.” *Comm’n Statement Related to Certain Administrative Adjudications* (Apr. 5, 2022) (the “*First Statement*”). That internal review, of course, was not conducted by the Division staff who were prosecuting the affected cases, but rather by “experienced investigative staff from the Division of Examinations under the supervision of the Commission’s General Counsel,” which in turn brought in a team of forensic analysts from an outside consulting firm. *Second Statement*.

That review team then interviewed more than 250 current and former Commission staffers and reviewed more than 500,000 pages of emails and attachments. *Id.* After completing its exhaustive, year-long forensic review, the review team found no evidence that anyone assigned to investigate and prosecute any of the affected adjudicative proceedings had ever actually accessed any of the adjudications group materials they theoretically could have accessed and reviewed during the relevant period. *See In re Pending Admin. Proceedings*, SEC Rel. No. 33-11198, at 2 (June 2, 2023). In other words, “[t]he review team’s investigation thus uncovered no evidence that the control deficiency resulted in harm to any respondent or affected the Commission’s adjudication in any proceeding.” *Id.* (emphasis added).

The Commission plainly did not take the rushed, “no-harm-no-foul” approach suggested by the Division in this case. To the contrary, despite finding no harm to any respondent and no effect on any pending adjudication, the Commission—to its credit—“determined to dismiss, as a matter of discretion, all pending proceedings that the review team found to be connected to the control deficiency, as to which the Commission is seeking relief, and in which there is no final order against a respondent.” *Id.* In all, dozens of pending administrative adjudications were immediately dismissed and closed, *en masse*, including some against respondents facing far more

serious charges than the paltry remnants of the Division’s case against Lemelson that eluded the jury’s shredder.¹⁰

It speaks volumes that the Division does not even acknowledge this materially indistinguishable (and likely dispositive) recent Commission precedent, much less attempt to explain why the Commission should treat its latest internal control deficiency—which is directly and unquestionably “connected to” this proceeding against Lemelson—any less seriously than the last one.

CONCLUSION

This proceeding should be dismissed forthwith.

Dated: June 13, 2025

Respectfully submitted,

/s/ Russell G. Ryan

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¹⁰ Of course, even more recently, the Commission has liberally exercised its discretion in dismissing many other ongoing administrative proceedings, mostly without any public explanation at all. *See, e.g., Robert Lewis Carver*, Exchange Act Rel. No. 102252 (Jan. 22, 2025) (unexplained dismissal of follow-on proceeding against a respondent who was convicted of criminal identity-theft and fraud and subject to at least two separate injunctions in civil cases brought by the Commission); *Alpine Sec. Corp.*, Exchange Act Rel. No. 102148 (Jan. 10, 2025) (unexplained dismissal of follow-on proceeding against recidivist penny-stock firm predicated on court injunction based on 2,720 violations of Commission’s ant-money-laundering record-keeping rules); *Halpern & Assocs.*, Exchange Act Rel. No. 101504 (Nov. 1, 2024) (unexplained dismissal of Rule 102(e) proceeding against recidivist audit firm and principal accused for the second time with improper professional conduct); *Joshua Abrahams*, Exchange Act Rel. No. 34-101505 (Nov. 1, 2024) (unexplained dismissal of Rule 102(e) proceeding); *Edward F. Hackett*, Securities Act Rel. No. 11310 (Sept. 27, 2024) (similar); *Paul L. Chancey*, Exchange Act Rel. No. 101208 (Sept. 27, 2024) (similar); *Alan J. Markowitz*, Exchange Act Rel. No. 101205 (Sept. 27, 2024) (similar); *Ira S. Viener*, Exchange Act Rel. No. 101203 (Sept. 27, 2024) (similar); *Jia Roger Qian Wang*, Exchange Act Rel. No. 101214 (Sept. 24, 2024); *Jason Jianxun Tang*, Exchange Act Rel. No. 101204 (Sept. 24, 2024) (similar).

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CERTIFICATE OF SERVICE

I, Russell G. Ryan, 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 13, 2025.

/s/ Russell G. Ryan _____

Counsel for Respondent Lemelson