UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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

RESPONDENT LEMELSON' REPLY IN FURTHER SUPPORT OF HIS MOTION FOR ISSUANCE OF A SUBPOENA AND TO POSTPONE THE HEARING

In resisting a limited subpoena seeking a presumably small and easily gathered set of recent documents (and/or a privilege log, as the ALJ has already ordered), the Division makes no effort to defend the filing of its unprecedented *ultra vires* lawsuit without prior consultation with or approval from the Commissioners, nor to argue that its claim of delegated authority was correct, nor to explain how and by whom the lawsuit came to end up before a federal court. The Division likewise offers neither a defense nor an explanation of how, why, or through who's action its former staffer continued to receive internal Division emails about the *ultra vires* lawsuit against Respondent Lemelson while she was acting as counsel to the Chairman (*i.e.*, then advising the effective equivalent of the Chief Justice overseeing this follow-on case against Lemelson).

Perhaps most conspicuously, the Division does not even acknowledge, much less address, the elephant in the room: The Commission's wholesale dismissal in June 2023 of *dozens* of pending adjudicative proceedings based on a more remote and hypothetical internal control failure involving the mere possibility that certain Division administrative staff may have had access to certain files of the adjudications group in the General Counsel's office. Despite that recent precedent, the Division makes no effort to explain why the more direct and troubling *combination* of internal control failures here should be entirely disregarded and forgotten.

The Division essentially dismisses these serious irregularities as "no harm, no foul," because (1) the Division abruptly withdrew its *ultra vires* lawsuit a week after it got caught attempting to wield this unlawful power that Congress granted only to Commissioners who are vetted and nominated by our elected President and then vetted again and confirmed by our elected Senators and (2) the Division somehow "confirmed that during the period the [Chairman's new counsel] was receiving these emails, [the former Division staffer] did not read and deleted any email she received from [the Division's] distribution list."[1]

But there *was* harm—both practical and constitutional. On the practical level, Lemelson and his counsel were forced to devote significant time and attention last month to defending a bogus federal lawsuit rather than spending that time preparing for the impending hearing that the Division and the ALJ have thus far refused to stay or continue. That precious time and attention included reviewing and analyzing the lawsuit; analyzing, researching, and discussing potential responses and defenses; consulting with and ultimately retaining secondary counsel (a former SEC staff member) with specialized expertise in SEC administrative practice and internal procedures (who soon identified the flaw in the Division's claim of delegated authority); preparing for and attending a status conference in a Boston federal courthouse convened at the insistence of the Division; and engaging in post-hearing discussion and analysis of arguments to be made in a brief the court had ordered filed by mid-June.[2] This ultimately wasted time and distraction was particularly consequential given that Lemelson's lead counsel had a pre-planned family vacation in early June (from which he returned yesterday evening), such that the *ultra vires* federal lawsuit

[1] The Division does not explain how it "confirmed" this fact. Presumably any secret inquiry did not involve additional *ex parte* contact with the former Division staffer who received the emails or anyone else in the Chairman's office.

[2] Lemelson and his counsel are still reviewing all options for seeking recovery of costs and fees incurred in responding to the Division's bogus federal lawsuit.

significantly curtailed his ability to focus on hearing preparation and pre-hearing submissions during May.

On the constitutional level, the short-lived federal lawsuit fatally tainted the appearance of fairness and impartiality demanded by the Due Process clause of the Fifth Amendment. The Division's public federal lawsuit purported to represent the allegations *of the Commissioners* in a newly initiated adversarial litigation against Lemelson related directly to the matters *currently pending* before the *same Commissioners* in an ongoing adjudication in which those Commissioners are supposed to be the neutral and impartial final adjudicators. For all practical purposes, 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 a 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 indicated 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 Commissioner had participated after making his speech. *Id.* at 726; *accord Staton v. Mayes*, 552 F.2d 908, 914-15 (10th Cir.) (as amended), *cert. denied*, 434 U.S. 907 (1977) ("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); *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).

That the recent *ultra vires* lawsuit against Lemelson included gratuitously and objectively false mischaracterizations of a 2020 jury verdict—*e.g.*, repeatedly endorsing the Division's preferred revisionist version of that verdict as finding "fraudulent statements" rather than neutrally reciting what the jury actually found—only makes the appearance of partiality that much worse here, as it publicly continued the Division's decade-long effort to damage Lemelson's career and reputation. The taint of the *ultra vires* lawsuit therefore goes to the heart of whether this follow-on proceeding comports with the adjudicator-impartiality requirements of due process. It is now a central threshold issue in this proceeding, and it deserves discovery and full accountability before the commencement of any hearing. Indeed, if discovery is denied now, it may never become available, because there would be no opportunity for discovery on any petition for review of any Commission final order issued without such discovery.[3]

With respect to the unspecified number of emails recently sent by the Division to an unspecified member of the Chairman's staff, the Division's resistance to discovery is essentially

[3] The Division absurdly argues that a handful of documents created in recent months that go to the heart of the integrity of this very proceeding are irrelevant, while in separate filings it insists that documents created five years ago in a wholly unrelated FINRA arbitration are somehow relevant.

"trust us, nothing to see here." But that's the whole point of discovery (especially the limited discovery Lemelson seeks here). Lemelson is not required to simply accept the Division's vague and unsworn assurances at face value; he's entitled to see exactly what the Division admittedly sent to the Chairman's office while his case was pending before the Chairman in his role as the chief adjudicator of Lemelson's case. Recall, importantly, that the May 19 letter in which the Division gave its assurances to Lemelson's counsel was the *same letter* in which the Division assured Lemelson's counsel that it had properly filed its *ultra vires* federal court lawsuit pursuant to delegated authority—and we saw how reliable that assurance turned out to be. This is also the same Division that convinced the Commission in 2018 to file a wildly unfounded complaint against Lemelson—after a Wells process that put the Division on notice of numerous deficiencies—that a federal jury and district judge later shredded after the Division's allegations were finally tested at trial in 2020. And it is the same Division that continues to repeatedly mischaracterize the jury verdict in this follow-on proceeding as having found "fraudulent statements," not to mention the same Division that issued repeated public releases after the jury verdict that similarly mischaracterized the jury verdict and willfully concealed the bulk of the story from the public. Experience has shown that only the source documents can be trusted, and perhaps even that may not be enough here.

Finally, in resisting postponement of the hearing, the Division ignores the fact that its *ultra vires* federal lawsuit has cast grave doubt over the constitutional legitimacy of this proceeding and that it significantly curtailed the time Lemelson's counsel would otherwise have spent focused on hearing preparation. Importantly, like most respondents (even those with counsel), Lemelson and his counsel lack anywhere near the time or resources that the Division can apparently devote to this proceeding. Moreover, the Division's platitudes about each month of delay allowing

Lemelson another month to earn his livelihood ring completely hollow. If the Division had any *genuine* concern about Lemelson's continuing presence in the industry, it could have sought a bar or suspension, a cease-and-desist order, or a preliminary injunction against him at any time over the past decade, *see* 15 U.S.C. § 80b-3(f) (bar or suspension option); *id.* § 80b-3(k) (cease-and desist option); Fed. R. Civ. P. 65 (preliminary injunction option), but it did none of the above. Instead, it spent nearly four leisurely years conducting a scorched-earth investigation of Lemelson, another four years litigating against him, and only then sought a bar or suspension after the court proceedings were completely finished. It didn't even ask the federal court to include a bar or suspension in its *final* injunction order, which the Division could have easily done if such relief had any genuine urgency whatsoever. And even after initiating this follow-on proceeding in April 2022, the case lay largely dormant on the Commission's docket for more than another two years. In short, any current suggestion of sudden urgency is profoundly unserious.

The subpoena to the Division should be issued and enforced, and the hearing should be postponed to allow adequate time for both discovery and a thoughtful and deliberate assessment of whether this proceeding should go forward at all in light of recent irregularities that fatally taint its constitutional legitimacy.

Dated: June 10, 2025

Respectfully submitted,

/s/ *Russell G. Ryan*

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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 10, 2025.

/s/ *Russell G. Ryan*

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