UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6755 / October 23, 2024

Admin. Proc. File No. 3-20828

In the Matter of

GREGORY LEMELSON

ORDER DENYING GREGORY LEMELSON'S MOTION FOR STAY OF PROCEEDINGS, DENYING THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION, AND CONVENING PUBLIC HEARING

On April 20, 2022, an order instituting proceedings ("OIP") was issued against Gregory Lemelson pursuant to Section 203(f) of the Investment Advisers Act of 1940, alleging among other things that he was enjoined from antifraud violations of the securities laws and that he was an investment adviser from the time of the underlying misconduct through the date of the OIP.[1] The OIP initiated proceedings to determine whether the allegations contained therein were true and whether remedial action was appropriate in the public interest. Lemelson filed an answer admitting the existence of the injunction and his investment adviser status. The Division has filed a motion for summary disposition, and Lemelson has filed an opposition to that motion.[2] Lemelson has also filed a motion for a stay of this administrative proceeding pending a civil action he filed in federal district court against the Commission alleging that this proceeding is unconstitutional.

We construe Lemelson's request for a stay—which the Division opposes—as one for postponement under Rule of Practice 161.[3] That rule authorizes adjournments and postponements for "good cause shown."[4] But motions to postpone a proceeding are "strongly disfavor[ed]" unless the movant makes "a strong showing that the denial of the request or motion

1 *Gregory Lemelson*, Advisers Act Release No. 6000, 2022 WL 1184458 (Apr. 20, 2022).

2 *See Gregory Lemelson*, Advisers Act Release No. 6054, 2022 WL 2218172 (June 21, 2022) (order scheduling summary disposition briefing).

3 17 C.F.R. § 201.161; *see Donald J. Fowler*, Exchange Act Release No. 89226, 2020 WL 3791560, at *1 (July 6, 2020) (construing motion for stay as request for adjournment or postponement under Rule of Practice 161).

4 17 C.F.R. § 201.161(a).

would substantially prejudice [his] case."[5] Lemelson has failed to show such good cause. Nor does Lemelson even claim that, absent a postponement, he will suffer substantial prejudice as to his ability to present his case or his defenses. Rather, he urges the Commission to stay this proceeding so that "an Article III court" can first resolve his various challenges to the proceeding.[6] But he will be able to develop and raise those challenges in the course of this proceeding. And he will also be able to appeal any eventual Commission decision to an Article III court, if the decision is adverse to him.[7] Indeed, Lemelson will still be able to pursue his federal district court case, even if we deny a stay, and he has indicated he will seek injunctive relief from that court if we deny a stay. Nor are we persuaded that we should grant a stay here simply because the Division, in the exercise of its prosecutorial discretion, sought to stay and then dismiss other administrative proceedings brought under different statutory provisions involving different facts. Accordingly, we DENY Lemelson's request for a stay of this administrative proceeding.

Turning to the Division's pending motion for summary disposition, the Division requests that the Commission bar Lemelson from the securities industry, alleging that Lemelson was enjoined for a period of five years from future violations of Section 10(b) of the Securities Exchange Act of 1934 and Exchange Act Rule 10b-5, following civil proceedings in which a jury found that Lemelson made three materially false and misleading statements about a public company.[8] The Division also alleges that Lemelson engaged in additional misconduct outside

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[5] *Id.* § 201.161(b). Although we ordered that "all reasonable requests for extensions of time will not be disfavored" with respect to the filing and service of papers, *Pending Administrative Proceedings*, Securities Act Release No. 10767, 2020 WL 1322001 (Mar. 18, 2020), that order does not apply to requests such as this to adjourn or postpone the proceeding itself. *See, e.g.*, *Fowler*, 2020 WL 3791560, at *1 n.10 (holding that the order does not apply to requests "to adjourn or postpone the proceeding itself pending an appeal of the underlying" follow-on predicate).

[6] Lemelson's challenges to this proceeding include that the Commission is biased against him and that he is entitled to a jury trial. Because these all relate to the validity of the final remedial order that the Commission might ultimately issue as a result of this administrative proceeding, rather than whether resolution of the proceeding should be postponed, we do not address them at this time.

[7] *See* Advisers Act Section 213(a), 15 U.S.C. § 80b-13(a) (providing that Commission orders under the Advisers Act may be appealed to a court of appeals); *see also, e.g.*, *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (holding that the "expense and disruption of defending" oneself in an agency adjudicatory proceeding does not constitute irreparable injury). Lemelson can also seek to stay, pending judicial review, any sanction that the Commission may impose against him, by filing a motion either to the Commission (while it retains jurisdiction) or to the relevant court of appeals. *See* Rule of Practice 401(c), 17 C.F.R. § 201.401(c); Advisers Act Section 213(b), 15 U.S.C. § 80b-13(b).

[8] *See SEC v. Lemelson*, 596 F. Supp. 3d 227 (D. Mass. 2022), *aff'd*, 57 F.4th 17 (1st Cir. 2023), *cert. denied*, 144 S. Ct. 486 (2023).

the period at issue in the civil proceeding, which the Division argues further supports its request. Lemelson opposes the Division's request, arguing, among other things, that the jury rejected some of the Division's theories of liability, and the district court suggested that a lifetime bar would not be warranted under the circumstances. Lemelson further disputes the Division's allegation that he committed misconduct outside the period at issue in the civil proceeding.

Advisers Act Section 203(f) authorizes the Commission to censure, place limitations on the activities of, suspend for up to 12 months, or bar a person from the securities industry if it finds, as relevant here, that (1) the person was enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security, (2) the person was associated with an investment adviser at the time of the alleged misconduct; and (3) such a sanction is in the public interest.[9] In assessing the public interest element, the Commission considers the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of the conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[10]

Commission Rule of Practice 250(b) provides that the Commission may resolve an administrative proceeding on a party's motion for summary disposition if "there is no genuine issue with regard to any material fact" and the moving party is "entitled to summary disposition as a matter of law."[11] Here, Lemelson maintains that while no bar is warranted, at minimum, the Commission should "hold a hearing to assess the public interest factors." We agree that an

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[9] 15 U.S.C. § 80b-3(f) (cross-referencing Advisers Act Section 203(e)(4), 15 U.S.C. § 80b-3(e)(4)); *see also id.* § 80b-3(e)(4) (discussing applicable injunctions).

[10] *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[11] 17 C.F.R. § 201.250(b); *see also ERHC Energy, Inc.*, Exchange Act Release No. 90517, 2020 WL 6891409, at *2 (Nov. 24, 2020) (discussing standard).

evidentiary hearing is warranted given the circumstances of this case.[12] We further find that it would serve the interests of justice and not result in prejudice to any party to specify further procedures in this matter.[13]

Accordingly, IT IS ORDERED that the Division of Enforcement's Motion for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that a public hearing for purposes of taking evidence on the questions set forth in Section III of the OIP shall be convened before an Administrative Law Judge as provided by Rule of Practice 110.[14] The Chief Administrative Law Judge shall designate, by rotation to the extent practicable, an Administrative Law Judge to be the presiding hearing officer.[15] The presiding hearing officer shall specify the time and place of the hearing by further order. The presiding hearing officer shall exercise the full powers conferred by the Commission's Rules of Practice and the Administrative Procedure Act.[16]

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[12] Although Lemelson has argued that a hearing is warranted in this case, he also argues that the removal restrictions for the Commission's administrative law judges are unconstitutional and that the case should not proceed until this "constitutional infirmity" is resolved. The Commission has, however, previously rejected such claims, and we endorse the Department of Justice's analysis of the issue in other proceedings. *See, e.g.*, *optionsXpress, Inc.*, Exchange Act Release No. 78621, 2016 WL 4413227, at *49-52 (Aug. 18, 2016), *abrogated in part on other grounds*, *Lucia v. SEC*, 585 U.S. 237 (2018); Defendants' Suggestions in Opposition to Plaintiffs' Motion for Preliminary Injunction § II, *H&R Block Inc. v. Himes*, No. 24-00198-CV-W-BP, 2024 WL 3742310 (W.D. Mo. Aug. 1, 2024), *appeal filed*, 2024 WL 2836827 (April 2024 Department of Justice brief); Br. For Appellees § II.A.3, *Leachco, Inc. v. Consumer Prod. Safety Comm'n*, 103 F.4th 748 (10th Cir. 2024) (No. 22-7060), 2023 WL 2155632, at *31-43 (February 2023 Department of Justice brief). Moreover, although Lemelson cites a Fifth Circuit case in support of his position on the ALJ removal issue, the Tenth Circuit has disagreed with that case, and Lemelson has not asserted that he resides in, or has his principal place of business in, the Fifth Circuit. *See* Advisers Act Section 213(a), 15 U.S.C. § 80b-13(a) (providing the courts of appeals where petitions for review of Commission decisions can be filed); *Jarkesy v. SEC*, 34 F.4th 446, 463-65 (5th Cir. 2022), *aff'd on other grounds*, 144 S. Ct. 2117 (2024); *Leachco*, 103 F.4th at 764-65 (disagreeing with the Fifth Circuit's *Jarkesy* decision at the preliminary injunction stage), *pet. for cert. filed*.

[13] *See* Rule of Practice 100(c), 17 C.F.R. § 201.100(c). To the extent conflicting, the procedures in this order supersede those specified in the OIP.

[14] 17 C.F.R. § 201.110.

[15] 17 C.F.R. § 200.30-10(a)(2).

[16] *See, e.g.*, 5 U.S.C. § 556; Rule of Practice 111, 17 C.F.R. § 201.111.

All motions, objections, or applications shall be directed to and decided by the presiding hearing officer.[17] This includes, without limitation, filings under Rules of Practice 210, 221, 222, 230, 231, 232, 233, and 250.[18] The parties should comply with the hearing officer's instructions regarding the provision of electronic courtesy copies. Any proposals for procedural schedules shall be directed to and decided by the presiding hearing officer.

IT IS FURTHER ORDERED that, pursuant to Rule of Practice 360(a)(2),[19] the hearing officer shall issue an initial decision no later than 75 days from the occurrence of one of the following events: (A) the completion of post-hearing briefing in a proceeding where the public hearing has been completed; (B) where the hearing officer has determined that no public hearing is necessary, upon completion of briefing on a motion pursuant to Rule of Practice 250;[20] or (C) the determination by the hearing officer that a party is deemed to be in default under Rule of Practice 155 and no public hearing is necessary.[21] This proceeding shall be deemed to be one under the 75-day timeframe specified in Rule of Practice 360(a)(2)(i) for the purposes of applying Rules of Practice 233 and 250.[22]

IT IS FURTHER ORDERED that the initial decision be issued on the basis of the record before the hearing officer, as defined by Rule of Practice 350,[23] and that the record index shall be prepared and certified in accordance with Rule of Practice 351.[24]

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17 *See* 17 C.F.R. § 201.151(b)-(c) (explaining how to file and how to direct filings when a matter is assigned to hearing officer).

18 17 C.F.R. §§ 201.210, .221, .222, .230, .231, .232, .233, .250.

19 17 C.F.R. § 201.360(a)(2).

20 17 C.F.R. § 201.250.

21 17 C.F.R. § 201.155.

22 17 C.F.R. §§ 201.233, .250, .360(a)(2)(i).

23 17 C.F.R. § 201.350.

24 17 C.F.R. § 201.351.

IT IS FURTHER ORDERED that, upon issuance of an initial decision, Rules of Practice 360(d), 410, and 411 shall govern further Commission consideration of this matter.[25]

By the Commission.

Vanessa A. Countryman
Secretary

[25] 17 C.F.R. §§ 201.360(d), .410, .411. Prior to issuance of an initial decision, interlocutory Commission review shall be governed by Rule of Practice 400, 17 C.F.R. § 201.400.