IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REVEREND FATHER EMMANUEL LEMELSON, *Plaintiff*, v. SECURITIES AND EXCHANGE COMMISSION, *Defendant*.	No. 24-cv-2415 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff, the Reverend Father Emmanuel Lemelson, seeks declaratory and injunctive relief to enjoin Defendant Securities and Exchange Commission ("SEC") from continuing to adjudicate an unconstitutional and unlawful "follow-on" administrative enforcement prosecution in which the agency is seeking to bar or suspend Lemelson from the securities industry. As explained more fully below, SEC's prosecution against Lemelson is a caricature of structural adjudicative bias that deprives Lemelson of his right to due process of law under the Fifth Amendment to the U.S. Constitution. SEC's prosecution also violates Article III of the Constitution and the separation of powers; Lemelson's rights under the Fifth and Seventh Amendments to have a jury decide his fate; Lemelson's statutory right to at least an evidentiary hearing to determine facts that could affect his ultimate punishment; and well-established principles of *res judicata*.

The Court should enjoin SEC's administrative enforcement prosecution of Lemelson and declare it unconstitutional and unlawful.

JURISDICTION AND VENUE

1. The Court has jurisdiction under Article III, § 2 of the United States Constitution and 28 U.S.C. §§ 1331, 1346, 1367, 1651, and 2201. *See also Free Enter. Fund v. Pub. Co. Acct'g Oversight Bd.*, 561 U.S. 477, 489-91 (2010); *Axon Enter., Inc. v. FTC and SEC v. Cochran*, 143 S. Ct. 890, 897 (2023) ("*Axon/Cochran*").

2. Venue is proper in this district because Defendant SEC is headquartered herein and because a substantial part of the events or omissions giving rise to Lemelson's claims occurred and continue to occur herein.

PARTIES

3. Lemelson is a U.S. citizen residing abroad. In addition to being an ordained Greek Orthodox priest, he currently manages an investment fund called The Spruce Peak Fund, LP, which *Hedge Fund Research* has ranked among the top-performing equity funds. Lemelson's investment research and analysis have been cited in a wide range of business media publications, including *The Wall Street Journal*, Bloomberg, CNBC, Fox Business News, *Fortune*, *Forbes*, *Barron's*, *Business Insider*, the *International Business Times*, Reuters, MarketWatch, and TheStreet.com.

4. Defendant SEC is an agency of the U.S. Government headquartered in Washington, DC.

RELEVANT FACTS

A. SEC's Rubber-Stamp "Follow-On" Process

5. Section 203(f) of the Investment Advisers Act of 1940 (the "Advisers Act") empowers SEC, among other things, to bar or suspend a person from working in the securities industry if it finds, "on the record after notice and opportunity for hearing," that such a bar or suspension is "in the public interest" and that the person has been convicted of a serious crime or

been enjoined by a court from, among other things, "engaging in or continuing any conduct or practice … in connection with the purchase or sale of any security." 15 U.S.C. § 80b-3(f) (incorporating by reference § 80b-3(e)(4)). In a typical year, using this power and similar power conferred by a parallel provision of the Securities Exchange Act of 1934, SEC initiates more than a hundred such "follow-on" administrative prosecutions—sometimes more than two hundred. In the vast majority of these cases, the respondent is suspended or barred through a settlement or default because, unsurprisingly, relatively few such respondents have the resources and fortitude to defend themselves in a second battle launched against them by their government.

6. In these SEC administrative follow-on proceedings, the deck is stacked decidedly against the accused and in SEC's own favor. The cases are ultimately adjudicated by the SEC commissioners themselves, sometimes after an initial decision is rendered by one of SEC's hand-picked administrative law judges ("ALJs"). No jury or independent Article III judge is involved; SEC holds its staff prosecutors to only the featherweight "preponderance of evidence" burden of proof; and ordinary rules of evidence are inapplicable. Worse yet, SEC and its ALJs routinely decide follow-on cases through "summary disposition," 17 C.F.R. § 201.250(b), (c)—a rough analogue to summary judgment in federal courts—thereby depriving respondents of not only a jury trial but even the non-jury evidentiary hearing ostensibly required by both the Advisers Act, 15 U.S.C. § 80b-3(f), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 554(b)(1), 554(c)(2), 556. *See generally* Alexander Platt, *Is Administrative Summary Judgment Unlawful?*, 44 HARV. J.L. & PUB. POL'Y 239, 251-59 (2021); Alexander Platt, *Unstacking the Deck: Administrative Summary Judgment and Political Control*, 34 Yale J. on Reg. 439, 461-69 (2017) (noting with disapproval SEC's routine and increasing reliance on summary disposition to adjudicate follow-on cases since 2002).

7. Courts have repeatedly instructed SEC to consider a range of case-specific factors when determining whether imposition of a bar or suspension in any given case is "in the public interest." As a practical matter, however, a bar or suspension is a foregone conclusion in virtually all SEC follow-on proceedings. According to exhaustive empirical analysis by a leading securities law scholar, SEC imposes a bar or suspension in *all* follow-on cases except the small handful in which SEC is unable to locate and serve the respondent, or where the predicate court injunction or criminal conviction is vacated. Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 963, 967 (2016); *accord In re Maher F. Kara*, SEC Initial Decision Rel. No. 979, 2016 WL 1019197, at *7 (Mar. 15, 2016) ("[f]rom 1995 to [March 2016], there have been over forty-six litigated follow-on proceedings based on antifraud injunctions or convictions in which the Commission issued opinions, and all of the respondents were barred—forty-three unqualified bars and three bars with the right to reapply after five years"). "Even the 1972 Miami Dolphins would envy that type of record." *Axon/Cochran*, 598 U.S. at 197 n.1 (Thomas, J., concurring) (quoting Ninth Circuit opinion below in that case).

B. SEC's Ongoing War Against Lemelson

8. SEC is an avowed and persistent nemesis of Lemelson. The agency has been in an openly aggressive and adversarial relationship with Lemelson for much of the past decade. It launched an intrusive and persecutive investigation against him in or around 2015 after a pharmaceutical company complained about Lemelson's withering public criticism of the company. In September 2018, just months after Lemelson sent an open letter to Congress accusing SEC of incompetency and financial illiteracy, the agency sued Lemelson in the United States District Court for the District of Massachusetts, leveling false and incendiary allegations that Lemelson had engaged in market manipulation and other nefarious misconduct. Among other baseless

allegations, SEC accused Lemelson of defrauding his own investors—a recklessly false allegation that a federal jury eventually rejected, but which by that time had caused Lemelson irremediable reputational and financial harm. SEC's lawsuit demanded millions of dollars in penalties and forfeitures against Lemelson.

9. Immediately upon filing its lawsuit against Lemelson, SEC also embarked on a years-long parallel media campaign to further demonize him. On September 12, 2018, the agency issued a false and defamatory press release emblazoned with the headline "SEC Charges Hedge Fund Adviser With Short-and-Distort Scheme." The press release had the purpose and predictable effect of prompting numerous media reports that dutifully repeated SEC's allegations, thereby inflicting further reputational and financial harm on Lemelson.

10. SEC's Massachusetts federal court prosecution against Lemelson has been hostile and contentious from the start—through discovery, numerous motions, trial, appeal, and an unsuccessful petition for certiorari. The litigation has continued even after Lemelson's unsuccessful appeal to the First Circuit and unsuccessful petition for certiorari to the Supreme Court, because Lemelson subsequently sought to recover his attorneys' fees and costs from SEC under the Equal Access to Justice Act ("EAJA"). As explained in his EAJA motion, an award of fees and costs is warranted because the Massachusetts jury overwhelmingly rejected SEC's charges against Lemelson and because the Massachusetts district court ultimately awarded SEC only a small fraction of the relief the agency unreasonably demanded in its complaint and in its post-trial pleadings. The Massachusetts district court denied Lemelson's EAJA motion in July 2024—in an opinion that began by noting the "long-running, hard-fought, [and] bitter" nature of the litigation—despite finding that Lemelson was a "prevailing party" in the case within the meaning of EAJA. Lemelson has appealed that decision to the First Circuit.

11. Although SEC overwhelmingly lost its case before the Massachusetts federal jury and obtained only a small fraction of the relief it had demanded, the Massachusetts district court entered a judgment that vaguely and summarily enjoined Lemelson "from violating Section 10(b) of the [Securities] Exchange Act and [SEC] Rule 10b-5 for a period of five years" while ordering him to pay a $160,000 civil penalty and no disgorgement. In doing so, the court rebuffed SEC's outlandish demand for a *permanent*, *lifelong* injunction and *more than $2.6 million* in penalties and disgorgement.

12. Although SEC could have requested that the Massachusetts district court judgment include an order barring, suspending, or enjoining Lemelson from participating in all or part of the securities industry, it did not seek such relief, thereby forever forfeiting its right to do so under well-established principles of *res judicata*. Upon information and belief, SEC made that deliberate tactical decision based on its erroneous assumption that it could unilaterally impose such relief in its own follow-on administrative prosecution, thereby avoiding the need to prove to a neutral and independent Article III district court that such relief was necessary or appropriate.

13. Throughout the contentious Massachusetts federal court proceedings, SEC has filed numerous pleadings, motions, and other documents that have repeatedly maligned Lemelson and effectively demonized him as not just a fraudster but a religious charlatan too.

14. SEC has also continued its defamatory media campaign against Lemelson. Even after the Massachusetts district court jury exonerated Lemelson of most of SEC's charges—including all charges alleging manipulation or a scheme to defraud—SEC issued another false and defamatory press release headlined "SEC Wins Jury Trial Against Hedge Fund Adviser Who Ran Manipulative Short Scheme." Incredibly, while boasting about SEC's purported "win"—and repeating the agency's false allegations of manipulation and scheming despite the jury's

unequivocal *rejection* of those very charges—the press release made *no mention whatsoever* of the jury rejecting most of SEC's case. Ironically, SEC routinely sues companies and individuals, including Lemelson, for far less egregious (and even unintentional) alleged omissions.

15. In short, through its words and actions over many years, SEC has repeatedly betrayed an intense, unrelenting contempt for Lemelson.

16. Yet despite this palpable disdain for its long-time nemesis, despite its baseless allegations against him, despite its misleading and incendiary press releases falsely maligning him, and despite its ongoing Massachusetts federal court litigation against him, SEC now pretends to sit in judgment as the supposedly impartial adjudicator of the follow-on administrative enforcement prosecution it launched against Lemelson in April 2022, through which the agency threatens to bar or suspend Lemelson from the securities industry. SEC launched that follow-on administrative prosecution—which arises from the same facts and circumstances as SEC's Massachusetts federal court prosecution—just weeks after the Massachusetts district court entered its final judgment predominantly in Lemelson's favor.

17. In SEC's follow-on administrative prosecution against Lemelson, SEC asserts as the relevant predicate for a bar or suspension that portion of the Massachusetts district court judgment that enjoined Lemelson "from violating Section 10(b) of the [Securities] Exchange Act and [SEC] Rule 10b-5 for a period of five years." SEC staff prosecutors in the follow-on administrative proceeding are the very same SEC attorneys who advised and represented SEC, and continue to do so, as the agency's lead counsel in the ongoing Massachusetts federal court prosecution. Upon information and belief informed by established SEC practice, these SEC attorneys have likely engaged in multiple *ex parte* attorney-client communications with the SEC commissioners about Lemelson's case since at least September 2018. *See, e.g.,* SEC

ENFORCEMENT MANUAL § 2.5 (November 28, 2017) (describing, among other things, the case-specific *ex parte* "action memorandum" submitted by SEC staff prosecutors to SEC commissioners, and related case-specific *ex parte* "closed meetings" held between SEC staff prosecutors and SEC commissioners, before authorization and commencement of public enforcement actions and certain subsequent events), *available at* www.sec.gov/divisions/enforce/enforcementmanual.pdf.

18. In short, SEC's commissioners not only have an intense and obvious prejudice against Lemelson but also the undeniable appearance of bias *in favor of* their own lawyers, who are now contemporaneously appearing before the commissioners as prosecutors of the administrative follow-on proceeding, even as they simultaneously continue to advise the same commissioners, *ex parte*, in connection with the parallel Massachusetts federal court litigation against Lemelson.

C. The Need for Declaratory and Injunctive Relief

19. SEC's administrative enforcement follow-on prosecution against Lemelson remains pending before the agency, as-yet undecided. The parties submitted briefs on the merits in that proceeding approximately two years ago, shortly before SEC separately filed its merits brief in the First Circuit opposing Lemelson's appeal from the Massachusetts district court judgment. Under SEC's interpretation of its procedural rules, the agency could bar or suspend Lemelson at any time through "summary disposition," without a jury trial, without further notice to Lemelson, and without even holding the hearing ostensibly required by both the Advisers Act and the APA. *Compare* 15 U.S.C. § 80b-3(f) (authorizing bar or suspension only after notice and opportunity for hearing) and 5 U.S.C. §§ 554(b)(1), 554(c)(2), 556(d) (describing hearing requirements for

administrative adjudications) *with* 17 C.F.R. § 201.250 (purporting to allow SEC to summarily impose bar or suspension without conducting any hearing).

20. A decision to bar or suspend Lemelson would inflict further immediate and irreparable harm on him while threatening catastrophic harm to the investment fund he manages and its investors. SEC bar and suspension orders typically take effect upon issuance or promptly thereafter, such that Lemelson could not continue managing the fund without violating the SEC bar order and risking further SEC prosecution and punishment for that violation. *See* 15 U.S.C. § 80b-3(f). His investment fund would also be at risk of SEC prosecution for "permit[ting]" Lemelson to continue playing his management role in violation of SEC's order. *See id*. But the fund is relatively small, and Lemelson is the only person currently capable of managing its assets; it would be nearly impossible for the fund to immediately recruit and hire a qualified manager to replace him, particularly if SEC's bar or suspension order, as is typical, prohibited him from participating in that recruitment and transition process.

FIRST CLAIM FOR RELIEF

(Denial of Due Process of Law in Violation of the Fifth Amendment)

21. Lemelson realleges and incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

22. The Fifth Amendment to the U.S. Constitution guarantees in relevant part that "No person shall be … deprived of life, liberty, or property, without due process of law."

23. "A fair trial in a fair tribunal is the basic requirement of due process," *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)), as well as an "inexorable safeguard" of individual liberty, *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292, 304 (1937) (quoting *St. Joseph Stock Yards Co. v. United States*,

298 U.S. 38, 73 (1936)). This means not only actual fairness but the appearance of fairness. "Every procedure which would offer a possible temptation to the average man as a judge to forget the burdens of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

24. One of the bedrock prerequisites of fairness and due process of law is that adjudicators must not decide their own cases. *See, e.g., Williams v. Pennsylvania*, 579 U.S. 1, 8-9 (2016); *In re Murchison*, 349 U.S. 133, 136-37 (1955). Yet that is precisely what SEC purports to do in its follow-on administrative prosecution against Lemelson. Moreover, SEC has a longstanding hostile and adversarial relationship with Lemelson—and indeed is still litigating the Massachusetts federal court case against him involving the same facts and events upon which the outcome of SEC's follow-on administrative prosecution will turn. Worse yet, the SEC lawyers leading the prosecution team in the follow-on administrative proceeding are the very same lawyers with whom the SEC commissioners have been working, hand in fiduciary glove, over the past five years in their prosecution of Lemelson in the Massachusetts federal courts. The appearance and reality of a stacked administrative deck, and of SEC's intractable adjudicative bias against Lemelson, could not be clearer.

25. SEC's adjudication of its follow-on administrative enforcement prosecution against Lemelson profoundly deprives Lemelson of his Fifth Amendment right to due process of law, inflicting substantial here-and-now injury on him and threatening to deprive him of his liberty and property rights to pursue his chosen livelihood and to continue operating his successful business.

Unless enjoined, SEC will continue in this deprivation and will inflict further injury on Lemelson and his fund.[1]

SECOND CLAIM FOR RELIEF

(Usurpation and Relocation of Judicial Power in Violation of Article III of the Constitution)

26. Lemelson realleges and incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

27. SEC is not a court of the United States within the meaning of Article III of the Constitution, and neither SEC nor its commissioners are independent judges with life tenure. SEC therefore lacks any lawful power to decide cases and controversies such as the administrative follow-on case against Lemelson, which threatens to punish him and deprive him of his private property and liberty rights without the Article III adjudication required by the Constitution.

28. By adjudicating and ultimately deciding its own case against Lemelson, SEC is usurping the judicial power of the United States and purporting to relocate and vest it in an independent agency of the executive branch, thereby violating Article III of the constitution and the constitutional separation of powers. Unless enjoined, SEC will continue to violate these structural constitutional safeguards and inflict further injury on Lemelson and his fund.

[1] Plaintiff acknowledges that his due process claim is in tension with the D.C. Circuit's decision in *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1104-08 (D.C. Cir. 1988), which primarily relied (and expanded) on the Supreme Court's decision in *Withrow v. Larkin*, 421 U.S. 35 (1975). Plaintiff believes in good faith that the relevant holding in *Blinder, Robinson* was erroneous and that its legal and factual premises, along with those underlying *Withrow*, have been substantially disproved and undermined over the intervening decades. Moreover, Plaintiff believes in good faith that the relevant holdings in both *Blinder, Robinson* and *Withrow* have been substantially eroded by more recent Supreme Court decisions, including *Williams v. Pennsylvania*, 579 U.S. 1 (2016), and *SEC v. Jarkesy*, 144 S. Ct. 2117, 2132 (2024), and thus no longer square with Supreme Court precedent or applicable law.

THIRD CLAIM FOR RELIEF

(Unlawful Deprivation of Fifth and Seventh Amendment Right to a Jury Trial)

29. Lemelson realleges and incorporates by reference the allegations contained in all preceding paragraphs of this Complaint.

30. Through its administrative follow-on prosecution of Lemelson, SEC seeks to deprive him of his liberty and private property rights to pursue his chosen profession and his chosen source of livelihood. Government can constitutionally do so only after affording Lemelson a trial through which the predicate findings of disputed fact are decided by a jury of his peers, not by the government's own self-interested officials and employees. *See SEC v. Jarkesy*, 144 S. Ct. 2117, 2132 (2024).

31. SEC's follow-on administrative enforcement prosecution lacks any procedural option for a trial by jury. By adjudicating the case without a jury, SEC is therefore depriving Lemelson of his rights under the Fifth and Seventh Amendments to have a jury decide the facts that can determine his punishment and affect his liberty and property interests. Unless enjoined, SEC will continue to violate Lemelson's Fifth and Seventh Amendment rights.

FOURTH CLAIM FOR RELIEF

(Unlawful Prosecution Barred by *Res Judicata*)

32. Lemelson realleges and incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

33. In its Massachusetts federal court prosecution of Lemelson, which SEC had a full and fair opportunity to litigate on the merits through a jury trial, SEC invoked the court's equitable powers by successfully demanding an injunction against Lemelson. SEC could have requested that the injunction include a bar or suspension to restrict Lemelson from participating in the

securities industry. *See* 15 U.S.C. §§ 78u(d)(1), 78u(d)(5), 80b-9(d). SEC made the deliberate tactical decision not to seek such relief.

34. Having deliberately chosen not to seek such relief in the Massachusetts federal court action, well-established principles of *res judicata* forbid SEC from splitting its claims and pursuing a second prosecution against Lemelson to obtain that relief now—especially a second prosecution in which SEC itself purports to serve as the adjudicator.

35. Unless enjoined, SEC will continue its unlawful second prosecution of Lemelson in plain violation of the principles of *res judicata*.

FIFTH CLAIM FOR RELIEF

(Unlawful Deprivation of Right to a Hearing on the Record)

36. Lemelson realleges and incorporates by reference the allegations contained in all preceding paragraphs of this Complaint.

37. The Advisers Act empowers SEC to impose a follow-on industry bar or suspension against Lemelson only if SEC makes certain factual findings "on the record after notice and opportunity for hearing." 15 U.S.C. § 80b-3(f). The APA likewise ostensibly requires SEC to afford Lemelson a hearing before imposing sanctions. 5 U.S.C. §§ 554(b)(1), 554(c)(2), 556(d).

38. Although SEC commenced its administrative follow-on prosecution against Lemelson more than two years ago, it has afforded him no opportunity for a hearing and appears poised to adjudicate the matter entirely on papers through "summary disposition," without any evidentiary hearing—the same way it decides the vast majority of its other contested follow-on prosecutions.

39. Should the Court decline to enjoin SEC from adjudicating its follow-on administrative prosecution of Lemelson, it should, at a minimum, direct SEC to afford him the

hearing required by the Advisers Act and the APA before imposing any industry bar, industry suspension, or other sanction against him.[2]

* * * *

WHEREFORE, Lemelson respectfully requests entry of judgment in his favor that:

A. Declares that SEC's follow-on administrative enforcement prosecution against Lemelson violates his right to due process of law under the Fifth Amendment to the Constitution;

B. Declares that SEC's follow-on administrative enforcement prosecution against Lemelson violates Article III of the Constitution and the constitutional separation of powers.

C. Declares that SEC's follow-on administrative enforcement prosecution against Lemelson violates his right to a jury trial under the Fifth and Seventh Amendments to the Constitution;

D. Declares that SEC's follow-on administrative enforcement prosecution against Lemelson is barred by principles of *res judicata*;

E. Enjoins SEC from continuing with or adjudicating its follow-on administrative enforcement prosecution against Lemelson;

F. In the event that the Court declines to enjoin SEC from continuing with or adjudicating its follow-on administrative enforcement prosecution against

[2] Plaintiff acknowledges that his fifth claim is in tension with the D.C. Circuit's opinion in *Kornman v. SEC*, 592 F.3d 173 (D.C. Cir. 2010), which relied on *Chevron* deference in upholding SEC's interpretation of the Advisers Act requirement of a hearing and *Auer* deference in upholding SEC's interpretation of its rule permitting summary disposition without a hearing. Plaintiff believes in good faith that *Kornman* was wrongly decided, is factually distinguishable, and has been effectively overruled by more recent Supreme Court decisions, including *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) and *Loper-Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Dep't of Commerce*, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron*).

Lemelson, directs SEC to afford Lemelson the hearing required by the Advisers Act and the APA;

G. Awards Plaintiff his costs and attorneys' fees incurred in connection with this case; and

H. Awards Plaintiff such other and further relief as the Court deems just and appropriate.

August 21, 2024

Respectfully submitted,

/s/ *Russell G. Ryan*

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