

No. 22-____

In the
Supreme Court of the United States

REV. FATHER EMMANUEL LEMELSON
(F/K/A GREGORY LEMELSON) AND
LEMELSON CAPITAL MANAGEMENT, LLC,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 10(b) of the Securities Exchange Act of 1934 prohibits any “manipulative or deceptive device or contrivance,” as defined by Securities and Exchange Commission rule, in connection with the purchase or sale of any security. SEC Rule 10b-5—which this Court has repeatedly held cannot create or expand liability beyond what § 10(b) prohibits—purports to make it unlawful not only “[t]o employ any device, scheme, or artifice to defraud” or “[t]o engage in “any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,” but also “[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.”

The jury in this case found no “device, scheme, or artifice to defraud” and no “act, practice, or course of business which operates or would operate as a fraud or deceit.” But it did find that three sentences or sentence fragments, embedded within Petitioners’ five published written reports and four online interviews about a publicly traded corporation, were intentionally or recklessly made “untrue statements of material fact or [omissions] to state material facts necessary in order to make the three statements made not misleading.” The First Circuit affirmed the district court’s judgment that rejected Petitioners’ First Amendment defense, held Petitioners liable

under § 10(b) and Rule 10b-5, imposed a \$160,000 penalty, and enjoined Petitioners for five years.

The questions presented are:

1. Absent proof of fraud or deception, does the First Amendment protect a securities market participant from being punished and enjoined by the government for intentionally or recklessly making untrue statements or omissions of material fact while criticizing a publicly traded corporation?

2. Absent proof of fraud or deception, do untrue statements or omissions of material fact, even if made intentionally or recklessly, constitute a “manipulative or deceptive device or contrivance” punishable under § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5?

PARTIES TO THE PROCEEDINGS

Petitioners Rev. Father Emmanuel Lemelson (f/k/a Gregory Lemelson) and Lemelson Capital Management, LLC were defendants in the U.S. District Court for the District Massachusetts and appellants in the U.S. Court of Appeals for the First Circuit.

Respondent Securities and Exchange Commission was the plaintiff in the district court and the appellee in the First Circuit.

The Amvona Fund, LP, was a “relief defendant” in the U.S. District Court for the District of Massachusetts but is not a party to the proceedings in this Court.

On March 18, 2020, the district court “[a]llowed as unopposed” a motion by Ligand Pharmaceuticals, Inc. for joinder as an interested party. Ligand is not a party to the proceedings in this Court.

RELATED PROCEEDINGS

SEC v. Gregory Lemelson, et al., No. 18-cv-11926 (D. Mass.), judgment entered March 30, 2022.

SEC v. Gregory Lemelson, a/k/a Father Emmanuel Lemelson, No. 22-1630 (1st Cir.), judgment entered January 3, 2023.

In the Matter of Gregory Lemelson, SEC Administrative Proceeding File No. 3-20828, order instituting proceedings issued April 20, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the First Circuit is reported at 57 F.4th 17 and is reproduced at App. 3a-31a. The verdict form returned by the jury in the district court is reproduced at App. 55a-56a, and the district court's judgment is reproduced at App.53a-54a.

JURISDICTION

The First Circuit denied Petitioners' timely motion for rehearing en banc on March 6, 2023. App. 1a-2a. On May 19, 2023, Justice Jackson extended the time to file a petition for a writ of certiorari until July 31, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides in relevant part:

Congress shall make no law ... abridging the freedom of speech, or of the press

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), provides in relevant part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange ...

(b) To use or employ, in connection with the purchase or sale of any security, ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, provides:

It shall be unlawful for any person, directly or indirectly ...,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

INTRODUCTION

Nobody likes being criticized. Criticism can seem unfair, inaccurate, and even ill-motivated. But the default response to unwelcome criticism, and the one the First Amendment demands, is robust debate and counter-speech—not federal prosecution and prior restraint.

Powerful, publicly traded corporations don't like criticism either. Criticism can hurt sales and corporate brands, depress stock prices, expose corporate misconduct or mismanagement, and threaten executives' compensation and job security. But unlike many targets of criticism, publicly traded corporations have no shortage of resources or platforms to refute their critics. They can issue press releases or social media posts. They can hold press conferences. They can organize conference calls with market analysts. They can enlist friendly market analysts to challenge naysayers with positive and optimistic counter-analysis. Their executives can appear for TV, radio, or online interviews. They can demand corrections or retractions and, if they have sufficient proof, they can even sue their critics for damages.

In this case, however, publicly traded pharmaceutical corporation Ligand Pharmaceuticals, Inc. eschewed those conventional options and took a different tack: It enlisted federal law enforcement to punish, silence, and deplatform its critic. When Petitioner Rev. Father Emmanuel Lemelson and his eponymous investment fund (collectively referred to herein as "Lemelson") publicly announced in 2014 that they had taken a "short" position in Ligand stock,

and then explained their reasons for doing so in a series of detailed reports and online interviews, Ligand lobbied agents at Respondent Securities and Exchange Commission (“SEC”) and demanded that the agency investigate and prosecute Lemelson. That lobbying eventually paid off.

After four years of investigation, SEC charged Lemelson with securities fraud in 2018, claiming his criticism of Ligand in 2014 was part of a fraudulent scheme to profit from his fully disclosed short position in Ligand stock. After trial, a jury rejected all of SEC’s fraud allegations. But the jury nevertheless found that one isolated sentence and a second isolated sentence fragment—both embedded within Lemelson’s 56 pages of published written reports about Ligand—along with a two-second, unscripted sentence fragment in one of Lemelson’s four online interviews about the company, were “untrue” statements or omissions of material fact made “intentionally or recklessly.” Based on that finding, the district court held Lemelson liable for using or employing a “manipulative or deceptive device or contrivance” under § 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) and SEC Rule 10b-5 “Rule 10b-5”). The district court imposed a \$160,000 penalty and enjoined Lemelson from making similar statements or omissions for five years.

This petition comes to the Court at a time when free speech rights are under increasingly relentless assault. Given the unusual clarity of the jury verdict, the petition offers the Court an ideal opportunity to decide whether, absent proof of fraud or deception, the First Amendment prohibits SEC from penalizing and enjoining commentary about publicly traded

corporations and other financial matters of public concern any time that commentary contains a few purported inaccuracies or omissions later deemed intentional or reckless. It also presents the Court, in the alternative, with an ideal opportunity to clarify that, absent proof of fraud or deception, even intentional or reckless “untrue statements” and omissions, do not amount to a “manipulative or deceptive device or contrivance” punishable under Exchange Act § 10(b) or Rule 10b-5.

STATEMENT OF THE CASE

1. Lemelson is an ordained Greek Orthodox priest, an activist investor, and a whistleblower on publicly traded corporations. During the period relevant here, he also managed an investment fund called the Amvona Fund. App. 5a. Lemelson is a prolific analyst and commentator on topics related to public securities markets and the companies whose securities trade in those markets, including some in which his investment fund invested. *Id.* Over the past 13 years, he has published scores of written reports concerning publicly traded corporations and related matters of public concern, has been interviewed dozens of times to offer his perspective and expertise on such matters, and has been widely cited and quoted in the global media for his analyses and opinions.

2. In May 2014, on behalf of the investment fund he managed, Lemelson began building a “short” position in the stock of Ligand Pharmaceuticals, Inc. *Id.* A short position is typically taken by someone who believes the market is overvaluing a company’s stock, or overlooking corporate mismanagement or

misconduct, and who then stands to profit if and when the stock price declines. Ligand is a publicly traded pharmaceutical corporation whose principal product at the relevant time was Promacta, an FDA-approved orphan drug for treating the side effects of certain therapies for hepatitis C. App.5a-6a. Ligand had recently sponsored the creation of, and entered into a licensing agreement with, another pharmaceutical company called Viking Therapeutics, Inc., which was not yet a publicly traded corporation but was in the process of registering its shares with SEC to allow them to trade in public markets. *Id.*

3. Between June and August 2014, Lemelson wrote five detailed reports about Ligand, which he published and made available to the general public without charge on the website of his investment fund and then republished through the investment news and commentary website Seeking Alpha (www.seekingalpha.com). App. 7a. As was true with his reports about other companies and topics, his opinion and analysis were at times covered by other media outlets including USA Today, Benzinga, Street Insider, and others. In his written reports concerning Ligand, which collectively totaled 56 pages, Lemelson fully disclosed his short position; questioned in detail Ligand's finances, accounting, business prospects, solvency, integrity, management competence, 2014 bond offering, and licensing arrangement with Viking; and explained why he believed Ligand's stock was vastly overvalued and had no intrinsic value.

Lemelson's reports also included prominent and extensive disclosures cautioning readers that he could not guarantee the accuracy, timeliness, or completeness of the information presented. Thus,

immediately after the initial “Overview” paragraph of his written reports appeared the following “Disclaimer”:

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A more detailed “Full Disclaimer” appeared at the end of each report.¹

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During the relevant period, Lemelson also participated in at least four separate interviews (collectively consuming more than an hour of airtime) that were broadcast by the online investment website Benzinga (www.benzinga.com). In those interviews, Lemelson offered a similarly negative assessment of Ligand and its financial prospects. App. 7a.

4. Lemelson's negative assessment of Ligand ultimately proved prescient. The company's stock price declined by approximately one-third in the months after Lemelson began publishing his warnings, although the district court found insufficient evidence to tie this overall stock price decline even to Lemelson's entire body of criticism over that period, much less the three isolated sentences and sentence fragments the jury ultimately found untruthful or misleading, App.46a, 47a, 51a. Those who found Lemelson's research and commentary persuasive and heeded his warnings

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realized significant investment gains or avoided significant investment losses, whereas those who didn't either lost money or missed the opportunity for investment gains. In short, free speech in the marketplace worked as our founders intended.²

5. Unsurprisingly, Ligand did not appreciate Lemelson's unflattering commentary and whistleblowing, nor the decline in its stock price in 2014. But instead of using its many available platforms to publicly refute Lemelson's criticism, the company directed its lawyers, including a former high-ranking SEC official, "to lean on the SEC to get an injunction on Lemelson's activities." *SEC v. Lemelson*, 532 F. Supp. 3d 30, 36-37 (D. Mass. 2021) (district court recitation of undisputed facts on summary judgment). As Ligand's chief executive officer acknowledged in his trial testimony, the company wanted Lemelson "silenced for good."

Ligand's lawyers then filed two written complaints with SEC (one in 2014 and the other in 2015); met with one team of SEC staff in Boston in September 2014 (using a PowerPoint presentation that "included

² Even after covering his short position at a profit in October 2014, Lemelson continued to speak out against Ligand. For example, he published several additional written reports and interviews about Ligand from 2015 through 2018 (none of which SEC ever challenged), filed five whistleblower reports with SEC over the same period, and wrote two detailed open letters to Congress—one in December 2016 and the other in July 2018—in which he accused Ligand of, among other things, ongoing securities fraud and abuse of the Orphan Drug Act of 1983. The July 2018 letter, which preceded SEC's filing of the complaint in this case by two months, also accused SEC of incompetency and financial illiteracy in failing to detect and prosecute Ligand's misconduct.

photos of Lemelson in his priestly robes” and baselessly accused him of engaging in an “affinity fraud” against his parishioners); met with a different team of SEC staff in June 2015 (after the Boston staff declined Ligand’s entreaties to investigate and prosecute Lemelson); and “communicated with SEC staff by email and telephone between September 2014 and March 2018.” *Id.* Ligand also enlisted a then-sitting member of Congress (who was later criminally indicted for unrelated reasons) to write a letter to the SEC Chair, coincident with the June 2015 meeting between the company’s lawyers and SEC staff, urging that the SEC investigate Lemelson. *See SEC v. Lemelson*, 334 F.R.D. 359, 361 (D. Mass. 2020) (denying SEC motion for protective order).

6. Ligand’s relentless campaign to “lean on” SEC eventually paid off. After four years of Ligand’s lobbying and the resulting SEC investigation, SEC filed a complaint against Lemelson that singled out a small handful of sentences and sentence fragments scattered among Lemelson’s 56 pages of written reports and four online interviews during 2014 as allegedly containing factual assertions that were either untrue or, if true, incomplete and thus misleading.

SEC’s complaint alleged no inaccuracies in any of the other hundreds of sentences contained in Lemelson’s reports and interviews about Ligand. Nor did the complaint question the prescience of Lemelson’s overall assessment of Ligand, as it specifically acknowledged that Ligand’s stock price fell by approximately 34 percent from June 2014 through October 2014 for reasons the district court ultimately found could not be causally connected to

any of the three statements the jury found untrue or misleading. App. 46a, 47a, 51a (refusing to award SEC any disgorgement of Lemelson's profits because "it is difficult to see how Lemelson is responsible for the entirety of the drop in Ligand's stock price" and because "SEC has not presented a reasonable approximation of the pecuniary gain" attributable to the three isolated untrue statements ultimately found by the jury).

Still, SEC's complaint repeatedly positioned Ligand as a victim and faulted Lemelson for the perceived offenses of "attacking Ligand with the intent to convince the investing public that Ligand's stock was overvalued;" publishing reports and interviews "intended to create a negative view of the company and its value and, consequently, to drive down the price of the company's stock;" publishing reports about Ligand that "were negative and took a dim view of the company's value and prospects;" and publishing reports and interviews for the purpose of "shak[ing] investor confidence in Ligand and driv[ing] down Ligand's share price." Despite the precipitous fall in Ligand's stock price as Lemelson had warned, SEC's complaint alleged that Lemelson's criticism of Ligand involved "fraud, deceit, manipulation, and/or deliberate disregard of regulatory requirements and directly resulted in losses to other persons," and thus that Lemelson violated Exchange Act § 10(b), 15 U.S.C. § 78j(b), and SEC Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. The complaint further alleged that Lemelson engaged in fraudulent, deceptive, or manipulative conduct in violation of § 206(4) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6(4),

and SEC Rule 206(4)-8 thereunder, 17 C.F.R. § 275.206(4)-8.

7. After a nine-day trial in the fall of 2021, a jury rejected nearly all of SEC’s allegations. More specifically, the jury found that SEC did *not* prove, by even a preponderance of the evidence, that Lemelson “intentionally or recklessly engag[ed] in a scheme to defraud, or any act, practice, or course of business which operates or would operate as a fraud or deceit.” App. 55a-56a. It also found that SEC did *not* prove any intentional or even negligent fraud in violation of the Investment Advisers Act or the relevant SEC rule thereunder. *Id.* And it further found that SEC did *not* prove that Lemelson’s harshest statements about Ligand—claiming the company was effectively insolvent—were intentional or reckless misstatements or omissions. *Id.*

Despite rejecting all of SEC’s charges of fraud and deceit, the jury found that, with respect to three of the isolated sentences and sentence fragments SEC had singled out from Lemelson’s five written reports and four oral interviews, Lemelson had “intentionally or recklessly made untrue statements of material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.” *Id.*³ Only one of the three statements directly concerned Ligand; the other two were about Ligand’s affiliated licensee, Viking, whose securities

³ Although Lemelson vehemently disagrees with the jury’s findings of untruthfulness and intent (or recklessness), for purposes of this petition he accepts and does not dispute those findings.

Lemelson never traded. The three statements were: (1) a two-second, unscripted sentence fragment from one of Lemelson's four internet radio interviews concerning Ligand, in which he asserted that in a telephone interview the day before—as reflected in his contemporaneous handwritten notes from the call—Ligand's investor relations representative had “basically agreed” with Lemelson's opinion that Ligand's main product, Promacta, was “literally going to go away;” (2) Lemelson's assertion in a written report, after quoting directly from a public SEC filing made by Viking, that the Viking financial statements included within its SEC filing were “unaudited;” and (3) Lemelson's assertion in the same written report—when referring to a Viking risk disclosure in the same public SEC filing that said “[w]e intend to rely on third parties to conduct our preclinical studies and clinical trials”—that “Viking does not intend to conduct any preclinical studies or trials.” App. 7a-10a.

The jury was not asked to further specify, and did not specify, whether it found these three statements to be untrue or, as explicitly permitted by the jury instructions, literally true but nevertheless materially incomplete and misleading. Upon the jury's verdict, and after denying Lemelson's various post-trial motions, the district court held Lemelson liable for violating Exchange Act § 10(b) and SEC Rule 10b-5 thereunder. App. 53a-54a. As punishment, the district court entered final judgment imposing a \$160,000 penalty and, without further specificity or elaboration, enjoining Lemelson from violating those provisions for a period of five years. *Id.* The entire text of the court's injunction reads: “Defendants are enjoined from violating Section 10(b) of the Exchange

Act and Rule 10b-5 for a period of five years.” App. 52a, 54a.⁴

8. The First Circuit affirmed in all respects. Notwithstanding Lemelson’s principal contention that the district court judgment abridged his free speech rights under the First Amendment, the appeals court applied conventional principles of review for appeals from civil cases determined by a jury, such as “constru[ing] facts in the light most favorable to the jury verdict;” “draw[ing] any inferences in favor of the [prevailing party];” “abstain[ing] from evaluating the credibility of the witnesses or the weight of the evidence;” “asking whether a rational jury could have found in favor of the party that prevailed;” and “set[ting] aside the jury verdict only if the jury failed to reach the only result

⁴ Less than a month after the district court entered its judgment, SEC initiated a follow-on administrative proceeding—assigning itself as final adjudicator and citing the district court’s injunction as its statutory predicate—in which the same two SEC prosecutors who served as the agency’s lead counsel in the district court have requested that the agency now summarily bar Lemelson from ever again participating in the securities industry. *See In re Lemelson*, SEC Investment Advisers Act Rel. No. 6000 (Order Instituting Proceedings Apr. 20, 2022), <https://www.sec.gov/litigation/admin/2022/ia-6000.pdf>. That non-jury proceeding remains pending, but Lemelson might be forgiven for suspecting that SEC is unlikely to rule against both itself and the lawyers who served as its lead counsel throughout the contentious proceedings in the district court, and in favor of its erstwhile litigation adversary. *See Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890, 907 n.1 (2023) (Thomas, J., concurring) (noting SEC’s “tendency to overwhelmingly agree with” its own decisions).

permitted by the evidence.” App. 12a (citations and internal quotations omitted).

Applying those deferential review principles, the First Circuit found no fault with the jury’s verdict. Following established circuit precedent, the court categorically rejected Lemelson’s First Amendment arguments because the three specific sentences the jury found untruthful (or, as the court acknowledged, perhaps literally true but nevertheless misleading “half-truths”) were, in the court’s view, statements of fact rather than opinion. App. 13a-16a. The court then found sufficient evidence in the record to establish the materiality and scienter elements required for liability under Exchange Act § 10(b) and Rule 10b-5. App. 16a-27a. It subsequently denied Lemelson’s timely petition for rehearing en banc. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT’S ESTABLISHED FIRST AMENDMENT PRECEDENT IN THREE DISTINCT WAYS

The district court’s judgment, affirmed by the First Circuit, directly and profoundly abridges Lemelson’s freedom of speech.⁵ At the behest of a publicly traded pharmaceutical corporation,

⁵ The First Amendment forbids the government from so much as “abridging” (*i.e.*, reducing) the freedom of speech, and thus provides broader protection from government restriction than would a bar against “prohibiting” speech. Philip Hamburger, *How the Government Justifies Its Social-Media Censorship*, Wall St. J. (Jun. 12, 2023), <https://www.wsj.com/articles/how-the-government-justifies-its-social-media-censorship-free-speech-supreme-court-doctrine-precedent-biden-laptop-twitter-fbi-facebook-af57b191>

Lemelson was prosecuted and penalized by the federal government for criticizing that corporation, and he was enjoined for five years—under threat of contempt—from engaging in similar criticism. This Court and others frequently confront relatively indirect First Amendment threats that are clad, so to speak, in sheep’s clothing, where the hand of government is more insidious. Here, by contrast, the free speech threat is straightforward and obvious; there is nothing subtle about it. To borrow Justice Scalia’s poignant metaphor, “this wolf comes as a wolf.” *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

The First Circuit nevertheless dismissed Lemelson’s First Amendment defense because, in its view, the three isolated statements the jury found untruthful (or half-truthful) were assertions of fact rather than opinion. That holding conflicts with this Court’s established First Amendment precedent for at least three reasons.

A. Even False Statements of Fact Are Protected by the “Breathing Space” the First Amendment Requires

Contrary to the First Circuit’s foundational premise, there is no categorical exception to the First Amendment for even deliberately untrue statements of fact. *United States v. Alvarez*, 567 U. S. 709 (2012) (plurality opinion) (habitual liar’s knowingly false factual claim of having been awarded Congressional Medal of Honor protected). As the plurality opinion in *Alvarez* confirmed, “[t]he remedy for speech that is false is speech that is true.” *Id.* at 726.

First Amendment protection is especially critical when the government cherry-picks for prosecution and punishment a few isolated factual statements from a voluminous trove of opinionated and otherwise factually accurate commentary on a matter of public interest. *See, e.g., Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (false factual assertion made within a larger article evaluating the quality of loudspeaker systems); *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (knowing failure, in an article describing a government report on police brutality, to acknowledge that factual statements from the report about a certain police supervisor were mere allegations from a private lawsuit rather than the government’s own findings). As this Court has repeatedly recognized, “[the] erroneous statement is inevitable in free debate” and “must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” *N.Y. Times v. Sullivan*, 376 U.S. 254, 271-72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)); *Bose Corp.*, 466 U.S. at 513 (same; quoting *Sullivan*); *accord Alvarez*, 567 U.S. at 718 (“some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee”).

The First Circuit’s zero-tolerance approach to misstatements and omissions—focusing on two isolated sentences about a Ligand affiliate plucked from 56 pages of opinionated written commentary and a two-second, unscripted soundbite from one of four oral interviews—turned these longstanding First Amendment presumptions upside down.

B. Abridgements of Free Speech Demand Clear and Convincing Proof of Falsity and Intent—and Rigorous Appellate Scrutiny

The First Circuit’s extreme deference to the jury verdict likewise contravened this Court’s established First Amendment precedent. Where, as here, free speech rights hang in the balance, this Court has consistently demanded proof of falsity and intentionality by “clear and convincing evidence.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *accord Sullivan*, 376 U.S. at 285-86 (1964) (proof of falsity and intent must be of “convincing clarity”). The Court has also demanded searching independent appellate examination of that evidence to ensure “that the judgment does not constitute a forbidden intrusion on the field of free expression,” *Sullivan*, 376 U.S. at 285; *accord Bose Corp.*, 466 U.S. at 499 (quoting *Sullivan* and citing additional cases). Even when speech falls into one of the “limited areas” beyond First Amendment protection, this Court has repeatedly recognized the need for “strategic protection” to ensure that protected speech is not chilled or self-censored. *Counterman v. Colorado*, 143 S. Ct. 2106, 2115 (2023).

C. Lemelson’s Speech Fell Outside Any “Fraud” Exception to the First Amendment

Lemelson’s speech did not fall within any of the limited areas this Court has placed beyond First Amendment protection. Specifically, it was outside any exception for fraudulent speech—for at least two independent reasons. First, the jury specifically found that Lemelson, in speaking out about Ligand, did *not*

“intentionally or recklessly engage in a scheme to defraud, or any act, practice, or course of business which operates or would operate as a fraud or deceit.” 35a. The jury found three untrue (or half-true) statements, but unanimously rejected every SEC allegation of fraud. App. 55a-56a.

Second, the district court’s jury instructions—consistent with prevailing law in the First Circuit and elsewhere—specifically excused SEC from having to prove several essential elements traditionally required to establish a common law fraud claim, including reliance, causation, or compensable harm. See also *SEC v. Lemelson*, 355 F. Supp. 3d 107, 109 (D. Mass. 2019) (denying in substantial part Lemelson’s motion to dismiss). Indeed, it would have been impossible to prove these elements here, because any hypothetical investor who heeded Lemelson’s warnings and sold Ligand stock—whether by liquidating an existing long position or taking a short position—would have realized a sizable financial *benefit* given the stock price *decline* over the ensuing weeks and months. Not surprisingly, therefore, SEC proved no deception or losses and the district court specifically found that “SEC has not provided any evidence that it could identify victims.” 51a. Thus, even if the jury had found the watered-down version of “fraud” that courts have allowed in the SEC enforcement context—which it did not—that finding would have been woefully insufficient to sweep Lemelson’s speech into any recognizable fraud exception to the First Amendment. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 617 (2003) (“Simply labeling an action one for ‘fraud,’ of course, will not carry the day”).

II. FEDERAL SECURITIES REGULATION NEEDS THIS COURT'S FIRST AMENDMENT GUIDANCE

This Court has never weighed in on the intersection of securities regulation and freedom of speech, and the decision below effectively grants SEC an exemption from First Amendment restrictions. Review is warranted to make clear to lower courts that no such exemption exists and to provide them with necessary guidance regarding constitutional limits on SEC's power to abridge free speech.

More than most other federal agencies, SEC is largely in the business of regulating speech. *E.g.*, Sean J. Griffith, *What's 'Controversial' About ESG? A Theory of Compelled Commercial Speech Under the First Amendment*, 101 NEB. L. REV. 876, 901-02 (2023) (securities laws “consist primarily of rules either prohibiting or compelling speech”); Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 58 WM. & MARY L. REV. 613, 641 (2006) (“securities regulation primarily involves restrictions on speech,” with rules that “both compel and prohibit corporate speech” and “regulate the content, form, and scope of corporate communications”); James C. Goodale, *The First Amendment and Securities Act: A Collision Course?*, N.Y.L.J. Apr. 8, 1983 at 1 (“there is no greater statutory regulation of speech than the [federal securities laws].”)⁶ Indeed, a significant

⁶ A former SEC commissioner once said that “[s]ecurities regulation is essentially the regulation of speech,” including both censorship and “a fair amount of prior restraint.” Roberta S. Karmel, *The First Amendment and Government Regulation of Economic Markets*, 55 BROOK. L. REV. 1, 1 (1989), while a

portion of SEC regulatory and enforcement activity is directed at telling companies and individuals what they must, may, or may not say about an increasing number of subjects. Griffith, 101 NEB. L. REV. at 902 Many SEC rules—including the one Lemelson was punished and enjoined for violating—overtly regulate and criminalize speech. 17 C.F.R. § 240.10b-5(b); see Schauer, 117 HARV. L. REV. at 1779 (securities actions “produce a milieu in which materials pertaining to a company's securities are written and distributed under the threat of sanction for false, misleading, or omitted disclosure”).

Notwithstanding that securities regulation entails significant restrictions on free speech, SEC has been largely immune from First Amendment challenges. This has led some academics and commentators to infer (sometimes approvingly) that the agency and its regulatory mission enjoy the functional equivalence of an exemption from First Amendment scrutiny. *E.g.*, Griffith, 101 NEB. L. REV. at 902 (“There is [among securities law professors] a claim for a kind of constitutional exceptionalism for securities law,” with some even arguing that “securities regulation somehow lies out of [First Amendment] bounds.”); Schauer, 117 HARV. L. REV. at 1769 (“It is not that such regulation satisfies a higher burden of justification imposed by the First Amendment. Rather, the First Amendment does not even show up in the analysis.”). While that may slightly overstate

prominent First Amendment scholar once said it “would not be wholly inaccurate” to describe SEC as the “Content Regulation Commission,” Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1778-79 (2004).

the case, appellate decisions addressing First Amendment rights in the context of federal securities law are noticeably rare. *See, e.g.*, Karl M. F. Lockhart, *A ‘Corporate Democracy’?: Freedom of Speech and the SEC*, 104 VA. L. REV. 1593, 1624 (2018) (“Courts have almost never seen challenges based on freedom of speech to proxy regulations and securities regulation in general.”); Wendy Gerwick Couture, *The Collision Between the First Amendment and Securities Fraud*, 65 ALA. L. REV. 903, 905-06 (2014) (“these regulations have been only rarely challenged in court” on First Amendment grounds).

The last time this Court granted certiorari to address the interplay between securities regulation and free speech—nearly 40 years ago—the Court ultimately declined to rule on a newsletter publisher’s First Amendment objection to registering with SEC as an investment adviser after holding that the publisher fit within a statutory exception to the registration requirement. *Lowe v. SEC*, 472 U.S. 181, 208-11 (1985).⁷ Three concurring justices would have reached the constitutional question and sustained the publisher’s First Amendment challenge in that case. 472 U.S. at 228-36 (White, J., concurring).⁸

⁷ As discussed below, the Court could similarly avoid the First Amendment issue here by holding that untruthful speech, without more, does not constitute a “manipulative or deceptive device or contrivance” within the meaning of Exchange Act § 10(b).

⁸ *See also Pirate Investor LLC v. SEC*, 561 U.S. 1026 (2010) (denying certiorari petition of investment newsletter, supported by more than 20 media organizations as amici, which was penalized in an SEC enforcement case for making false statements); *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003) (per

Lemelson’s petition presents the Court with an overdue opportunity to decide the extent, if any, to which SEC regulation and enforcement is subject to First Amendment scrutiny. Review is especially warranted now, given SEC’s continuing disregard of free speech rights both in its regulatory agenda, *see, e.g., NAM v. SEC*, 800 F.3d 518 (D.C. Cir. 2015) (setting aside SEC “conflict mineral” disclosure rule on First Amendment grounds), and in its enforcement program, *see, e.g., SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring) (noting, with respect to SEC’s non-negotiable demand that its enforcement targets agree to a gag order as a condition of any settlement, that “[a] more effective prior restraint is hard to imagine”); *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011 at *1 (S.D.N.Y. Oct. 28, 2022) (SEC “stands nearly alone” among all federal agencies in demanding gag orders as a condition of settlement).

III. EXCHANGE ACT SECTION 10(b) AND SEC RULE 10b-5 DO NOT REACH NON-FRAUDULENT FALSE STATEMENTS

The decision below upheld liability under Exchange Act § 10(b) and SEC Rule 10b-5 based on speech that the jury found untrue but not fraudulent. This unprecedented expansion of liability under these

curiam) (6-3 decision dismissing certiorari petition as improvidently granted in false advertising case that, in Justice Breyer’s dissenting view, “directly concern[ed] the freedom of Americans to speak about public matters in public debate,” where waiting to decide the issue “extracts a heavy First Amendment price” in the form of self-censorship and a “chilling effect”).

oft-litigated provisions of federal securities law warrants the Court's review.

Exchange Act § 10(b) prohibits—indeed criminalizes—“use or employ[ment],” in connection with the purchase or sale of any security, of any “manipulative or deceptive device or contrivance” in contravention of such rules and regulations that SEC may prescribe. 15 U.S.C. § 78j(b). Enabled by that statute, SEC hastily promulgated Rule 10b-5 in 1942. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 767 (1975) (quoting Remarks of Milton Freeman, *Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 793, 922 (1967) (SEC staff, with little discussion, drafted the rule by “put[ting] ... together” § 10(b) with § 17(a) of the Securities Act of 1933 and obtaining the SEC commissioners' approval the same day with oral input from only one commissioner, whose sole comment before signing off was, “Well, ..., we are against fraud, aren't we?")). Notwithstanding its hasty and impulsive provenance (and perhaps because of it), Rule 10b-5 has since spawned decades of prolific federal court litigation, including SEC's case against Lemelson.

This Court has repeatedly held that liability under SEC Rule 10b-5 is coextensive with liability under Exchange Act § 10(b)—that is, the rule cannot create or expand liability for conduct that is not prohibited by its enabling statute. *See, e.g., Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 262 (2010); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008); *SEC v. Zandford*, 535 U.S. 813, 816 n.1 (2002); *United States v. O'Hagan*, 521 U.S. 642, 651-54 (1997); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 172-73, 177 (1994);

Aaron v. SEC, 446 U.S. 680, 689-90 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-214 (1976). In this case, an overly literal reading of Rule 10b-5 resulted in liability for speech that is not prohibited by the rule’s enabling statute, and thus the rule was invalidly applied.

On its face, Exchange Act § 10(b) does not abridge speech—not even intentionally fraudulent speech. Nor does the statute mention the word “fraud” at all. The statute prohibits “manipulative or deceptive device[s] or contrivance[s].” 15 U.S.C. § 78j(b). And Congress presumably intended this statute to prohibit manipulative or deceptive *conduct*, rather than speech, because just a year earlier it had enacted § 17(a) of the Securities Act of 1933. Subparagraph (2) of that section expressly prohibits “obtain[ing] money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading,” 15 U.S.C. § 77q(a)(2)—language conspicuously absent from Exchange Act § 10(b). Yet, even under this potentially speech-abridging provision of the Securities Act § 17(a)(2), liability attaches only if the speaker “obtain[ed] money or property” by means of misleading speech. By contrast, subparagraph (b) of SEC Rule 10b-5 purports to prohibit and criminalize “untrue” speech and nothing more, something Congress obviously never intended when it enacted Exchange Act § 10(b).

As applied here against Petitioner Lemelson, SEC Rule 10b-5 was stretched well beyond anything prohibited by its enabling statute (or even by Securities Act § 17(a)(2), which SEC did not charge

Lemelson with violating). SEC did allege fraudulent conduct *in addition to* the making of “untrue” statements or omissions of material fact, but the jury rejected *all* of SEC’s fraudulent conduct charges. More specifically, and as previously noted, the jury found that SEC did *not* prove that Lemelson violated either subparagraph (a) of Rule 10b-5 (by “intentionally or recklessly engaging in a scheme to defraud”), 17 C.F.R. § 240.10b-5(a), or subparagraph (c) of the rule (by engaging in any “act, practice, or course of business which operates or would operate as a fraud or deceit”), *id.* § 240.10b-5(c). *See* App. 55a. The jury found *only* that Lemelson intentionally or recklessly made three untrue statements or omissions of material fact in violation of subparagraph (b) of the rule, 17 C.F.R. § 240.10b-5(b). *See* App. 56a.

In a sense, then, this case is the flip side of *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019), which is instructive here. In *Lorenzo*, this Court held that even where an accused wrongdoer was not the “maker” of an untrue statement under subparagraph (b) of SEC Rule 10b-5, and thus could not be penalized for violating that subparagraph of the rule, he could still be penalized for disseminating the untrue statement if doing so was *also* part of a fraudulent scheme, act, practice, or course of business that violated subparagraph (a) or (c) of the rule. *Id.* at 1099. Here we have the opposite scenario to what was presented in *Lorenzo*: As found by the jury, SEC proved *only* the making of an untrue statement that was *not* also part of any fraudulent scheme, act, practice, or course of business that would have violated subparagraph (a) or (c) of the rule. Importantly, the jury also did not make any finding that Lemelson used or employed any “manipulative or

deceptive device or contrivance,” as required for liability under Exchange Act § 10(b) or derivatively under SEC Rule 10b-5.

IV. THIS CASE PROVIDES AN IDEAL VEHICLE TO DECIDE THE FIRST AMENDMENT QUESTION AND THE SECURITIES LAW QUESTION

This case presents the Court with an ideal vehicle to address whether and to what extent SEC may lawfully penalize and silence speech that analyzes and challenges the disclosures, financial health, and financial prospects of publicly traded corporations. Such speech—even when it includes isolated errors (as is inevitable)—plays a critical role in the robust give-and-take that ensures fair and transparent markets. Punishing, silencing, chilling, or otherwise abridging such speech violates not only the First Amendment rights of the speakers, but also those of the investing public to hear dissenting views about the companies they might consider investing in. *Cf. Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (“the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (law directing postmaster general to detain incoming mail deemed communist political propaganda violated recipient’s First Amendment rights and “is at war with the ‘uninhibited, robust, and wide-open’ debate and discussion that are contemplated by the First Amendment” (quoting *Sullivan*, 376 U.S. at 270)).

The decision below, if allowed to stand, would embolden SEC to punish and silence other critics of public companies whenever the agency, as here,

deems the criticism to be even slightly ill-informed or misguided. It would undoubtedly chill commentators and analysts from speaking out for fear of facing Lemelson-like consequences. It would also embolden other publicly traded corporations to enlist federal law enforcement in efforts to silence and punish their critics—especially when, as here, they lack the clear and convincing evidence of actual malice needed to prove defamation or other tort claims. *See generally* Couture, 65 ALA. L. REV. at 906 (arguing for full application of actual malice standard to securities law claims that are based on allegedly false statements by corporate outsiders). The Court should seize this opportunity to ensure that robust commentary and debate about our publicly traded companies remains free, unpunished, and un-chilled.

It is also critically important for this Court to clarify the reach of Exchange Act § 10(b) and SEC Rule 10b-5 when untrue speech about publicly traded corporations is not fraudulent. Does the mere utterance of untrue statements—even if done intentionally or recklessly—amount to a “manipulative or deceptive device or contrivance” punishable under Exchange Act § 10(b) and SEC Rule 10b-5, absent proof that the statements were *also* part of a fraudulent scheme, act, practice, or course of business? Given the unusual clarity of the jury verdict here, this case offers a rare and ideal vehicle for deciding that question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 31, 2023

No. 22-____

In the
Supreme Court of the United States

REV. FATHER EMMANUEL LEMELSON
(F/K/A GREGORY LEMELSON) AND
LEMELSON CAPITAL MANAGEMENT, LLC,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 22-1630

U.S. SECURITIES & EXCHANGE COMMISSION,

Plaintiff–Appellee,

v.

GREGORY LEMELSON, a/k/a Father Emmanuel
Lemelson; LEMELSON CAPITAL
MANAGEMENT, LLC,

Defendants–Appellants,

THE AMVONA FUND, LP,

Defendant.

Before

Barron, Chief Judge,
Kayatta, Lynch, Gelpí, and Montecalvo, Circuit
Judges.

ORDER OF COURT

Entered: March 6, 2023

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

Donald Campbell Lockhart, Paul Gerard Alvarez, Alfred A. Day, Ezekiel L. Hill, Marc Jonathan Jones, Kevin Paul Martin, Douglas Scott Brooks, Thomas M. Hoopes, Brian J. Sullivan, William E. Evans III

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 22-1630

U.S. SECURITIES & EXCHANGE COMMISSION,

Plaintiff, Appellee,

v.

GREGORY LEMELSON, a/k/a Father Emmanuel
Lemelson; LEMELSON CAPITAL
MANAGEMENT, LLC,

Defendants, Appellants,

THE AMVONA FUND, LP,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
MASSACHUSETTS

[Hon. Patti B. Saris, U.S. District Judge]

Before
Kayatta, Lynch, and Gelpí,
Circuit Judges.

Kevin P. Martin, with whom William E. Evans III,
Goodwin Procter LLP, Douglas S. Brooks, Brian J.
Sullivan, Thomas M. Hoopes, and Libby Hoopes

Brooks, P.C. were on brief, for appellants.

Ezekiel L. Hill, Attorney, Securities and Exchange Commission, with whom Dan M. Berkovitz, General Counsel, John W. Avery, Deputy Solicitor, and Paul G. Alvarez, Senior Appellate Counsel, were on brief, for appellee.

January 3, 2023

LYNCH, Circuit Judge. The U.S. Securities and Exchange Commission (the “SEC”) brought a civil enforcement action against Gregory Lemelson, also known as Father Emmanuel Lemelson (“Lemelson”); Lemelson Capital Management, LLC; and the Amvona Fund, LP. After trial, the jury found Lemelson liable for three untrue statements of a material fact in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. After the jury verdict and further briefing and argument, the district court judge, who had presided over the jury trial, ordered Lemelson to pay a civil penalty and enjoined him from violating Section 10(b) and Rule 10b-5 for five years. See SEC v. Lemelson, 596 F. Supp. 3d 227, 238 (D. Mass. 2022).

In this appeal, Lemelson argues that his three statements were protected by the First Amendment and that the SEC failed to introduce sufficient evidence to support the jury’s determination that the statements were (1) of fact rather than opinion, (2) material, and (3) made with scienter. He also contends that the district court abused its discretion

and committed an error of law in entering the injunction. We reject Lemelson's arguments and affirm.

I.

A.

The following facts were presented to the jury.

While working as an investment adviser and fund manager at Lemelson Capital Management, LLC, Lemelson managed all investments for a hedge fund called the Amvona Fund. In this role, Lemelson published online reports and conducted interviews regarding companies in whose stock the Amvona Fund invested. For example, Lemelson sometimes posted his reports on Seeking Alpha, a website where contributors post opinions or reports concerning financial topics. Unlike paid portals like Bloomberg where investment analysts traditionally post their research, Seeking Alpha is a non-subscription and open-forum resource, which Lemelson selected in order to expand the audience for his reports.

In May 2014, the Amvona Fund began building a short position ¹ in the stock of Ligand Pharmaceuticals, Inc. ("Ligand"), a biotechnology company. At the time, Ligand was a small "virtual company" that would discover or acquire the economic rights to new drug candidates, license those

¹ "To take a short position in a stock means to sell borrowed stock at the current price in the hope that the stock price will decline and the borrower will be able to return the borrowed stock by purchasing it at the later, lower price." Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 422 n.5 (1st Cir. 2007).

candidates to other companies for development, and partner with other entities to manufacture and market approved drugs.

Ligand's principal product in 2014 was Promacta, a drug that had been approved by the U.S. Food and Drug Administration (the "FDA") and various foreign drug agencies for treatment related to several medical disorders, including hepatitis C. Ligand partnered with other companies to manufacture and market Promacta in return for royalty payments based on those sales. As of May 2014, Ligand expected Promacta royalties to be a substantial portion of its future revenues. Promacta is still on the market today.

Ligand had also recently entered a licensing agreement with Viking Therapeutics, Inc. ("Viking"), a biopharmaceutical drug development company. Under the licensing deal, Viking would develop certain Ligand drug candidates and Ligand would acquire royalty rights and equity in Viking. Viking focused on the development of novel therapies for metabolic and endocrine disorders.

Viking had exclusive rights to five drug candidates based on molecules licensed from Ligand. As of 2014, all five drug candidates were undergoing preclinical studies or clinical trials, which were required before seeking FDA approval so that the drugs eventually could be brought to market. According to Viking's Form S-1² (the "Viking S-1")

² A Form S-1, or a "Registration Statement Under the Securities Act of 1933," is filed by a company making a public stock offering. See, e.g., Versyss Inc. v. Coopers & Lybrand, 982 F.2d 653, 654 (1st Cir. 1992).

filed on July 1, 2014, Viking “intend[ed] to rely on third parties to conduct [its] preclinical studies and clinical trials.” (Emphasis omitted).

The Viking S-1 contained both audited and unaudited financial data about Viking. It also included a report from Marcum LLP, an accounting firm that had “audited [Viking’s] . . . balance sheets . . . as of December 31, 2012 and 2013.”

Between June and August 2014, Lemelson published reports and conducted interviews in which he criticized Ligand’s finances, prospects, and management and argued that Ligand stock was vastly overvalued. As relevant here, Lemelson made statements related to both Promacta and Viking. We describe each of the three statements for which the jury found liability.

i. The Promacta Statement

On June 16, 2014, Lemelson published his first report concerning Ligand on his website and on Seeking Alpha. The report stated that Ligand “face[d] it[s] biggest existential threat” from “what is likely to be a momentous impairment of its largest royalty generating asset, Promacta,” due largely to a competitive threat from a new drug called Sovaldi.

On June 18, Lemelson discussed Promacta’s future during a phone call with Bruce Voss, Ligand’s investor relations representative. The next day, Lemelson gave a radio interview for the financial website Benzinga. The interview was for Benzinga’s online “PreMarket Prep” show, which provides investors with information prior to market open. During the interview, Lemelson stated the following

about Promacta:

Promacta accounted for 72 percent of [Ligand's] royalty revenues ... [and] is literally going to go away.

I mean I had discussions with management just yesterday -- excuse me, their [investor relations] firm, and they basically agreed. And they said, look, we understand Promacta is going away.

(Emphasis added). Lemelson's statement that Voss told Lemelson that Ligand understood Promacta was "going away" (the "Promacta Statement") is the first statement at issue in this appeal.

ii. The Viking Statements

The next two statements at issue were made about two weeks later by Lemelson in his next report concerning Ligand. Both statements concerned Viking.

First, the report stated the following about Viking's drug development capabilities:

Viking does not intend to conduct any preclinical studies or trials and does not own any products or intellectual property or manufacturing abilities and leases space from Ligand. Viking appears to be a single-purpose vehicle created to raise more capital from public markets for its sponsor, Ligand Pharmaceuticals.

(Emphasis added). The statement that “Viking does not intend to conduct any preclinical studies or trials” (the “Preclinical Studies Statement”) is the second statement at issue in this appeal.

Next, the report stated the following about the financial data included in the Viking S-1:

On April 7, 2014, Viking’s Board of Directors appointed Marcum LLP as an independent registered public accounting firm stating [in the Viking S-1]:

“From September 24, 2012 (Inception) through April 7, 2014, neither we nor anyone on our behalf consulted with Marcum regarding (1) the application of accounting principles to a specified transaction, either completed or proposed, (2) the type of audit opinion that might be rendered on our financial statements, or (3) any matter that was either the subject of a disagreement . . . or a ‘reportable event’”

In other words, Marcum was merely hired, but the company has not yet even consulted with the firm on any material issues. The financial statements provided on the [Viking S-1] accordingly are unaudited.

(Emphasis added). The statement that Viking’s “financial statements provided on the [Viking S-1] accordingly are unaudited” (the “Audit Statement”) is the third statement at issue in this appeal.

Lemelson made the Preclinical Studies Statement and the Audit Statement (collectively, the “Viking Statements”) in support of his broader statement that Viking was a “single-purpose vehicle” and a “shell company” being used by Ligand to “generate paper profits to stuff [Ligand’s] own balance sheet.”

In the following months, Lemelson published several more reports critical of Viking and Promacta’s prospects. Lemelson continued building the Amvona Fund’s short position in Ligand stock throughout this time. Ligand’s stock price declined, and Lemelson covered the short position on various dates for a profit.

B.

On September 12, 2018, the SEC filed a complaint against Lemelson, Lemelson Capital Management, LLC, and the Amvona Fund in the U.S. District Court for the District of Massachusetts. As later amended, the complaint alleged, inter alia, that the Promacta Statement and the Viking Statements were material misstatements of fact prohibited by Section 10(b) and Rule 10b-5.³The case went to trial and, after both

³ The SEC also alleged that Lemelson (1) engaged in a fraudulent scheme and course of business in violation of subsections (a) and (c) of Rule 10b-5; (2) made other untrue statements that there were “significant concerns about Ligand’s imminent insolvency” and that Ligand’s “liabilities exceeded tangible assets, meaning the company was insolvent”; and (3) misled his own investors in contravention of the Investment

parties rested, Lemelson unsuccessfully moved for judgment as a matter of law. On November 5, 2021, the jury found Lemelson liable for the three statements.⁴

After the jury verdict, Lemelson renewed his motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b). Lemelson argued, *inter alia*, that the Viking Statements were opinions protected by the First Amendment and that the SEC failed to produce sufficient evidence that all three statements were material and made with scienter. The district court rejected these arguments and denied the motion.

The district court then received briefing and heard argument concerning the proper remedies for Lemelson's violations. The SEC requested, *inter alia*, a \$656,500 civil penalty against Lemelson and an injunction permanently enjoining him from violating Section 10(b) and Rule 10b-5. Lemelson countered that the civil penalty should be "far less" than \$80,000 and that no injunction should be issued. The district court assessed a civil penalty of \$160,000 and enjoined Lemelson from violating Section 10(b) and Rule 10b-5 for five years.⁵ Lemelson, 596 F. Supp. 3d

Advisers Act.

⁴ The jury found Lemelson not liable with respect to the SEC's other claims.

⁵ The injunction also applied to Lemelson Capital Management, LLC. Lemelson, 596 F. Supp. 3d at 238. The district court declined to (1) enter a civil penalty against Lemelson Capital Management, LLC; (2) order joint and several disgorgement of the defendants' pecuniary gain; or (3) assess prejudgment interest. Id. at 230. The SEC has not appealed

at 238. The court rejected the SEC’s contention that a permanent injunction was warranted, noting that Lemelson’s “violation was not as severe as in many of the cases where courts ordered permanent injunctions.” Id. at 233.

Lemelson timely appealed.⁶

II.

We review de novo a district court’s denial of a motion for judgment as a matter of law. Suero-Algarín v. CMT Hosp. Hima San Pablo Caguas, 957 F.3d 30, 37 (1st Cir. 2020). In reviewing the record, we “construe facts in the light most favorable to the jury verdict, draw any inferences in favor of the non-movant, and abstain from evaluating the credibility of the witnesses or the weight of the evidence.” Id. We “ask whether . . . a rational jury could have found in favor of the party that prevailed,” Bisbal-Ramos v. City of Mayagüez, 467 F.3d 16, 22 (1st Cir. 2006), and set aside the jury verdict “only if the jury failed to reach the only result permitted by the evidence,” Quiles–Quiles v. Henderson, 439 F.3d 1, 4 (1st Cir. 2006).

Section 10(b) prohibits, “in connection with the purchase or sale of any security,” the “use or

these decisions. Nor is the amount of the civil penalty at issue in this appeal.

⁶ The district court also denied Lemelson’s motion for a new trial. Because Lemelson develops no argument on appeal concerning this denial, he has waived the issue. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

employ[ment]” of “any manipulative or deceptive device or contrivance in contravention” of SEC regulations. 15 U.S.C. § 78j(b). Subsection (b) of Rule 10b-5 declares it “unlawful,” “in connection with the purchase or sale of any security,” to “make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading.” 17 C.F.R. § 240.10b-5(b).

Lemelson argues that the jury verdict must be overturned for three reasons. First, he argues that the Viking Statements were opinions that are protected by the First Amendment and nonactionable under Section 10(b) and Rule 10b-5. Second, he contends that the SEC failed to introduce evidence sufficient to prove that the Promacta Statement and Viking Statements were material. Finally, he argues that the jury lacked a sufficient basis to find that he made the Promacta Statement and Viking Statements with scienter. We address each argument in turn.

A.

Lemelson first contends that the Viking Statements were statements of opinion⁷ and thus were nonactionable under Rule 10b-5 and protected by the First Amendment. We disagree.

“A [Rule 10b-5] violation . . . requires a false, or misleadingly omitted, statement of fact.” Constr. Indus. & Laborers Joint Pension Tr. v. Carbonite,

⁷ Lemelson does not argue that the Promacta Statement was a statement of opinion.

Inc., 22 F.4th 1, 7 (1st Cir. 2021). The “most significant difference between statements of fact and expressions of opinion is that ‘a statement of fact ... expresses certainty about a thing, whereas a statement of opinion ... does not.’” Id. (quoting Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 183 (2015)).

A reasonable jury could have concluded that the Viking Statements “expresse[d] certainty about ... thing[s],” and thus were actionable statements of fact, for a number of reasons. Omnicare, 575 U.S. at 183. In the Preclinical Studies Statement, Lemelson wrote that “Viking does not intend to conduct any preclinical studies or trials,” and in the Audit Statement, he asserted that Viking’s “financial statements provided on the [Viking S-1] ... are unaudited.” Neither statement was prefaced by words like “I think” or “I believe,” which “can play a role in demonstrating a lack of certainty.” Carbonite, 22 F.4th at 7 (citing Omnicare, 575 U.S. at 187). Both statements were factually contradicted by the Viking S-1, which included audited financial data and stated Viking’s intention to “expend substantial funds in research and development, including preclinical studies and clinical trials.” Indeed, Lemelson himself in his testimony characterized the Audit Statement as a “mistake[n]” reading of the Viking S-1. And even though Viking intended to have third parties conduct preclinical studies and clinical trials on its behalf, a rational jury could have found the Preclinical Studies Statement to be, at the least, a misleading “half-truth[]” actionable under Rule 10b-5. SEC v. Johnston, 986 F.3d 63, 72 (1st Cir. 2021); see also Lucia v. Prospect St. High Income Portfolio, Inc., 36

F.3d 170, 175 (1st Cir. 1994) (“[T]he fact that a statement is literally accurate does not preclude liability under federal securities laws.”).

Lemelson cites a series of First Circuit defamation cases for the proposition that the First Amendment generally precludes liability “when the speaker ‘outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions.’” McKee v. Cosby, 874 F.3d 54, 61 (1st Cir. 2017) (quoting Riley v. Harr, 292 F.3d 282, 289 (1st Cir. 2002)); see also, e.g., Phantom Touring, Inc. v. Affiliated Publ’ns, 953 F.2d 724, 730 (1st Cir. 1992). Lemelson reasons that the Viking Statements simply “interpret[ed]” the facts in the Viking S-1, and thus that the statements were protected opinions.

The SEC argues that the First Amendment principles at issue are limited to the defamation context, and notes that Lemelson has failed to cite any cases applying those principles in the context of Section 10(b) and Rule 10b-5. Because we determine the Viking Statements to be statements of fact, we need not decide whether the cases cited by Lemelson reach beyond defamation law. Even were we to consider these cases and apply de novo review, see Naser Jewelers, Inc. v. City of Concord, 513 F.3d 27, 32 (1st Cir. 2008), Lemelson’s argument fails because the Viking Statements “reasonably would be understood to declare or imply provable assertions of fact,” McKee, 874 F.3d at 60-61 (quoting Phantom Touring, 953 F.2d at 727). Far from presenting interpretations of the facts contained in the Viking S-1, the Viking Statements are flatly inconsistent with

those facts. See, e.g., Piccone v. Bartels, 785 F.3d 766, 771 (1st Cir. 2015) (“[T]he speaker can immunize his statement from defamation liability by fully disclosing the non-defamatory facts on which his opinion is based.” (emphasis added)); id. at 774 (“The First Amendment generally protects statements of opinion where the speaker ‘outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts” (internal quotation marks omitted) (quoting Riley, 292 F.3d at 289) (emphases added)); see also Cheng v. Neumann, 51 F.4th 438, 444 (1st Cir. 2022) (noting that “statement[s] of opinion” without “provably false factual connotation[s]” can receive First Amendment protection against defamation suits (quoting Milkovich v. Lorain J. Co., 497 U.S. 1, 20 (1990))). Further, Lemelson was “claiming to be in possession of objectively verifiable facts,” not merely “expressing a subjective view” of the Viking S-1. McKee, 874 F.3d at 61 (quoting Riley, 292 F.3d at 289); see also Cheng, 51 F.4th at 444.

B.

Lemelson next argues that even if all three statements were untrue statements of fact, a reasonable jury could not have on the evidence presented, concluded that the statements were material.

Liability under subsection (b) of Rule 10b-5 only lies with respect to misstatements or omissions of “material fact.” 17 C.F.R. § 240.10b-5(b) (emphasis added). To prove materiality, the SEC must show that there exists a “substantial likelihood” that the fact

“would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)). The determination of materiality is typically left to the jury. In re Cabletron Sys., Inc., 311 F.3d 11, 34 (1st Cir. 2002).

We first address the Promacta Statement and then address the Viking Statements. We conclude that the SEC introduced evidence sufficient for a rational jury to find all three statements material.

i.

The controversy over the Promacta Statement stemmed from the June 18 phone call between Lemelson and Voss. No transcript of the call was introduced at trial, and Lemelson and Voss offered different accounts of their dialogue. According to Lemelson, Voss “said [Ligand] agreed that [Sovaldi] would eliminate the need for Promacta.” According to Voss, Lemelson himself “made th[e] comment” that “Promacta sales are going to go away” and then followed the comment with a “rhetorical ‘don’t you agree?’”, to which Voss provided no verbal reply. Voss testified that he had actually informed Lemelson that Promacta had a “bright future.” The jury credited Voss’s account of the call, finding the Promacta Statement -- i.e., Lemelson’s statement that Voss affirmatively “said” that Ligand understood Promacta was “going away” -- to be an “untrue statement of a material fact” in violation of Rule 10b-5.

A reasonable jury could have found the Promacta Statement material. First, the SEC introduced

evidence demonstrating the importance of Promacta to Ligand's bottom line. See Carbonite, 22 F.4th at 8 (noting that the "importan[ce] [of a] product" to a company is relevant in determining the materiality of a statement concerning that product's effectiveness). Ligand had released positive revenue data for Promacta, noting, for example, that increased Promacta royalties contributed to aggregate royalty revenues of \$7.9 million for the three months ending March 31, 2014, compared to \$5.8 million for the same period in 2013. Further, witness testimony demonstrated that investment analysts had projected augmented Promacta revenues from 2015 to 2020, that Promacta could potentially expand into new geographic markets, and that new medical applications for Promacta were being pursued. And the jury also considered evidence that Sovaldi would not negatively impact Promacta sales to patients with certain medical conditions. Ligand thus had "expected [Promacta royalties] to be a substantial portion of [its] ongoing revenues" and knew that setbacks for Promacta "could significantly impair [Ligand's] operating results and/or reduce the market price of [its] stock."

The SEC also produced evidence demonstrating investors' alarm and concern about the Promacta Statement and that they communicated those concerns to Ligand. For example, one Ligand shareholder emailed Ligand about the Benzinga interview and stated that the Promacta Statement "seem[ed] to [the shareholder] to be a flat out falsehood" that warranted "legal action." Ligand's President, Matthew Foehr, wrote an email the day after the interview stating that Foehr was "fielding

questions from pretty major [share]holders” about the interview. Further, the SEC introduced the testimony of Robert Fields, a portfolio manager who testified that it “[w]ould . . . have been important to [him] as an investor in Ligand if Promacta was, in fact, going away” because Promacta “made up the majority of the current revenue of [Ligand]” and was Ligand’s “largest source of cash flow.”⁸

The jury also considered evidence that Lemelson himself took credit for the decline in Ligand’s stock value in the summer of 2014. For example, in an email to another investment adviser in October 2014, Lemelson wrote that his “multi-month battle with [Ligand]” was “paying off” because it resulted in Ligand’s shares being “down ~40% since [Lemelson] published” his first report on June 16. A reasonable jury could infer that Lemelson himself believed that the Promacta Statement, which was a substantial part of his “battle” with Ligand, would be material to investors.

Lemelson contends that the Promacta Statement cannot have been material given that Voss signaled at least “tacit agreement” by failing to respond to

⁸ The presence of Fields’ testimony distinguishes this case from United States v. Bingham, 992 F.2d 975 (9th Cir. 1993), a case cited by Lemelson in support of his argument that the SEC failed to prove the Promacta Statement’s materiality. There, the defendant failed to disclose that he was an officer and director of the issuer of stock he was selling, and the government’s sole materiality evidence was broker testimony that brokers “would always find a buyer’s or seller’s status as a corporate officer to be of interest.” Id. at 976. In contrast with the “abstract” testimony in Bingham, id., Fields’ testimony was specific to Ligand and the Promacta Statement.

Lemelson's comment that Promacta was "going to go away." But this argument does not confront the fact that during his interview with Benzinger, Lemelson stated that Voss affirmatively "said" that Promacta was going away. Voss testified that he "[a]bsolutely [did] not" say those words or "anything to that effect." A rational jury could have found Voss's account of the phone call more credible than Lemelson's. See Suero-Algarín, 957 F.3d at 37 (noting that when adjudicating a motion for judgment as a matter of law, the court must "abstain from evaluating the credibility of the witnesses"). A rational jury could also find that investors would likely react much more adversely to news that Ligand said Promacta was going away than they would to news that a Ligand representative said nothing when Lemelson so claimed, while also saying that Promacta had a "bright future."

ii.

A rational jury also could find the Viking Statements material. As with Promacta, the SEC introduced evidence demonstrating the importance of the Viking deal to Ligand. See Carbonite, 22 F.4th at 8. For example, Foehr testified that Ligand needed Viking's "development expertise" because Ligand did not have that expertise "internally," and Fields attested that "[t]he potential economic royalties that Ligand [could] receive from Viking number[ed] in the multiple billions of dollars."

Further, a reasonable jury could have inferred that investors were concerned about the Viking Statements. Foehr testified that Ligand received "an increasing number of questions about [Lemelson's]

reports from a variety of individuals, investors,” and “other companies” with whom Ligand was “working . . . on potential licenses.” And importantly, Fields testified that it would “have been important for [him] to know as an investor” if “Viking were a shell.” Although Fields did not specifically identify the Viking Statements, Lemelson himself acknowledges that he made the Preclinical Studies Statement “to support his opinion that Viking [was] a single-purpose vehicle/shell company.” Drawing all inferences in the SEC’s favor, *see Suero-Algarín*, 957 F.3d at 37, a reasonable jury could have viewed the Viking Statements as important parts of Lemelson’s broader argument that Viking was a shell company, which Fields believed was material.

Lemelson argues that the public availability of the Viking S-1 precludes a jury from finding his statements material. Because the Viking S-1 reported audited financial results and detailed Viking’s intentions to manage preclinical studies and clinical trials, Lemelson contends, his false statements to the contrary cannot have altered the “total mix” of information available to investors. We disagree. Lemelson is not helped by his reference to our statement that it is “not a material omission to fail to point out information of which the market is already aware.” *Thant v. Karyopharm Therapeutics Inc.*, 43 F.4th 214, 222 (1st Cir. 2022) (emphasis added) (quoting *Baron v. Smith*, 380 F.3d 49, 57 (1st Cir. 2004)). We have never held that it cannot be a material misstatement to flatly contradict publicly available facts. *See, e.g., Ponsa-Rabell v. Santander Sec. LLC*, 35 F.4th 26, 34 (1st Cir. 2022) (distinguishing “omissions” from “affirmative

misrepresentations”); Johnston, 986 F.3d at 72 (bypassing dispute about duty to disclose because defendant “chose to make statements”). Indeed, Lemelson’s position would risk foreclosing Rule 10b-5 liability for all untrue statements belied by public securities filings.⁹

Lemelson cites Teamsters Local 282 Pension Trust Fund v. Angelos, 762 F.2d 522 (7th Cir. 1985), and Phillips v. LCI International, Inc., 190 F.3d 609 (4th Cir. 1999). He misleadingly argues that these cases hold that “even lies are not actionable” when an investor “possesses information sufficient to call the [mis]representation into question.” Teamsters, 762 F.2d at 529–30; see also Phillips, 190 F.3d at 617. In Teamsters, the Seventh Circuit addressed not the materiality element, but rather the “reliance” element in a private (not brought by the SEC) securities enforcement suit, noting (in dicta) that a plaintiff investor cannot “claim . . . that he relied on or was deceived by [a] lie” if he in fact “knows enough so that the lie . . . still leaves him cognizant” of the truth. 762 F.2d at 530. But in an enforcement action brought by the SEC, the SEC need not prove any

⁹ Lemelson is correct that public SEC filings, like the Viking S-1, are part of the “total mix” of information available to investors. See, e.g., United States v. Contorinis, 692 F.3d 136, 143 (2d Cir. 2012). But he cites no cases holding that a statement contradicting such filings could not be “viewed by [a] reasonable investor as having significantly altered th[at] ‘total mix.’” Basic, 485 U.S. at 231–32 (quoting TSC Indus., 426 U.S. at 449). Similarly, we reject Lemelson’s contention that his statements were rendered categorically immaterial by his identifying himself as a short seller in his reports.

individual investor's reliance. See SEC v. Tambone, 597 F.3d 436, 447 n.9 (1st Cir. 2010) (en banc). In Phillips, which also involved a private suit, the Fourth Circuit found not actionable an executive's statement, after merger negotiations had recently taken place, that "[w]e're not a company that's for sale"; the court emphasized that the executive "did not deny present or future merger negotiations" and "actually indicated that there would be mergers in the company's future." 190 F.3d at 619 (alteration in original). Here, in contrast, Lemelson specifically stated that Viking was unaudited and would not conduct preclinical studies or trials.

C.

Finally, Lemelson contends that even if all three statements were "untrue statement[s] of a material fact" under Rule 10b-5, a reasonable jury could not have found that he made the statements with the requisite scienter.

Evidence of scienter is required to establish violations of Section 10(b) and Rule 10b-5. Johnston, 986 F.3d at 74. Proof of scienter requires "a showing of either conscious intent to defraud or 'a high degree of recklessness.'" SEC v. Ficken, 546 F.3d 45, 47 (1st Cir. 2008) (quoting ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 58 (1st Cir. 2008)). A "high degree of recklessness" entails "a highly unreasonable omission,' one that not only involves 'an extreme departure from the standards of ordinary care,' but also 'presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious the actor must have been aware of it.'" Johnston, 986 F.3d at 74 (quoting Corban v. Sarepta Therapeutics,

Inc., 868 F.3d 31, 37 (1st Cir. 2017)).

First addressing the Promacta Statement and then examining the Viking Statements, we find the evidence sufficient to support the jury's finding that Lemelson made all three statements with scienter.

i.

As to the Promacta Statement, a reasonable jury could have credited Voss's testimony that he "[a]bsolutely [did] not" say that Promacta was going away or "anything to that effect." Rather, Voss told Ligand leadership that he "represented [Ligand] forcefully" during his call with Lemelson and "pointed out that [hepatitis C] is only one of several indications for [Promacta], and that even within [hepatitis C] there exists a sizeable market for Promacta independent of Sovaldi." Voss testified that he informed Lemelson of these views and that Promacta had a "bright future."

A rational jury could find that Lemelson knew Voss's account of the call to be accurate, yet intentionally or recklessly chose to misconstrue the conversation. See Johnston, 986 F.3d at 74 ("[A] defendant's publication of statements when that defendant 'knew facts suggesting the statements were inaccurate or misleadingly incomplete is classic evidence of scienter.'" (quoting Aldridge v. A.T. Cross Corp., 284 F.3d 72, 83 (1st Cir. 2002))). Indeed, Voss emailed Lemelson after the Benzinga interview, writing that Voss "never made th[e] statement [that Promacta was going away], never agreed with that statement[,] and never would because it's not true," but Lemelson never responded to the email or "publicly acknowledge[d]" Voss's competing

interpretation of the call.

ii.

The SEC also introduced sufficient evidence for the jury to find that Lemelson made the Viking Statements with scienter. In particular, a reasonable jury could infer that Lemelson understood from the Viking S-1 that Viking had audited financials and that Viking intended to manage preclinical studies and trials, yet intentionally or recklessly made statements to the contrary.

Lemelson held himself out as a sophisticated investor who had been “featured, quoted or cited in substantially every major global financial news media outlet.” He made all the investment decisions for the Amvona Fund, which he touted as “one of the world’s top-performing hedge [f]unds.” He also testified to having read “hundreds of financial statements.”

Lemelson admitted that he read and “carefully researched” the Viking S-1. The Viking S-1 extensively detailed Viking’s intentions to manage preclinical studies and clinical trials, and it included various audited financial data. Given Lemelson’s financial expertise and his testimony that he closely reviewed the Viking S-1, a reasonable jury could conclude that Lemelson “knew facts suggesting the [Viking] [S]tatements were inaccurate or misleadingly incomplete.” Johnston, 986 F.3d at 74 (quoting Aldridge, 284 F.3d at 83); see also Geffon v. Micrion Corp., 249 F.3d 29, 36 (1st Cir. 2001) (noting that “disregard of current factual information acquired prior to the statement at issue” can be evidence of scienter). Indeed, Lemelson testified that he knew a Form S-1 cannot be filed without audited

financial data, a fact also mentioned by Foehr in his testimony. And even if the Preclinical Studies Statement were taken as literally true because Viking planned to hire third parties to conduct studies and trials on its behalf, a rational jury could conclude that Lemelson presented the statement as a misleading “half-truth[],” supporting an inference of scienter. Johnston, 986 F.3d at 72. Whether or not a reasonable jury could have concluded that the Viking Statements were intentional misstatements to investors, a rational jury could find that Lemelson made the statements with a “high degree of recklessness,” Ficken, 546 F.3d at 47 (quoting ACA Fin. Guar. Corp., 512 F.3d at 58), particularly given that he published the statements two days after the Viking S-1 became public and without first contacting anyone at Viking for comment.

Further, the importance of the Ligand short position to Lemelson could lead a reasonable jury to infer that he would investigate Viking thoroughly. Lemelson testified that the short position comprised a “substantial part” of the Amvona Fund’s portfolio and that 34 percent of the invested funds was his “family’s money.” Although the fact that Lemelson “stood to benefit from wrongdoing” does not itself necessarily prove scienter, Kader v. Sarepta Therapeutics, Inc., 887 F.3d 48, 60 (1st Cir. 2018) (quoting Greebel v. FTP Software, Inc., 194 F.3d 185, 197 (1st Cir. 1999)), a reasonable jury could infer that Lemelson would have carefully researched Viking and thus been aware of the misleading nature of his statements, *cf.* Carbonite, 22 F.4th at 9 (“[T]he importance of a particular item to a defendant can support an inference that the defendant is paying

close attention to that item” (internal quotation marks omitted) (quoting Loc. No. 8 IBEW Ret. Plan & Tr. v. Vertex Pharms., Inc., 838 F.3d 76, 82 (1st Cir. 2016))).

We reject Lemelson’s challenge to the jury’s scienter finding and, as noted, reject Lemelson’s other challenges to the jury verdict. We affirm the jury verdict.

III.

Lemelson argues that the district court abused its discretion and committed an error of law in enjoining him from violating Section 10(b) and Rule 10b-5 for five years. We disagree.

In an SEC enforcement action, we review the district court’s decision to enter an injunction for abuse of discretion. SEC v. Sargent, 329 F.3d 34, 38 (1st Cir. 2003). Abuse of discretion occurs “when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the [district] court makes a serious mistake in weighing them.” Id. (quoting Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988)). “[A] district court [also] abuses its discretion if it incorrectly applies the law to particular facts.” Id. (quoting Am. Bd. of Psychiatry & Neurology, Inc. v. Johnson-Powell, 129 F.3d 1, 3 (1st Cir. 1997)).

Congress authorized the SEC to seek injunctive relief to prevent violations of securities laws. See 15 U.S.C. § 78u(d)(1). A district court may enter such an injunction “where there is, ‘at a minimum, proof that

a person is engaged in or is about to engage in a substantive violation of either [the Securities Act of 1933 or the Securities Exchange Act of 1934] or of the regulations promulgated thereunder.” Sargent, 329 F.3d at 39 (quoting Aaron v. SEC, 446 U.S. 680, 700–01 (1980)). The legal standard for issuance of the injunction is a “reasonable likelihood of recidivism,” which is assessed by looking at “several factors, none of which is determinative.” Id. These factors include, inter alia, (1) the “nature of the violation, including its egregiousness and its isolated or repeated nature,” (2) “whether the defendants will, owing to their occupation, be in a position to violate again,” and (3) “whether the defendants have recognized the wrongfulness of their conduct.” Id.

The district court properly weighed these three factors and considered no improper ones. First, it examined the “nature of the violation” and found that the Promacta Statement was “particularly egregious.” Lemelson, 596 F. Supp. 3d at 233. As the district court emphasized, Promacta was “Ligand’s key product.” Id. The jury determined that Lemelson falsely told the public that Voss said Promacta was “going away,” when in fact Voss said just the opposite: that Promacta had a “bright future.” And Lemelson “derived a[] direct personal profit” from the misstatement by cashing in his short position. Sargent, 329 F.3d at 39.

Next, the district court noted that Lemelson would be in a position to violate again owing to his occupation as an investment adviser and management of a new hedge fund called the Spruce Peak Fund since early 2021. Lemelson, 596 F. Supp. 3d at 233. In contrast with the two defendants’

occupations in Sargent -- webcasting and dentistry, respectively, see Sargent, 329 F.3d at 39–40 -- Lemelson’s continued position as a hedge fund manager and investment adviser would readily allow him to benefit from future material misstatements concerning investments.

Lemelson argues that the district court committed an error of law by issuing an injunction on the basis of a mere possibility, rather than a likelihood, of future violations. He relies on the fact that the district court wrote that Lemelson “will be able to violate again.” Lemelson, 596 F. Supp. 3d at 233. Although Lemelson is correct that the legal standard is a “reasonable likelihood of recidivism,” Sargent, 329 F.3d at 39 (emphasis added), not a mere possibility of future violations, he takes the district court’s language out of context. The district court’s statement that Lemelson “will be able to violate again” was made when applying the factor from Sargent concerning “whether the defendant[] will, owing to [his] occupation, be in a position to violate again.” Id. (emphasis added). The court correctly quoted this factor and ultimately applied the “reasonable likelihood of recidivism” standard. Lemelson, 596 F. Supp. 3d at 231. No legal error occurred.

Finally, the district court determined that Lemelson had failed to “recognize the wrongfulness of his conduct.” Id. at 233. The court referenced the fact that Lemelson incurred sanctions by violating a protective order and leaking confidential material related to the litigation to the press. Id. at 232–33. Further, when the district judge heard post-verdict argument on whether to impose an injunction, she allowed Lemelson to speak and Lemelson said he

would “never regret the things [he] did.” Also, Lemelson’s lack of regret and remorse is highlighted by the fact that even after Voss emailed Lemelson that Voss had never said Promacta was going away, Lemelson never took steps to inform the public of Voss’s disagreement with Lemelson’s account of what was said. Lemelson had opportunities to correct his misstatements and took advantage of none of them.

That there was no abuse of discretion is further evidenced by the district court’s careful rejection of the SEC’s request for a permanent injunction. The court contrasted Lemelson’s case with various cases that each involved “egregious conduct occurring over prolonged periods of time.” *Id.* at 231–32; *see, e.g., SEC v. Wall*, No. 19-cv-00139, 2020 WL 1539919, at *8 (D. Me. Mar. 31, 2020) (violations spanning more than four years); *SEC v. Chan*, 465 F. Supp. 3d 18, 38 (D. Mass. 2020) (scheme lasting nearly two years); *SEC v. Present*, No. 14-cv-14692, 2018 WL 1701972, at *1, *5 (D. Mass. Mar. 20, 2018) (twenty-one violations over multiple years). The court concluded that Lemelson’s “violation was not as severe as in many of the cases where courts ordered permanent injunctions” and enjoined Lemelson for only five years. *Lemelson*, 596 F. Supp. 3d at 233. That this was within the district court’s discretion is consistent with case law in other circuits. *See, e.g., SEC v. Levine*, 517 F. Supp. 2d 121, 147 (D.D.C. 2007), *aff’d*, 279 F. App’x 6 (D.C. Cir. 2008) (ten-year injunction); *SEC v. Johnson*, 595 F. Supp. 2d 40, 45 (D.D.C. 2009) (five-year injunction); *SEC v. Spartan Sec. Grp.*, No. 19-cv-448, 2022 WL 3224008, at *5 (M.D. Fla. 2022)

(same).¹⁰

Lemelson notes that the SEC did not seek any injunctive relief until 2021. Even so, there was no abuse of discretion in the district court’s view that there still existed a “reasonable likelihood of recidivism.” Sargent, 329 F.3d at 39. Indeed, the district court acknowledged during the motion hearing that the lack of violations since 2014 “mitigate[d] against a lifetime bar” and accordingly chose to enter a five-year injunction instead. Doing so was not an abuse of discretion. See Negrón-Almeda v. Santiago, 528 F.3d 15, 21 (1st Cir. 2008) (“Under [abuse of discretion review], we may not reverse a determination simply because we, if sitting as a court of first instance, would have weighed the relevant considerations differently.”).

IV.

For the foregoing reasons, the judgment of the district court is affirmed.

¹⁰ Lemelson objects to the SEC’s use of the injunction to seek a lifetime associational bar against him under 15 U.S.C. § 80b-3. As Lemelson notes, when the district court later denied Lemelson’s motion to amend the judgment, the court “agree[d] [that] a lifetime ban would be excessive.” Nevertheless, only the five-year injunction is on appeal here, and the district court was within its discretion in imposing that injunction. If the SEC imposes an associational bar, Lemelson may appeal that decision in a separate action. See, e.g., Kornman v. SEC, 592 F.3d 173, 175, 181 (D.C. Cir. 2010).

Appendix C

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

SECURITIES	AND)	
EXCHANGE)	
COMMISSION,)	
)	
	Plaintiff,)	
)	
v.)	Civil Action
)	No. 18-11926-PBS
)	
GREGORY LEMELSON)	
and	LEMELSON)	
CAPITAL)	
MANAGEMENT, LLC,)	
)	
	Defendants,)	
)	
	and)	
)	
THE AMVONA FUND,)	
LP,)	
)	
	Relief Defendant.)	

MEMORANDUM AND ORDER

March 30, 2022

Saris, D.J.

INTRODUCTION

The Securities and Exchange Commission (“SEC”) brought a civil enforcement action against Defendants Gregory Lemelson (“Lemelson”) and Lemelson Capital Management, LP (“LCM”) for violations of the Securities Exchange Act and the Investment Advisers Act of 1940 (the “Advisers Act”). Following a trial, the jury returned a mixed verdict on November 5, 2021, finding Lemelson liable for three false statements and not liable under a scheme liability theory and the Advisers Act. The SEC now moves for entry of final judgment (Dkt. 244). The SEC requests this Court order: (1) an injunction permanently restraining and enjoining Defendants from violating Section 10(b) of the Securities Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5]; (2) a \$656,500 civil penalty against Lemelson; (3) a \$775,000 civil penalty against LCM; (4) \$656,500 in joint and several disgorgement against Lemelson and LCM; and (5) prejudgment interest of \$208,624. Lemelson opposes all five components of the proposed order (Dkt. 260). After hearing, the Court enters the following final judgment: Defendants are enjoined from violating Section 10(b) of the Exchange Act and Rule 10b-5 for a period of five years, and Lemelson is ordered to pay a Tier III civil penalty in the amount of \$160,000.

FACTUAL BACKGROUND

I. The Charged Conduct

Lemelson served as Chief Investment Officer of LCM in 2014. Lemelson managed the Amvona Fund through LCM, and he “made all investment decisions for that fund.” Dkt. 246-5 (Parties’ Agreed-to Facts),

¶ 5. Beginning in May 2014, the Amvona Fund took a short position in shares of Ligand Pharmaceuticals, Inc. Lemelson and LCM took a short position on behalf of the Amvona Fund on thirteen dates between May 2014 and October 2014. The total short position from this period was \$5,082,334.60. Between June and August of that year, Lemelson published five reports concerning Ligand. In a report published July 3, 2014, Lemelson represented that Viking Therapeutics, Inc., (“Viking”), a company that signed a licensing deal with Ligand, “does not intend to conduct any preclinical studies or trials and does not own any products or intellectual property or manufacturing abilities and leases space from Ligand.” Dkt. 246-11 at 7. Lemelson wrote that “Viking appears to be a single-purpose vehicle created to raise more capital from public markets for its sponsor, Ligand Pharmaceuticals.” Id. In the same report, Lemelson mused that Viking had a “curious relationship” with its accounting firm and stated that Viking “has not yet even consulted with the firm on any materials issues” and “[t]he financial statements provided on the S1 accordingly are unaudited.” Id. at 9–10.

Between June and October, Lemelson also gave four interviews on Benzinga Premarket Prep Shows (“Benzinga”). During his interview with Benzinga on June 19, 2014, Lemelson described a phone call with Bruce Voss, Ligand’s investor relations firm representative. Lemelson said “It’s literally going to go away, I mean, I had discussions with [Ligand] management just yesterday – excuse me, their [Ligand’s] IR [investor relations] firm. And they basically agreed. They said, ‘Look, we understand

Promacta's going away.” Dkt. 246-5, ¶ 14. Lemelson and LCM covered the short position on five dates, for a total of \$3,785,690.19. The Amvona Fund profited \$1,296,644.41 from the short position in Ligand.

II. The Litigation

The SEC charged Lemelson and LCM with violations of Section 10(b) and Rule 10b-5 of the Securities Exchange Act and Section 206(4) and Rule 206(4)-8 of the Investment Advisers Act. The jury determined that the SEC proved Lemelson “intentionally or recklessly made untrue statements of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading” as to the Benzinga interview, the Viking audit statement, and the Viking preclinical trial statement. Dkt. 246-8 (Verdict Form) at 1–2.

The jury answered “No” for the allegedly false statements about Ligand’s insolvency and found no Rule 10b-5 scheme liability. The jury also answered “No” on the two questions related to whether the SEC proved that Lemelson intentionally, recklessly, or negligently violated the Advisers Act. Id.

Over the course of this acrimonious litigation, this Court has issued opinions on a motion to dismiss (Dkt. 29), motions for summary and partial summary judgment (Dkt. 146), a motion in limine to exclude argument that the statements were opinions (Dkt. 204), and a motion for renewed judgment as a matter of law (Dkt. 243), and the Court assumes familiarity with those opinions.

DISCUSSION

I. Injunction

A. Legal Standard

Section 21(d) of the Exchange Act provides that the SEC may bring an action to enjoin a person “engaged or [] about to engage” in violations of the Act, and “upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.” 15 U.S.C. § 78u(d)(1). An injunction is appropriate where there is, “at a minimum, proof that a person is engaged in or is about to engage in a substantive violation of either one of the Acts or of the regulations promulgated thereunder.” SEC v. Sargent, 329 F.3d 34, 39 (1st Cir. 2003) (quoting Aaron v. SEC, 446 U.S. 680, 700–01 (1980)). The legal standard for issuing an injunction is “reasonable likelihood of recidivism, not an imminent threat of it.” Sargent, 329 F.3d at 39. Courts assess the likelihood of recidivism through several, non-dispositive factors: “the nature of the violation, including its egregiousness and its isolated or repeated nature”; “whether the defendants will, owing to their occupation, be in a position to violate again”; and “whether the defendants have recognized the wrongfulness of their conduct.” Id.

The Second Circuit has cautioned that “when defendants are active in the securities field [a]n injunction is a drastic remedy, not a mild prophylactic.” SEC v. Am. Bd. of Trade, Inc., 751 F.2d 529, 535–36 (2d Cir. 1984) (quoting Aaron, 446 U.S. at 703 (Burger, C.J., concurring)); see also SEC v. Johnson, 595 F.Supp.2d 40, 45 (D.D.C. 2009) (imposing a temporary injunction of five years and

warning of the seriousness of a permanent injunction). One court has held that violations of securities laws are not enough on their own to satisfy egregiousness. See SEC v. Snyder, No. H-03-04658, 2006 WL 6508273, at *2 (S.D. Tex. Aug. 22, 2006).

Many district courts in this circuit have issued permanent injunctions for egregious conduct occurring over prolonged periods of time. For prolonged schemes, see SEC v. Wall, No. 2:19-cv-00139-JHR, 2020 WL 1539919, at *8 (D. Me. Mar. 31, 2020); SEC v. Chan, 465 F. Supp. 3d 18, 38 (D. Mass. 2020); SEC v. Present, No. 14-cv-14692-LTS, 2018 WL 1701972 at *1 (D. Mass. Mar. 20, 2018). For repeated conduct, see SEC v. Weed, 315 F. Supp. 3d 667, 676 (D. Mass. 2018). For egregiously fraudulent conduct, see SEC v. Cody, No. 16-cv-12510, 2019 WL 6619195 at *4 (D. Mass. Dec. 5, 2019); SEC v. Druffner, 517 F. Supp. 2d 502, 513 (D. Mass. 2007).

B. Parties' Arguments

The SEC seeks a permanent injunction. The SEC argues that Defendants' violations "were deliberately calculated to strike at the heart of Ligand's business." Dkt. 245 at 3–4. In its view, the fraudulent statements focused on "Ligand's most important product (Promacta) and a vital new business relationship (Viking)." Dkt. 245 at 4. The SEC avers that the conduct was egregious and repetitive because the jury found that Lemelson made three separate fraudulent statements, Lemelson never corrected the statements, and Lemelson never publicly acknowledged that Voss denied his claim. Moreover, the SEC contends that not only is Lemelson in a position where he could violate again, but he likely

will violate again.

The Commission bolsters this claim by pointing to what it describes as Lemelson's "improper behavior" during litigation and his "minimizing and mischaracterizing the meaning and import of the jury verdict." *Id.* at 5. The SEC points out that this Court sanctioned Lemelson \$100 per page of leaked material after Lemelson violated a protective order and leaked 50 pages of material to the press. The SEC also emphasizes that Lemelson, through his counsel, threatened a priest, who had provided allegedly false information about Lemelson's credentials as a priest to the Commission, with litigation.

Lemelson opposes, emphasizing that the jury found that the three discrete statements were not part of a larger scheme and over seven years have passed since Lemelson made the statements. Lemelson contends that the violations in the case were not egregious because he did not cover any of his short position as to the statements made on July 3 about Viking, and he covered "less than 6% of his overall position" six hours after his Benzinga radio interview. Dkt. 260 at 4. Lemelson also argues that the July 3 statements were about Viking, a company whose stock Lemelson did not trade, and the SEC did not offer evidence that Ligand's stock price was impacted by the Viking statements. Lemelson next argues that the conduct was not repetitive because "[t]hree isolated statements out of thousands of pages of published work and multiple media appearances does not constitute 'repeated' conduct." *Id.* at 6. Lemelson further avers that the Court can be assured that Lemelson will not violate again because he has not been charged with any securities violations before

or after the present case. He contends that the SEC's "improper behavior" justification is unrelated, as Lemelson was already sanctioned for violating the protective order and counsel's letter to a third-party priest cannot be used as support for the proposition that Lemelson is likely to engage in future violations. Finally, Lemelson asks that the Court consider general equity concerns. If the Court issues an injunction, he emphasizes, the Commission will likely seek to permanently bar Lemelson from working as an investment advisor. Lemelson has provided the Court with eleven letters of support from his investors who want him to stay on as their advisor.

C. Analysis

1. Nature of the Violation

As to the nature of the violation, the jury found that Lemelson made three different material false statements. However, he was found not liable for an overarching scheme, indicating that the SEC was not able to prove that these three separate statements were connected to a scheme to defraud Ligand investors. I find that one of the three statements, that Bruce Voss agreed that Promacta, Ligand's key product, was going away, was particularly egregious. The three fraudulent statements were made on June 19 and July 3. While Lemelson engaged in a campaign to drive down Ligand's stock, the material misstatements occurred over the course of a short time period.

2. Position to Violate Again

Lemelson will be able to violate again, as he

continues to work as an investment adviser and recently started a new fund, Spruce Peak Fund. Investors will continue to look to his advice and rely on the truthfulness of his reports.

3. Acknowledgement of Wrongdoing

Finally, Lemelson continues to unabashedly defend his actions. Lemelson does not recognize the wrongfulness of his conduct or acknowledge when he was clearly wrong (like the statements about Viking). His pugilistic approach to the litigation (e.g., the tweets and the leaked documents) indicates he has not learned his lesson.

Considering the factors laid out in Sargent and the precedent above, Lemelson's conduct merits an injunction, but his violation was not as severe as in many of the cases where courts ordered permanent injunctions. A temporary injunction is more appropriate in this case. The Court sets the injunction for a period of five years.

II. Civil Penalty

A. Legal Standard

Section 20(d)(2) of the Securities Act, 15 U.S.C. § 77t(d)(2), and § 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3) provide that the civil penalty “shall be determined by the court in light of the facts and circumstances.” 15 U.S.C. §§ 77t(d)(2)(A), 78u(d)(3)(B)(i). “The tier determines the maximum penalty, with the actual amount of the penalty left up to the discretion of the district court.” SEC v. Kern, 425 F.3d 143, 153 (2d Cir. 2005) (citing 15 U.S.C. § 77t(d)). Tier II requires “fraud, deceit, manipulation,

or deliberate or reckless disregard of a regulatory requirement.” 15 U.S.C. § 77t(d)(2)(B). Tier III requires the fraud elements of Tier II plus that “such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.” 15 U.S.C. § 77t(d)(2)(C).

Both parties consider the appropriate penalty under the following factors: “the egregiousness of the violation, the defendant’s willingness or failure to admit wrongdoing, the isolated or repeated nature of the violations, the degree of scienter involved, the defendant’s cooperation with authorities or lack thereof, and the defendant’s current financial condition.” SEC v. Esposito, No. 16-cv-10960-ADB, 2018 WL 2012688, at *9 (D. Mass. Apr. 30, 2018) (the “Esposito factors”).

B. Parties’ Arguments

The SEC argues that Lemelson should be ordered to pay a third-tier penalty of \$656,500. This amount reflects Lemelson’s pecuniary interest in the approximately \$1.3 million of profits gained by the Amvona Fund. The SEC calculates this amount by adding Lemelson’s share of the profits based on his 34% ownership of the assets in the Amvona Fund (\$442,000) plus a 25% performance fee he collected on the remaining profits of \$214,000. The SEC adds that LCM should also pay a third-tier penalty of \$775,000, “the amount authorized at the time of the offending conduct against entities under Exchange Act Section 21(d)(3)(B)(iii).” Dkt. 245 at 9. The SEC argues that the Court should impose a separate penalty for LCM “[d]espite the parties’ agreement at trial to focus on Lemelson as a proxy for LCM as to the fraudulent

conduct at issue” because LCM enabled Lemelson to carry out the fraudulent conduct. Id.

The SEC condemns defendants’ conduct as repetitive and egregious. Further, it argues that Lemelson has failed to take responsibility for his misconduct, the conduct involved a high degree of scienter, and defendants’ fraud created a risk of significant losses to Ligand investors. The SEC points out that Lemelson himself took credit for driving down Ligand’s stock, indicating that three false statements were made with scienter. He has refused to take responsibility despite the jury’s verdict. The SEC alleges that he continues to engage in deceitful practices, citing to a tweet that Lemelson sent out from three accounts after the jury verdict. The tweet quotes part of the first line of a Law360 article, saying “A Boston federal jury on Friday absolved a Greek Orthodox priest of fraud claims in a U.S. SEC suit alleging he launched a short-and-distort scheme through his hedge fund” Dkt. 245 at 11. The SEC contends that this was an effort to mislead the public and minimize the seriousness of the jury’s verdict.

Lemelson insists that the Court should impose less than the \$80,000 maximum for a Tier II penalty. Tier III is inappropriate, Lemelson argues, because the SEC has not shown there was substantial loss or significant risk of such loss in the case. Lemelson contends that he never claimed that any decline in Ligand’s stock price was attributable to the three statements for which he was found liable. He also calls the SEC’s social media argument false and hypocritical. Lemelson “simply retweeted this article—he did not draft its language or otherwise comment on it.” Dkt 260 at 18–19. Further, Lemelson

calls out the SEC for their own misleading press release after the trial, entitled “SEC Wins Jury Trial Against Hedge Fund Adviser Who Ran Manipulative Short Scheme.” Dkt. 260 at 19 (quoting Dkt. 261-34). Finally, Lemelson avers that the Court should not allow the SEC to “improperly double-dip” with separate civil monetary penalties for both Lemelson and LCM. Dkt. 260 at 21.

In reply, the SEC adds the expert report of its expert Dr. Erin Smith to bolster the argument that Defendants’ fraud created a risk of investor loss. The SEC contends first that actual losses are not necessary; and second, even if they were necessary, their expert demonstrates that investors traded in reliance on that information on the two days on which Defendants made their fraudulent statements.

C. Analysis

As an initial matter, Lemelson and LCM should not face separate civil penalties. Before trial, the parties agreed that “because LCM was controlled and operated entirely by Fr. Lemelson, there would be no need for separate evidence to try to establish liability against both Fr. Lemelson and LCM.” Dkt. 260 at 21. The parties’ earlier agreement undercuts the SEC’s argument that the entities engaged in distinct conduct for purposes of a penalty.

In asking for a Tier II violation, Lemelson essentially concedes “fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.” 15 U.S.C. § 77t(d)(2)(B). His fraud is not in question. To enter Tier III, the SEC must show that his violations caused substantial losses or created a significant risk of substantial loss to

investors. The SEC attaches Dr. Smith's expert report and a letter from Robert H. Fields of Cardinal Capital Management, LLC, who testified at trial, stating he is "confident the false and misleading statements Father Lemelson made likely artificially depressed the price of Ligand's stock, thereby harming investors." Dkt. 268-1. As to the Benzinga interview, Dr. Smith's report concludes "that the interview is associated with a -2.44% abnormal decline in Ligand's stock price, which is statistically significant at the 90% confidence level." Dkt. 266-1 at 13. As to the July report containing the statements about Viking, she "estimated that Ligand's stock price declined by -1.95%, which is statistically significant at the 99% confidence level." Dkt. 266-1 at 14. Dr. Smith further found that, after Newswire distributed Lemelson's July 3 report about Viking on July 7, Ligand's stock price declined by -3.97%, statistically significant at the 99% confidence level.

While Lemelson focuses on actual losses, the SEC is correct that a significant risk of substantial loss is enough to qualify a violation for Tier III penalties. Courts have differed on what is required to show a significant risk of loss, however. Some courts have not required concrete evidence that any investors traded (or were at risk of trading) in reliance on such statements. See SEC v. Monterosso, 557 F. App'x 917, 929 (11th Cir. 2014) (holding that a significant risk of substantial loss to investors exists wherever the fraudulent statements at issue "would have been important to any reasonable shareholder"); SEC v. SeeThruEquity, LLC, No. 18 Civ. 10374 (LLS), 2022 WL 171196, at *2 (S.D.N.Y. Jan. 19, 2022) ("Disseminating such materially false information

into the market created a significant risk of substantial loss to the investing public.”) (citing SEC v. Universal Express, Inc., 646 F. Supp. 2d 552, 568 (S.D.N.Y. 2009) (explaining that a defendant’s mere “dissemination of materially false information create[d] a significant risk of substantial loss to the investing public”)).

Other courts have refused to infer a “significant risk of substantial losses” in the absence of proof that such a risk existed. See SEC v. Madsen, No. 17-CV-8300 (JMF), 2018 WL 5023945, at *4 (S.D.N.Y. Oct. 17, 2018) (“Although all Section 10(b) or Rule 10b-5 frauds could be said to create some ‘risk’ of some ‘harm’ to investors, the Remedies Act reserves third-tier civil penalties for those frauds that create a significant risk of substantial losses.”) (internal citations omitted); SEC v. Eiten, No. No. 11-12185-GAO, 2014 WL 4965102, at *2 (D. Mass. Sept. 30, 2014) (“The SEC argues that Eiten’s false reports could have resulted in investor losses, but has not demonstrated any amount of actual losses that were substantial.”); SEC v. Todt, No. 98 Civ. 3980 (JGK), 2000 WL 223836, at *12 (S.D.N.Y. Feb. 25, 2000) (refusing to impose a third-tier penalty without evidence that any investors “ever seriously entertained” transacting based on the fraud).

Based on the verdict and evidence, I find that at least one of the statements, the Promacta remark in the Benzinga interview, would have been extremely important to a reasonable investor and created a significant risk of substantial loss. A reasonable investor hearing that a company’s key product is “going away” would be influenced to sell. Lemelson himself bragged that he was responsible for Ligand

losing \$500 million in market capital. Further, Dr. Smith's analysis provides persuasive evidence that investors traded in reliance on all three statements. Dr. Smith found that the radio interview and the July 3 report are associated with abnormal declines in Ligand's stock price. While the amount of actual loss attributable to the three false statements over the entire period of time when Lemelson engaged in his campaign against Ligand between June and October is unclear, Lemelson's violations created a significant risk of substantial losses to investors. Therefore, a Tier III penalty is appropriate.

A third-tier violation is capped at the greater of "the gross amount of pecuniary gain to such defendant as a result of the violation" or \$160,000 when the statute is adjusted for inflation. See 15 U.S.C. § 77t(d)(2)(c); Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of January 15, 2022), SEC (Jan. 15, 2022), <https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm>. The SEC proffers that \$656,500 is the appropriate penalty as it represents Lemelson's pecuniary gain over the entire short campaign. But the statute requires that the pecuniary gain be a result of the violation, and the SEC has not shown that Lemelson's entire gain is a reasonable approximation for the amount of money he gained as a result of his three false statements. Remember, the jury found that Lemelson was not liable for a short-and-distort scheme, so it is not correct that the entire short campaign is a proxy for Lemelson's violation. The SEC ignores the other negative reports published at the same time, the volatility of the stock before and

after the events, and their expert's view on assessing causal impact. Dr. Smith explains that "stocks react to news very quickly, typically within five to fifteen minutes of the announcement," and "the impact of an event on the stock price can be measured by the change in the stock price immediately surrounding the announcement." Dkt. 266-1 at 11. Looking to the expert's intraday event study, the price of Ligand stock fifteen minutes prior to the radio interview was \$66.59. Fifteen minutes after the interview, the price dropped to \$64.47. This drop of - 2.44% is the "abnormal return" that the expert associates with the statement, though the expert hedges that "[w]hile the price reaction measured from the close on the previous day to 15 minutes after the statement is statistically significant at the 90% level, it is not statistically significant when I use alternative estimation windows (1 minute before to 15 minutes after and 1 minute before to 5 minutes after)." Id. at 13 n.49. The SEC expert therefore cautions that "this result should be considered as weak evidence of an effect." Id. Noticeably absent from the expert report is an attempt to calculate the pecuniary gain connected to each false statement.

The SEC has not demonstrated that Lemelson's misstatements were reflected in the price months later, as opposed to "confounding news and trading noise irrelevant to the event." Id. at 11. Because the SEC has proposed a penalty based on an overarching scheme and has not reduced the penalty to reflect factors outside of the statement, the Court adopts the statutorily set penalty of \$160,000.

III. Disgorgement

A. Parties' Arguments

The SEC next requests disgorgement of Defendants' pecuniary gain from the short campaign, \$656,500. The SEC also asks that the disgorgement be ordered to be joint and several, citing several recent District of Massachusetts cases that have ordered the entity and the entity's sole owner jointly and severally liable. See Esposito, 2018 WL 2012688, at *9 (ordering managing director and entity jointly and severally liable for total disgorgement and prejudgment interest); SEC v. Locke Capital Mgmt., Inc., 794 F. Supp. 2d 355, 369 (D.R.I. 2011) (holding entity and entity's sole owner jointly and severally liable for disgorgement); SEC v. Tropikgadget FZE, 146 F. Supp. 3d 270, 282 (D. Mass. 2015) (holding defendants jointly and severally liable for disgorgement amount with prejudgment interest).

Lemelson stresses that the Supreme Court's recent decision in Liu v. SEC, 140 S. Ct. 1936 (2020), explains why disgorgement is inappropriate in this case. Lemelson points out that the Liu Court held that disgorgement can only be awarded if it benefits victims. Lemelson notes that the Commission "makes no attempt to identify any alleged victim or suggest a process to identify such alleged victims." Dkt. 260 at 14. Instead, in a footnote, the SEC said that the Commission could establish a Fair Fund to determine the feasibility of identifying victims.

B. Analysis

In Liu, the Supreme Court held that "a disgorgement award that does not exceed a

wrongdoer's net profits and is awarded for victims is equitable relief permissible under § 78u(d)(5).” Liu, 140 S. Ct. at 1940. Liu first discusses longstanding equitable principles, where equity courts “limited awards to the net profits from wrongdoing.” Id. at 1945. While the Court “has carved out an exception when the ‘entire profit of a business or undertaking’ results from the wrongful activity,” aside from that exception, “courts consistently restricted awards to net profits from wrongdoing after deducting legitimate expenses.” Id. at 1945–46 (quoting Root v. Lake Shore & M.S. Ry. Co., 105 U.S. 189, 203 (1881)). The Court also clarified the purpose of disgorgement. Section 78u(d)(5) restricts equitable relief to “that which ‘may be appropriate or necessary for the benefit of investors.’” Id. at 1947 (quoting 15 U.S.C. § 78u(d)(5)). The Court rejected the Government’s position that the “primary function of depriving wrongdoers of profits is to deny them the fruits of their ill-gotten gains, not to return the funds to victims as a kind of restitution.” Id. at 1948. Rather, “the SEC’s equitable, profits-based remedy must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains.” Id.

“The court’s power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing.” SEC v. MacDonald, 699 F.2d 47, 54 (1st. Cir. 1983) (en banc) (quoting SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978)). In MacDonald, the First Circuit, sitting en banc, was asked

whether, where [a defendant]
fraudulently purchased company shares
“while in possession of material non-

public information [he should be required, in an action brought by the Commission,] to disgorge the entire profits he realized from his subsequent sale of those securities about a year later, rather than limiting disgorgement to an amount representing the increased value of the shares at a reasonable time after public dissemination of the information.”

699 F.2d at 52. The court focused on whether the later profits were “causally related” to the wrongdoing. Id. at 54. After the investing public learned of the information and the market responded, any “subsequent profits” were “purely new matter” and not subject to disgorgement. Id. at 54–55. The court explained that “[t]here should be a cut-off date” in cases where “the sellers have an opportunity to take remedial action.” Id. at 54.

“[I]n order to establish a proper disgorgement amount, ‘the party seeking disgorgement must distinguish between the legally and illegally derived profits.’” SEC v. Razmilovic, 738 F.3d 14, 31 (2d Cir. 2013) (quoting CFTC v. British Am. Commodity Options Corp., 788 F.2d 92, 93 (2d Cir. 1986)). While private enforcement suits are different from SEC suits, that difference “does not entirely eliminate the need for proof of a causal connection between the securities violation and the disgorged funds.” SEC v. Teo, 746 F.3d 90, 103 (3rd Cir. 2014). This Court “may exercise its equitable power only over property that is causally related to the wrongdoing.” SEC v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989). Though disgorgement “may well be a key to the SEC’s

efforts to deter others from violating the securities laws, [it] may not be used punitively.” Id. The burden initially rests with the SEC to “establish[] a reasonable approximation of the profits causally related to the fraud.” Razmilovic, 738 F.3d at 31.

In light of the volatility of the stock price, the jury’s lack of a finding of scheme liability, and the SEC’s lack of adequate discussion of victims, the Court will not order disgorgement in this case. The Supreme Court recently made clear that disgorgement is a tool intended to benefit investors, not to further punish the defendant. See Liu, 140 S. Ct. at 1948. While the SEC seeks to argue that stock volatility and confounding events are irrelevant, it is difficult to see how Lemelson is responsible for the entirety of the drop in Ligand’s stock price between June and October 2014. Without scheme liability, it seems that the defendant’s “wrongdoing” would be more properly limited to profits that resulted from his three specific false statements. Moreover, the investing public had access to information about at least two of the statements—that Viking was audited and that it would have third parties conduct preclinical trials—and therefore could take remedial action. As discussed above, the SEC has not presented a reasonable approximation of the pecuniary gain from these three statements. Moreover, the SEC has not provided any evidence that it could identify victims and has left open whether it is feasible to create a Fair Fund. See Dkt. 245 at 13 n.3 (“The Commission desires to distribute collected civil penalties, disgorgement, and prejudgment interest to affected investors via a Fair Fund established pursuant to Section 308(a) of the Sarbanes-Oxley Act,

if feasible. Once the Defendants pay the ordered disgorgement and penalties, the Commission will determine the feasibility of a distribution and petition this Court to establish the Fair Fund.”). The Court declines to impose disgorgement; therefore, there is no need to discuss prejudgment interest.

ORDER

For the reasons stated above, the Court orders the following final judgment:

Defendants are enjoined from violating Section 10(b) of the Exchange Act and Rule 10b-5 for a period of five years, and Lemelson is ordered to pay a Tier III civil penalty in the amount of \$160,000 forthwith.

SO ORDERED.

/s/ PATTI B. SARIS

Hon. Patti B. Saris

United States District Judge

Appendix D

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

Securities and Exchange
Commission

Plaintiff

v. CIVIL ACTION
NO. 18-11926-PBS

Gregory Lemelson, et al

Defendant(s)

JUDGMENT IN A CIVIL CASE

I. XX Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED:

Count 1: Fraud in the Purchase or Sale of Securities in Violation of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder

Judgment is hereby entered for the Plaintiff

Count 2: Fraudulent, Deceptive, or Manipulative Act or Practice to Investors or Potential Investors in Pooled Investment Vehicle in Violation of Section 206(4) of the Investment Advisers Act and Rule

206(4)-8 Thereunder

Judgment is hereby entered for the Defendant

II. XX Decision by the Court after the jury verdict

IT IS ORDERED AND ADJUDGED:

Defendants are enjoined from violating Section 10(b) of the Exchange Act and Rule 10b-5 for a period of five years, and Lemelson is ordered to pay a Tier III civil penalty in the amount of \$160,000 forthwith.

Robert M. Farrell Clerk of
Court

/s/ M. Malloy
Deputy Clerk

Dated:3/30/2022

Appendix E

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

<hr/>		
SECURITIES	AND)
EXCHANGE)
COMMISSION,)
)
	Plaintiff,)
)
v.)
)
)
)
GREGORY LEMELSON)
)
	Defendant,)
<hr/>		

Civil Action
No. 18-11926-PBS

VERDICT FORM

Saris, D.J.

- Did the Securities and Exchange Commission prove that Father Gregory Lemelson violated Rule 10b-5 (a) and (c) by intentionally or recklessly engaging in a scheme to defraud, or any act, practice, or course of business which operates or would operate as a fraud or deceit?
Yes No
- Did the Securities and Exchange Commission prove that defendant intentionally or recklessly made untrue statements of a material fact or omitted to state a material fact necessary in order to make the statements

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made, in light of the circumstances under which they were made, not misleading with respect to the following statements:

(a) The Benzinga Interview (Exhibit 3, page 16)

Yes No

(b) The Viking audit statement (Exhibit 4, page 10)

Yes No

(c) The Viking preclinical trial statement (Exhibit 4, page 7).

Yes No

(d) The insolvency statements (Exhibit 6, pages 1–2; Exhibit 7, pages 3–6).

Yes No

3. Did the Securities and Exchange Commission prove that defendant intentionally or recklessly violated the Advisors Act?

Yes No

4. Did the Securities and Exchange Commission prove that defendant negligently violated the Advisors Act?

Yes No

I certify that the answer to each of the questions is unanimous.

Dated: 11/5/2021 Christopher Michelangelo

Foreperson

No. _____

**In The
Supreme Court of the United States**

REV. FATHER EMMANUEL LEMELSON
(F/K/A GREGORY LEMELSON) AND
LEMELSON CAPITAL MANAGEMENT, LLC,
Petitioners,

V.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

CERTIFICATE OF SERVICE

On this 31st day of July, 2023, a copy of the above referenced PETITION FOR WRIT OF CERTIORARI was sent by U.S. mail and email to:

Elizabeth Prelogar
Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
supremectbriefs@usdoj.gov
Counsel of Record for Respondent

Respectfully submitted,

/s/ Russell G. Ryan
Counsel of Record

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(202) 869-5210
russ.ryan@nclalegal.org

No. _____

**In The
Supreme Court of the United States**

REV. FATHER EMMANUEL LEMELSON
(F/K/A GREGORY LEMELSON) AND
LEMELSON CAPITAL MANAGEMENT, LLC,
Petitioners,

V.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

CERTIFICATE OF WORD COUNT

I hereby certify on this 31st day of July, 2023, that the above referenced
PETITION FOR WRIT OF CERTIORARI contains 7,272 words.

Respectfully submitted,

/s/ Russell G. Ryan

Counsel of Record

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