

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19798

In the Matter of

SERGEY PUSTELNIK a/k/a
SERGE PUSTELNIK,

Respondent.

**DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT
SERGEY PUSTELNIK'S MOTION TO ADJOURN**

Respondent seeks to adjourn this administrative proceeding pending a decision in an ongoing appeal to the Second Circuit. *See* Respondent's Motion to Adjourn (hereafter "Resp. Mot. Adjourn"). Adjournment of the current proceeding would not be in the public interest and Respondent's motion should be denied.

FACTS

On May 13, 2020, the Securities and Exchange Commission ("Commission" or "SEC") issued an order instituting this administrative proceedings ("OIP") against Respondent. The OIP is a follow-on action based on an injunction entered against Respondent in *SEC v. Lek Securities Corporation, et al.*, 17-cv-1789, in the United States District Court for the Southern District of New York (the "District Court Litigation").¹ The District Court Litigation involved

¹ On April 14, 2020, following a jury trial finding Respondent liable on all counts alleged, the district entered a final judgment against Respondent permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 and Sections 9(a)(2) and 10(b) of the Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, ordering him to pay civil money penalties, and holding him jointly and severally liable with two other defendants for disgorgement and prejudgment interest.

Respondent's participation in two manipulative trading schemes. Respondent filed his answer to the OIP on July 28, 2020, and admitted therein that an injunction had been entered against him in the District Court Litigation following a jury verdict in favor of the SEC on all counts. The primary issue in this administrative proceeding is what, if any, follow-on remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act.

Respondent is currently appealing the decision in the District Court Litigation to the Court of Appeals for the Second Circuit. In that appeal, the SEC has requested a limited remand from the Second Circuit to the district court to determine if the Supreme Court's July 2020 decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020), has any impact on the district court's order finding Respondent and two co-defendants liable for disgorgement and prejudgment interest. *See Ex. 1 to Resp. Mot. Adjourn.* Pointing to that motion to remand, Respondent now seeks an adjournment of the current administrative proceeding "until there is finality at the Lower Court."² *Resp. Mot. Adjourn at 2.* Respondent does not make the requisite showing for an adjournment, and his motion should be denied.

ARGUMENT

Adjournments are disfavored and will only be permitted where the Respondent makes "a strong showing that the denial of the request or motion would substantially prejudice" his case. 17 C.F.R. § 201.161(b).³ Respondent provides no justification to support his request for an

² It appears that Respondent is seeking an adjournment until the district court determines remedies for purposes of the limited remand. To the extent that Respondent seeks an adjournment pending resolution of the appeal by the Second Circuit, or any subsequent remand to the district court, such a lengthy adjournment would be inappropriate for the reasons discussed herein.

³ The Commission's March 18, 2020 order stating that "reasonable requests for extensions of time will not be disfavored as stated in Rule 161," Exchange Act Rel. No. 88415, does not apply to adjournments or postponements of follow-on proceedings pending an appeal of the underlying injunction. *See In re Donald J. Fowler*, Exchange Act Rel. No. 89226 (July 6, 2020), n. 10. In considering an adjournment under Rule 161, the Commission can look

adjournment, identifies no prejudice that would arise if an adjournment is not entered, and points to no precedent to support the request.

The Commission routinely denies requests for adjournments in follow-on actions pending an appeal of the underlying injunction, and should similarly do so here. *See, e.g., In re Donald J. Fowler*, Exchange Act Rel. No. 89226 (July 6, 2020); *In re Richard L. Goble*, Admn. Proc. Rel. No. 678 (July 21, 2011). As the Commission has observed, a pending appeal does not justify a delay in the follow-on proceedings and would be contrary to “the strong public interest in the prompt enforcement of the federal securities laws.” *In re Donald J. Fowler*, Exchange Act Rel. No. 89226; *see also In re Paul Free, CPA*, Exchange Act Rel. No. 66260 (Jan. 26, 2012) (“As we have previously stated, the pendency of an appeal generally is an insufficient basis upon which to prolong a Commission proceeding.”); *In re James E. Franklin*, Exchange Act Rel. No. 56649 (Oct. 12, 2007), n.15 (“it is well established that a pending appeal does not affect the injunction’s status as a basis for this administrative proceeding.”).

Adjourning the current proceeding while the motion to remand is briefed and decided would indefinitely delay the outcome of this proceeding, which would not be in the public interest.⁴ Respondent has already received two extensions of time in which to answer the OIP (*see* Exchange Act Rel. Nos. 89034 and 89160), and further delays are not warranted.

Moreover, an adjournment pending resolution of the motion to remand would serve no purpose because any decision made on remand would not alter the course of or remedies at issue

at, among other things: “(i) The length of the proceeding to date; (ii) The number of postponements, adjournments or extensions already granted; (iii) The stage of the proceedings at the time of the request; (iv) The impact of the request on the hearing officer’s ability to complete the proceeding in the time specified by the Commission; and (v) Any other such matters as justice may require.” 17 C.F.R. § 201.161(b).

⁴ The Second Circuit has not yet ruled on the SEC’s request for the motion to remand, and thus the district court has not set a briefing schedule. While it is unknown at this juncture how long it would take to reach a “final” remedies determination on remand, it is anticipated that it would take several months.

in the instant administrative proceeding. The limited remand would be for the purpose of addressing whether *Liu* had any impact on the disgorgement, prejudgment interest and penalties ordered by the district court. But the current administrative proceeding is based on the imposition of an injunction against Respondent, which is not expected to be at issue in the limited remand to determine the impact of remedies in light of *Liu*.⁵ Even if the district court alters the disgorgement, prejudgment interest or penalties ordered against Respondent, the modification of those remedies would not affect the analysis of the appropriate remedies under Exchange Act Section 15(b) that is the subject of this administrative proceeding.

Respondent identifies no “substantial prejudice” that he would suffer if adjournment were not entered. Adjournment would serve no purpose as a decision on remand will not alter the course of this proceeding, but rather would unnecessarily delay the proceeding in contravention of the public interest. Accordingly, Respondent’s motion should be denied.

Date: 9/2/2020

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⁵ Indeed, even if the underlying injunction were ultimately overturned on appeal, the appropriate course would be to seek to vacate any determination based on the injunction. *See In re Donald J. Fowler*, Exchange Act Rel. No. 89226.

Service List

The attached DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT SERGEY PUSTELNIK'S MOTION TO ADJOURN has been sent to the following parties and other persons entitled to notice:

Pursuant to the parties' agreement to waive paper service in these proceedings and instead accept service of all papers by email, the enclosed document has been served via electronic mail as follows:

Sergey Pustelnik

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