

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act Of 1934

Admin. Proc. File No. 3-19798

In the Matter of

SERGEY PUSTELNIK a/k/a
SERGE PUSTELNIK,

Respondent.

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

Dear Secretary Countryman,

The below is a reply to the division of enforcement's opposition to my motion to adjourn the Administrative Proceeding File No. 3-19798 from August 16, 2020. I am currently representing myself *pro-se*.

I agree with the SEC's Facts section except for the last sentence: "[r]espondent does not make the requisite showing for an adjournment, and his motion should be denied." This is not a fact, at least not yet.

To complete the factual record, on August 19th, 2020 the Appellants in *SEC v. Lek Securities Corporation, et al., 17-cv-1789* have filed a "Memorandum of Law in Support of Appellants' Unopposed Motion to Hold Appeal in Abeyance" with the Second Circuit Court. *See*

Exhibit 3. The SEC did not object nor opposed the motion and agreed to the timeline proposed therein. To the extent as they are relevant, I hereby incorporate the arguments made in that motion attached as Exhibit 3. On the same day, August 19th, 2020 the Second Circuit granted the motion.

Appellants move the Court to hold briefing in abeyance pending the Court's decision on Appellee's motion for limited remand. Appellants also request that if the motion for limited remand is denied, Appellants' brief be due 60 days after the denial of that motion; and if the motion for limited remand is granted and the Court retains jurisdiction, Appellants' brief be due within 60 days after any new decision of the district court.

IT IS HEREBY ORDERED that the Appellants' motion is GRANTED.

See Exhibit 4.

I am making a similar motion, requesting that the current proceeding be held abeyance pending the Second Circuit ("Higher Court") decision on SEC's own motion for limited remand. I also request that if the motion for limited remand is granted, the summary disposition in this proceeding be held in abeyance until the decision of the district court ("Lower Court"). To dispel any ambiguity, this is what is meant in Motion to Adjourn by "Finality at the Lower Court," and request either an "adjournment," "tolling," or an "abeyance" of the current proceeding.

I agree that I have cited no precedent in the motion to adjourn filed on August 16th. The August 19th decision of the Second Circuit took place three days later. Yet the SEC in their September 2nd motion has cited no precedent on point either and avoided citing the only precedent that is relevant: the August 19th decision to hold the appeal in abeyance by the Second Circuit. Instead, the SEC's proffered precedents are directed at a strawman argument: the

adjournment of this proceeding pending a resolution of an appeal of the underlying case. I never argued that the adjournment should be granted until the resolution of the appeal. Instead, I submit that the current proceeding should be adjourned (or be held in abeyance) until “there is finality at the Lower Court,” of which this proceeding is a derivative as is the appeal.

The SEC cites *Fowler*, in which the motion to stay the proceeding was denied because the respondent requested “*to stay this proceeding pending his appeal of the underlying civil suit*” which was denied according to long standing precedent. *See In re Donald J. Fowler*, Exchange Act Rel. No. 89226 (July 6, 2020). Instead, the current motion to adjourn argues for an adjournment until there is resolution of the current underlying civil case in its first instance and not its derivative appeal.

Identically in SEC’s cited *Goble*, the “[r]espondent submitted a Motion to Stay Proceeding (Motion), pending the outcome of Respondent’s appeal of the underlying injunction,” which has been denied. *See In re Richard L. Goble*, Admn. Proc. Rel. No. 678 (July 21, 2011). This is not what the current motion to adjourn requests and instead requests that the proceeding be adjourned until the resolution of the underlying case.

SEC also points to *Free* who argued that “the 102(e) proceedings against him be stayed pending the outcome of any appeal that he may file,” which was also denied. *See In re Paul Free*, CPA, Exchange Act Rel. No. 66260 (Jan. 26, 2012). *Free* argued that he may file an appeal in the future. This circumstance is entirely irrelevant to the current motion to adjourn.

Finally, the SEC cites *In re James E. Franklin*, in which “Franklin seeks a Commission stay of this proceeding pending his appeal to the United States Court of Appeals,” which has also

been denied. *See In re James E. Franklin, Exchange Act Rel. No. 56649 (Oct. 12, 2007), n.15.*

The SEC also provides three quotes, and for the sake of being concise I will include only one that is representative of all three, “it is well established that a pending appeal does not affect the injunction’s status as a basis for this administrative proceeding.” *Id.* I agree that these precedents are well-established. However they are irrelevant to the argument in this motion requesting an adjournment until the underlying case, *SEC v. Lek Securities Corporation, et al., 17-cv-1789*, which gives rise to this administrative proceeding, be resolved at the first instance: at the district court level.

Thus, the SEC also has not provided any precedent that is relevant to the argument. Perhaps it is so because it is a novel circumstance in which the SEC on one pole in one set of documents filed with one court seeks a new decision in the Lower Court and on another pole in another set of filings in this proceeding seeks to continue to summary disposition as if the underlying case has been fully resolved at the first instance. The only relevant precedent is the logical Second Circuit’s same-day decision to hold the derivative appeal and its briefings until after the issue of finality of the Lower Court’s final decision is resolved. Additional precedents from the Second Circuit that may be a useful guide are “[i]t is the frequent practice of [the Second Circuit] to remand a case for a limited purpose while an appeal is held in abeyance.” *Balintulo v. Daimler AG*, 727 F.3d 174, 193 n.30 (2d Cir. 2013) (citing *Hayden v. Pataki*, 449 F.3d 305, 371 (2d Cir. 2006)). Federal Rule of Appellate Procedure 12.1(b) likewise allows the Second Circuit to retain jurisdiction over an appeal despite a limited remand to the district court, and it has been held that such a remand stays a pending appeal until the district court has acted.

See, e.g., Mendia v. Garcia, 874 F.3d 1118, 1122 (9th Cir. 2017); *Huawei Techs. Co., Ltd. v. Samsung Elecs. Co., Ltd.*, 757 F. App'x 1011, 1011 (Fed. Cir. 2019). Both the appeal and this proceeding are derivative actions of the underlying case and the same logic and reasoning should apply, or at least be highly persuasive to this proceeding as it is in the Federal Courts.

The SEC points out that two extensions of time have already been granted. That is true. However this motion is not for an extension of time but rather an adjournment until the underlying case is finalized at the SEC's own motion.

The SEC argues that the motion to adjourn does not specifically identify “substantial prejudice’ that [I] would suffer if adjournment were not entered. I respectfully disagree and will attempt to elucidate my argument. If the Higher Court grants even a limited remand, this proceeding should be held in abeyance while the district court conducts further proceedings. *See Balintulo*, 727 F.3d at 193 n.30; *Hayden*, 449 F.3d at 371. That is because I should not have to try to hit a moving target in my briefing. The SEC's brief for summary disposition should be formulated and filed in light of the final decision of the district court. If that decision is not yet final because the Second Circuit, at the request of SEC itself, may remand the case for the district court to make further findings or issue further orders, SEC should await those findings or orders before filing their brief. It therefore follows that the briefing schedule should be adjourned, tolled or held in abeyance until the parties know whether such a remand will be ordered. Otherwise, I face the prospect of having to research, draft and file my response without knowing what the final decision of the district court will be.

The possible prospect for supplemental briefing after remand—assuming the Second Circuit allows it—will not cure that potential prejudice, since without a stay of briefing I, the respondent, will have to decide the issues to raise in my brief and how to present those issues before I know the district court’s final rulings. Accordingly, I respectfully request to hold the current briefing schedule in abeyance and reset the briefing deadlines once the Second Circuit has ruled on the Remand Motion. In case that the remand sought by the SEC is granted, to hold this briefing schedule in abeyance until the district court renders its final decision in the underlying case.

Both the Second Circuit and the SEC have agreed that a sixty day deadline following a either a denial of limited remand or a final decision of the Lower court is appropriate. I am not seeking such an extension and believe any amount of time that is appropriate for the SEC to prepare their motion for summary disposition is sufficient.

In the opposition to this motion, the SEC also argues that 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” and not the injunction, “which is not expected to be at issue in the limited remand to determine the impact of remedies in light of *Liu*.” *See Division Of Enforcement’s Opposition*.

If the Second Circuit does remand the case to the district court to re-decide remedies it is not certain what decisions the district court will make. The injunction is a remedy and while the SEC does not expect it to be at issue, it is nevertheless a remedy and is not precluded from being affected. Both the appeal at the Second Circuit and this administrative proceeding are derivative

actions arising from findings at the district court. The briefings at the Second Circuit court have already been adjourned until there is finality in the underlying proceedings. The briefings in this proceedings should be similarly adjourned.

For the foregoing reasons, this Court should hold the briefing schedule for summary dispositions in abeyance pending a decision on the Remand Motion and a finality at the district court. Should this motion be denied, I respectfully request that the SEC be precluded from presenting any facts, evidence, or arguments regarding, referencing, or implying any disgorgement, prejudgment interest or penalties ordered against me. The SEC aver that “[e]ven 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.” *See Department of Enforcement Opposition.*

Thank you for your consideration.

Sincerely,

Respondent
Sergey Pustelnik

September 11, 2020

/s/ Sergey Pustelnik

Sergey Pustelnik

[REDACTED]
Jersey City, NJ [REDACTED]

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act Of 1934

Admin. Proc. File No. 3-19798

In the Matter of

SERGEY PUSTELNIK a/k/a
SERGE PUSTELNIK,

Respondent.

Certificate of Service

As per mutual agreement with the Staff to use email as means of service dated June 8, 2020

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

has been served on

Sarah Nilson
NilsonS@sec.gov

Sincerely,

September 11, 2020

/s/ Sergey Pustelnik
Sergey Pustelnik

[REDACTED]
Jersey City, NJ [REDACTED]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-1854

Caption [use short title]

Motion for: holding proceedings in abeyance and resetting briefing deadlines

Set forth below precise, complete statement of relief sought:

To hold proceedings in abeyance pending this Court's decision on the SEC's pending motion for a limited remand and to reset briefing deadlines such that Appellants' brief will be due within 60 days of the Court's decision if remand is denied or within 60 days of the district court's decision on remand if remand is granted and the Court retains jurisdiction. See Local Rule 31.2(a)(3); Balintulo v. Daimler AG, 727 F.3d174, 193 n.30 (2d Cir. 2013).

SEC v. Lek Securities Corp.

MOVING PARTY: Vali Mgmt. Ptners DBA Avalon FA Ltd., Nathan Fayer, Serge Pustelnik

OPPOSING PARTY: SEC

- Plaintiff Defendant
Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: James M. Wines

OPPOSING ATTORNEY: Kerry J. Dingle

[name of attorney, with firm, address, phone number and e-mail]

Law Office of James M. Wines

U.S. Securities & Exchange Commission

1802 Stirrup Lane, Alexandria, VA 22308

100 F St. NE, Washington, DC 20549

(202) 297-6768; winesj@wineslegal.com

(202) 551-6953; dinglek@sec.gov

Court- Judge/ Agency appealed from: Hon. Denise Cote, U.S. District Judge, Southern District of New York

Please check appropriate boxes:

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

Has this request for relief been made below? Yes No

Has this relief been previously sought in this court? Yes No

Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney:

/s/ James M. Wines

Date: August 19, 2020

Service by: CM/ECF Other [Attach proof of service]

20-1854

IN THE
United States Court of Appeals for the Second Circuit

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff- Appellee,

v.

LEK SECURITIES CORP.,

Defendant,

SAMUEL LEK,

Defendant,

VALI MANAGEMENT PARTNERS D/B/A AVALON FA LTD,

NATHAN FAYYER, SERGEY PUSTELNIK,

Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of New York, No. 17-cv-1789, Judge Cote Presiding

**MEMORANDUM OF LAW IN SUPPORT OF APPELLANTS'
UNOPPOSED MOTION TO HOLD APPEAL IN ABEYANCE**

Appellants respectfully move this Court to hold briefing in this case in abeyance pending the Court's decision on appellee Securities and Exchange Commission's ("SEC's") pending motion to remand. The SEC has moved to remand this case to the district court for further proceedings regarding the disgorgement remedy in light of the Supreme Court's decision in *Liu v. SEC*, 140

S. Ct. 1936 (2020). Although Appellants have opposed that motion, they also believe that the briefing schedule in this case should be held in abeyance until the Court rules on the motion. If the motion is granted notwithstanding Appellant's opposition, the case will return to the district court at least in part and the SEC will be asking the district court to make additional findings or enter additional orders with regard to the remedy. Because Appellants intend to challenge the legality and propriety of the district court's remedy (among other issues), they cannot effectively formulate and brief that challenge until they know the district court's final decision on those issues. Accordingly, judicial economy and efficiency would be furthered if Appellants' brief were due 60 days after the district court has ruled on remand (if the Court grants the remand motion and retains jurisdiction) or 60 days after this Court has denied the remand motion. If a new appeal is required after remand, Appellants would file their brief in the ordinary course of that appeal.

Appellants have conferred with counsel for the SEC, who has stated that the SEC does not oppose this motion or the proposed deadlines.

BACKGROUND

On June 22, 2020, mere days after Appellants noticed their appeal in this case, the Supreme Court decided *Liu*, which addressed the propriety and limits of disgorgement in SEC civil enforcement actions. On July 13, the Clerk set September 25, 2020 as the due date for Appellants' opening brief. On July 24,

nearly a month after Appellants filed their initial forms indicating the orders and issues potentially to be addressed in this appeal, the SEC moved the Court to remand this case in order to allow the district court to “address the impact on the ordered remedies, if any, of the Supreme Court’s decision in *Liu*.” *See generally* Mem. of Law in Support of SEC’s Mot. for a Limited Remand to Address Remedies in Light of *Liu v. SEC* (“Remand Motion”), Dkt. 31. Appellants opposed the Remand Motion on August 3. *See* Mem. of Law in Opposition to SEC’s Mot. for a Limited Remand to Address Remedies in Light of *Liu v. SEC*, Dkt. 39. As of the filing of this motion, the Court has not yet ruled on the Remand Motion. But the September 25 deadline for Appellants’ opening brief remains in place.

DISCUSSION

Although Appellants have opposed the Remand Motion, they also believe that judicial economy and efficiency would be furthered if Appellants’ brief were not due until after the Court has ruled on that motion and it is known whether the district court will be entering further orders or making further findings on issues pertaining to disgorgement or any other matters. In this Court, a “dispositive motion ... tolls the time periods set forth” in the Court’s briefing schedule. Second Cir. Local R. 31.2(a)(3). Appellants believe that both the text and intent of that rule support holding the briefing schedule in abeyance in this case. The Remand

Motion could be characterized as a dispositive motion to the extent it seeks to have this appeal disposed of in the first instance through a remand that would result in new findings or orders that would need to be challenged in Appellants' opening brief. Indeed, if the Court elects to remand the case without retaining jurisdiction, such a remand would in fact dispose of the entire case and Local Rule 31.2(a)(3) would clearly apply.

But even if the Remand Motion is not technically dispositive, the intent of that Rule—to avoid having parties brief issues that may be obviated or altered by a pending motion—applies to this case. “It is the frequent practice of this Court to remand a case for a limited purpose while an appeal is held in abeyance.”

Balintulo v. Daimler AG, 727 F.3d 174, 193 n.30 (2d Cir. 2013) (citing *Hayden v. Pataki*, 449 F.3d 305, 371 (2d Cir. 2006)). Federal Rule of Appellate Procedure 12.1(b) likewise allows this Court to retain jurisdiction over an appeal despite a limited remand to the district court, and it has been held that such a remand stays a pending appeal until the district court has acted. *See, e.g., Mendia v. Garcia*, 874 F.3d 1118, 1122 (9th Cir. 2017); *Huawei Techs. Co., Ltd. v. Samsung Elecs. Co., Ltd.*, 757 F. App'x 1011, 1011 (Fed. Cir. 2019).

Under these principles, this Court should hold the current briefing deadlines in abeyance until it decides the Remand Motion. If the Court grants even a limited remand, this appeal should be held in abeyance while the district court conducts

further proceedings. *See Balintulo*, 727 F.3d at 193 n.30; *Hayden*, 449 F.3d at 371.

That is because Appellants should not have to try to hit a moving target in their briefing. Rather, Appellants' opening brief should be formulated and filed in light of the final decision of the district court. If that decision is not yet final because this Court may remand the case for the district court to make further findings or issue further orders, Appellants should await those findings or orders before filing their brief. It therefore follows that the briefing schedule should be tolled or held in abeyance until the parties know whether such a remand will be ordered.

Otherwise, Appellants face the prospect of having to research, draft and file their opening brief without knowing what the final decision of the district court will be. The possible prospect for supplemental briefing after remand—assuming the Court allows it—will not cure that potential prejudice, since without a stay of briefing Appellants will have to decide the issues to raise in their opening brief and how to present those issues before they know the district court's final rulings.

Accordingly, Appellants respectfully request that the Court hold the current briefing schedule in abeyance and reset the briefing deadlines once the Court has ruled on the Remand Motion. If that motion is denied, Appellants respectfully request that their brief be due within 60 days after that denial. If that motion is granted and the Court retains jurisdiction, Appellants request that their opening brief be due within 60 days after the district court has ruled on remand. And if the

Remand Motion is granted and the current judgment is vacated and remanded without the Court retaining jurisdiction, thereby requiring Appellants to notice a new appeal from a new judgment on remand, Appellants will file their brief in the ordinary course of that new appeal. As noted, the SEC does not oppose Appellants' request or the proposed deadlines.

CONCLUSION

For the foregoing reasons, the Court should hold the briefing schedule in abeyance pending a decision on the Remand Motion. If the motion is denied, Appellants' brief should become due 60 days after the denial of that motion. If the motion is granted and the Court retains jurisdiction, Appellants' brief should become due within 60 days after any new decision of the district court. And if the Court remands without retaining jurisdiction and Appellants must file a new appeal, their brief would become due in the ordinary course of that new appeal.

Respectfully submitted,

/s/ James M. Wines
James M. Wines
Law Office of James M. Wines
1802 Stirrup Lane
Alexandria, VA 22308
(202) 297-6768
winesj@wineslegal.com

August 19, 2020

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because it contains 1,246 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f). This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), which are applicable under Rule 27(d)(1)(E), because the motion has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman typeface.

/s/ James M. Wines

James M. Wines

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on August 19, 2020. In accord with Second Circuit Rule 25.1(h), service upon participants in the case who are registered CM/ECF users will be accomplished by the appellate CM/ECF system.

/s/ James M. Wines

James M. Wines

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of August, two thousand twenty.

United States Securities and Exchange
Commission,

Plaintiff - Appellee,

v.

Vali Management Partners, DBA Avalon Fa LTD,
Nathan Fayer, Sergey Pustelnik, AKA Serge
Pustelnik,

Defendants – Appellants.

ORDER

Docket No. 20-1854

Appellants move the Court to hold briefing in abeyance pending the Court's decision on Appellee's motion for limited remand. Appellants also request that if the motion for limited remand is denied, Appellants' brief be due 60 days after the denial of that motion; and if the motion for limited remand is granted and the Court retains jurisdiction, Appellants' brief be due within 60 days after any new decision of the district court.

IT IS HEREBY ORDERED that the Appellants' motion is GRANTED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court


