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 REPLY IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

The Division of Enforcement ("Division") filed its Motion for Summary Disposition ("SD Motion") on April 23, 2021, seeking an order barring Respondent Sergey Pustelnik ("Respondent" or "Pustelnik") from (1) association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and (2) participating in the offering of any penny stock (collectively, "collateral bars"). The collateral bars are sought pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), based on the jury verdict and subsequent district court injunction against Respondent in *SEC v. Lek Securities Corp., et al*, Civil Action No. 17-cv-1789 (S.D.N.Y.) ("District Court Litigation").

As set forth in the SD Motion, the public interest factors weigh heavily in favor of a finding that permanent collateral bars are in the public interest under the test set forth in *Steadman v. SEC*,

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603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).[1] In his response ("Opposition"), Pustelnik presents no evidence or arguments sufficient to overcome the Division's showing that permanent collateral bars are in the public interest. Instead, Respondent raises procedural arguments that are invalid and unavailing, and issues that were considered and rejected in the District Court Litigation, and should not be reconsidered in this follow-on proceeding.

1. Collateral Bars Are In The Public Interest

Respondent first argues that collateral bars "are not justified and cannot be in the public interest" because his underlying conduct only related to his involvement with a broker-dealer, and not the additional activities proscribed by the collateral bars. Opp. at 2-3. But there is no requirement that the Division show a nexus to each activity sought to be barred. *See, e.g., In re Kenneth C. Meissner, et al.*, Initial Dec. Rel. No. 850 (Aug. 4, 2015) (imposing permanent collateral bars on Respondent Scott where his conduct involved acting as an unregistered broker-dealer); *In re George Louis Theodule*, Initial Dec. Rel. No. 607 (June 2, 2014) (entering full collateral bars against Respondent even though his conduct was limited to acting as an unregistered broker-dealer and unregistered investment advisor).[2] Rather, the determination is whether, based on the facts and circumstances of the particular case, it is in the public interest to prevent the Respondent from participating in the securities industry in any capacity. *See In re*

[1] The public interest factors are: (1) the egregiousness of the respondent's actions, (2) the isolated or recurrent nature of the infraction, (3) the degree of scienter involved, (4) the sincerity of the respondent's assurances against future violations, (5) the respondent's recognition of the wrongful nature of his conduct, and (6) the likelihood that the respondent's occupation will present opportunities for future violations. *Steadman,* 603 F.2d at 1140.

[2] Respondent cites two cases—*In re Edward Tamimi,* Sec. Exch. Act Rel. No. 63605 (Dec. 23, 2010), and *In re Marshall E. Melton,* 80 SEC Docket 2258, 2003 WL 21729839, *9 (July 25, 2013)—to support his argument that bars outside of the limited scope of the conduct should not issue. Opp. at 3-4. Those cases were cited by the Division for the proposition that violations of the anti-fraud provisions merit the severest of sanctions under the securities laws. Mot. at 8-9. In both cases, the Commission issued the specific bars sought by the Division, and did not in any way suggest that additional bars, had they been sought, would be improper.

Herbert Steven Fouke, Initial Dec. Rel. No. 660 (Aug. 29, 2014), at 4 (finding collateral bars appropriate against individual involved in long-running manipulation scheme). In this case, it is decidedly in the public interest to do so.[3]

Respondent does not dispute the verdict and rulings in the District Court Litigation (Opp. at 2), which detail the scope and egregiousness of his actions. Respondent, along with his co-defendants, orchestrated two distinct trading schemes intended to manipulate the securities markets. SD Mot. Ex. 8 (Remedies Op.), at 12.[4] His conduct was not isolated. He "engaged in market manipulation on a massive scale," over a period of many years, resulting in substantial losses to the market. *Id*. at 18-20. After full consideration of the evidence, a jury unanimously found that the trading strategies at issue constituted manipulation of the securities markets and that Respondent violated scienter-based anti-fraud provisions of the federal securities laws. SD Mot. Ex. 2 (Verdict). In his Opposition, Respondent provides no information concerning his current occupation. Notably, he makes no assurances that he will not commit future violations. He half-heartedly attempts to accept responsibility by acknowledging that he "is not blameless for the conduct and indeed serious mistakes were made," but undermines that acceptance by continuing to insist that responsibility rests with his co-defendants and that the trading at issue was innocent. Opp. at 4-6.

Given the gravity and scope of Respondent's conduct, the harm caused to the market, Respondent's refusal to take responsibility and sincerely recognize the wrongfulness of his

[3] Defendant does not dispute that he was enjoined from violating certain provisions of the federal securities laws and was associated with a broker-dealer, but points out that the manipulative scheme continued for almost two years after he was barred by FINRA. Opp. at 4; SD Mot. Ex. 10. The fact that Respondent continued to engage in manipulation after he had been barred from associating with a broker-dealer only reinforces the risk that he will find opportunities for future violations if given any opportunity to be involved in the securities industry.

[4] Copies of the exhibits cited herein were attached to the SEC's opening brief filed on April 23, 2021.

conduct, and the lack of assurances against future violations, the *Steadman* factors strongly weigh in favor of a finding that full collateral bars against Respondent are appropriate and in the public interest, and necessary to prevent further harm to investors and the markets.

2. Permanent Bars Are Appropriate

Respondent next argues that his conduct does not warrant permanent bars. Respondent cites no precedent supporting his request for more limited bars, but instead raises arguments that have already been rejected in the District Court Litigation. The Commission "has repeatedly held that a respondent in a follow-on proceeding may not challenge the findings made by the court in the underlying proceeding," and his attempts to do so should be rejected. *In re Phillip J. Milligan*, Exchange Act Rel. No. 61790, at 6-7 (Mar. 26, 2010) (Comm. Op.); *see also In re James E. Franklin*, Exchange Act Rel. No. 56649 (Oct. 12, 2007) (Comm. Op.), at 6 ("doctrine of collateral estoppel precludes the Commission from reconsidering the injunction as well as factual and procedural issues that were actually litigated and necessary to the court's decision to issue the injunction.").

Respondent asks the Commission to consider four facts in determining the appropriate remedial action: (1) his allegedly more limited role as a registered representative in contrast to the role of Lek Securities, the broker-dealer that the strategies were executed through; (2) purported reliance on the broker-dealer and its counsel; (3) differing expert opinions; and (4) the novel nature of the trading at issue. Each of these issues was considered and rejected in the District Court Litigation, and none should act as a mitigating factor in determining the appropriate bar.

First, Respondent's attempt to diminish his role in the manipulative schemes by arguing that he was merely a registered representative with "no control nor responsibility over the decisions of the broker-dealer and its leadership" is disingenuous. Respondent was both a registered

representative at Lek Securities and a control person of Avalon. In these dual roles, Respondent was in a unique position to ensure the success of—or to prevent—the manipulative schemes. Respondent, as a gatekeeper himself, abdicated his responsibilities by recruiting traders to engage in manipulative strategies through Avalon while at the same time representing to Lek Securities that the Avalon traders were not engaged in manipulation. *See* SD Mot., Ex. 8 (Remedies Op.) at 19; *see also id.* at 22 (Respondent and his Avalon co-defendants "repeatedly concealed their participation in the layering scheme from the Lek Defendants during the investigation."). This evidence was fully presented to the judge and jury, and resulted in the injunction that led to this follow-on proceeding.[5] *See* SD Mot., Ex. 8 (Remedies Op.) at 18 ("Nor were Defendants bit players in the schemes. Fayyer, Pustelnik, and Avalon coordinated nearly every facet of the plan to manipulate the market.").

Second, Respondent's ability to rely on an advice of counsel defense was considered and rejected. Respondent did not properly assert a reliance defense or permit the examination of evidence that might form the basis of such defense, and thus was not permitted to use the attorney-client privilege as both "a shield and a sword." *SEC v. Lek Securities Corp., et al.*, 17CIV1789 (DLC), 2019 WL 5703944, at *3 (S.D.N.Y. Nov. 5, 2019) (*"Lek IV"*) (internal citations omitted). Further, Respondent could not assert reasonable reliance on advice obtained by Lek Securities where he was not jointly represented and did not have full access to information that Lek Securities provided to and advice it received from its counsel. *Id.* Respondent cannot relitigate these factual

[5] The fact that Sam Lek negotiated a bar with a right to apply for reentry after ten-years is irrelevant to the current public interest determination against Respondent.

and procedural issues that have already been decided in the underlying District Court Litigation. *See In re James E. Franklin*, Exchange Act Rel. No. 56649 (Oct. 12, 2007) (Comm. Op.), at 6.

Respondent's third argument should be excluded for the same reason. After extensive *Daubert* briefing in the District Court Litigation, the opinions of Respondent's experts were excluded as unreliable and inadmissible. *SEC v. Lek Securities Corp., et al.*, 370 F.Supp.3d 384, 416 (S.D.N.Y. Mar. 14, 2019) (*"Lek I"*) (excluding opinion of Haim Bodek as unreliable); *SEC v. Lek Securities Corp., et al.*, 17CIV1789 (DLC), 2019 WL 1304452 (S.D.N.Y. Mar. 21, 2019) (*"Lek II"*) (excluding opinion of Ronald Filler as inadmissible). Respondent should not be allowed to relitigate those findings here.

Finally, Respondent mistakenly argues that "the findings that real orders can be artificial is novel in the U.S. justice system." Opp. at 6. As the district court noted in ruling on a motion for summary judgment, the "position that open market orders may never constitute manipulative conduct is not the law." *SEC v. Lek Securities Corp., et al.*, 17CIV1789 (DLC), 2019 WL 1375656, *2 (S.D.N.Y. Mar. 26, 2019) (*"Lek III"*). Regardless, Respondent had the full opportunity to present his argument that "real orders" in the trading strategies at issue were not manipulative, and the jury nonetheless found that the strategies "constituted a manipulation of the securities markets." SD Mot. Ex. 2 (Verdict), at 9. As the district court stated in finding that Pustelnik acted with scienter, "[a]s early as September 2012, [Pustelnik and the other defendants who were tried] learned of a FINRA inquiry into trades they were conducting through Lek Securities. Armed with this knowledge, Defendants increased their use of layering. Defendants' scienter is also illustrated by their efforts to conceal their activity and connections to the schemes." *See* SD Mot., Ex. 8 (Remedies Op.) at 19.

Respondent's arguments boil down to another attempt to excuse his behavior and relitigate the findings in the District Court Litigation. For the reasons stated in its opening brief dated April 23, 2021, as well as the reasons outlined herein, the Division respectfully requests that the Commission grant the Division's motion for summary disposition and impose permanent collateral bars against Pustelnik.

Date: June 18, 2021

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Certificate of Service

I certify that on June 18, 2021, I caused to be served the foregoing DIVISION OF ENFORCEMENT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION on the following persons in the manner indicated:

By email per stipulation:
Sergey Pustelnik
[redacted]

/s/ Sarah S. Nilson