

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 91399 / March 24, 2021

Admin. Proc. File No. 3-19798

In the Matter of

SERGEY PUSTELNIK a/k/a
SERGE PUSTELNIK

ORDER GRANTING MOTION TO AMEND THE ORDER INSTITUTING PROCEEDINGS,
DENYING MOTION FOR ADJOURNMENT AS MOOT, AND SETTING BRIEFING
SCHEDULE FOR MOTION FOR SUMMARY DISPOSITION

On May 13, 2020, the Securities and Exchange Commission issued an order instituting proceedings (“OIP”) against Sergey Pustelnik a/k/a Serge Pustelnik (“Respondent”) pursuant to Section 15(b) of the Securities Exchange Act of 1934.¹ The OIP stated that, on April 14, 2020, a federal district court entered a final judgment against Respondent permanently enjoining him from future violations of certain provisions of the federal securities laws. The final judgment also provided that Pustelnik was jointly and severally liable for disgorgement and prejudgment interest with certain other defendants and required him to pay a civil money penalty.

Respondent appealed the judgment to the United States Court of Appeals for the Second Circuit. On July 24, 2020, the Commission filed a motion with that court requesting a limited remand to the district court to address the impact, if any, of the Supreme Court’s decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020), on the remedies ordered.

On August 6, 2020, an Initial Scheduling Order was issued in this proceeding, which set briefing schedules for two motions that the parties informed the Commission they intended to file: a motion for adjournment by Respondent and a motion for summary disposition by the Division of Enforcement.² Pursuant to the schedule established by that order, Respondent filed a motion on August 16, 2020, seeking an adjournment of this proceeding. Respondent acknowledged that an adjournment based solely on a pending appeal would be inconsistent with

¹ *Sergey Pustelnik a/k/a Serge Pustelnik*, Exchange Act Release No. 88862, 2020 WL 2502264 (May 13, 2020).

² *Sergey Pustelnik a/k/a Serge Pustelnik*, Exchange Act Release No. 89492, 2020 WL 4569080 (Aug. 6, 2020).

Commission precedent; instead, based on the particular facts at issue here, he sought an adjournment “until there is finality at the [district court]” in the civil action in which he had been enjoined.³

Subsequently and before the Division was required to file its motion for summary disposition, the Commission issued an order suspending the briefing schedule for that motion.⁴ The order explained that the suspension allowed for consideration of the impact of the court’s anticipated resolution of the motion for limited remand on Respondent’s motion for adjournment.

On November 20, 2020, the Second Circuit remanded to the district court for a determination of whether its judgment was consistent with *Liu*, and, if appropriate, entry of an amended judgment.⁵ The Commission and Respondent subsequently submitted briefs to the district court addressing *Liu*. On February 9, 2021, the district court entered an amended final judgment, which again enjoined Respondent from violating certain provisions of the securities laws, but eliminated his disgorgement obligation and increased the civil money penalty imposed on him.⁶ On February 24, 2021, Respondent appealed the judgment to the Second Circuit.⁷

On March 8, 2021, the Division of Enforcement filed a motion to amend the OIP to add a reference to the amended final judgment. Rule of Practice 200(d)(1) provides that “[u]pon motion by a party, the Commission may, at any time, amend an order instituting proceedings to include new matters of fact or law.”⁸ Such amendments to OIPs, which can reflect “subsequent

³ See, e.g., *Donald J. Fowler*, Exchange Act Release No. 89226, 2020 WL 3791560, at *2 (July 6, 2020) (“We have repeatedly held that ‘the pendency of an appeal of a civil or criminal proceeding does not justify any delay in related ‘follow-on’ administrative proceedings.’”) (quoting *Thomas D. Melvin*, Exchange Act Release No. 75844, 2015 WL 5172974, at *7 n.52 (Sept. 4, 2015)).

⁴ *Sergey Pustelnik a/k/a Serge Pustelnik*, Exchange Act Release No. 89937, 2020 WL 5632668 (Sept. 21, 2020).

⁵ *SEC v. Vali Mgm’t Partners*, No. 20-1854, ECF No. 64 (2d Cir. Nov. 20, 2020) (granting Commission’s motion for limited remand except denying motion insofar as remand was sought pursuant to *United States v. Jacobson*, 15 F.3d 19, 21-22 (2d Cir. 1994)).

⁶ *SEC v. Lek Sec. Corp.*, No. 1:17cv1789, ECF No. 593 (S.D.N.Y. Feb. 9, 2021); see also *SEC v. Lek Sec. Corp.*, No. 1:17cv1789, ECF No. 594 (S.D.N.Y. Feb. 9, 2021) (order enjoining Respondent and imposing \$7.5 million civil money penalty on him).

⁷ See *SEC v. Lek Sec. Corp.*, No. 21-453 (2d. Cir.) (appellate proceeding).

⁸ 17 C.F.R. § 201.200(d)(1).

developments” in a proceeding,⁹ “should be freely granted, subject only to the consideration that other parties should not be surprised nor their rights prejudiced.”¹⁰ Amending the OIP to add a reference to the entry of the amended judgment, a fact of which the Commission could take official notice,¹¹ does not prejudice or surprise Pustelnik.¹² Indeed, the Division states that Pustelnik does not object to the amendment. Accordingly, we grant the motion and, given the nature of the amendment, do not order Pustelnik to file an amended answer or require the parties to conduct an additional prehearing conference.¹³ The amended OIP is attached to this order.

We also find that the district court’s entry of an amended judgment moots Respondent’s motion for adjournment. Respondent sought an adjournment until the district court resolved the issues posed by a remand. Because the district court has done so, the adjournment Respondent sought would have no effect, and we deny Respondent’s motion as moot.

Accordingly, it is now appropriate to set a briefing schedule for the Division’s motion for summary disposition pursuant to Rule of Practice 250.¹⁴ Rule 250 provides that summary disposition is appropriate if “there is no genuine issue with regard to any material fact and . . . the

⁹ See *James S. Tagliaferri*, Exchange Act Release No. 31804, 2015 WL 5139389, at *2 (Sept. 2, 2015) (citing *Carl L. Shipley*, Exchange Act Release No. 10870, 1974 WL 161761, at *4 (June 21, 1974)); see also *David Pruitt, CPA*, Exchange Act Release No. 85171, 2019 WL 857536, at *2 (Feb. 21, 2019) (stating that the Commission “ha[s] applied Rule 200(d)(1) repeatedly to grant requested amendments that incorporate subsequent developments in the case”).

¹⁰ *Robert David Beauchene*, Exchange Act Release No. 68974, 2013 WL 661619, at *2 (Feb. 25, 2013) (quoting *Charles K. Seavey*, Advisers Act Release No. 1925A, 2001 WL 228030, at *2 (Mar. 9, 2001)).

¹¹ See Rule of Practice 323, 17 C.F.R. § 201.323 (providing that “[o]fficial notice may be taken of any material fact which might be judicially noticed by a district court of the United States”); *Anderson v. Wells Fargo Bank, N.A.*, 953 F.3d 311, 314 (5th Cir. 2020) (taking judicial notice of court judgments and opinions).

¹² *Cf. Shipley*, 1974 WL 161761, at *4 n.17 (stating that motions to amend “are granted routinely” to add allegations regarding injunctions entered against respondents following issuance of the OIP given that “the public interest requires that the injunction and its implications be considered in the administrative proceeding”).

¹³ See Rule of Practice 220(b), 17 C.F.R. § 201.220(b) (providing that “[i]f the order instituting proceedings is amended, the Commission or the hearing officer *may* require that an amended answer be filed”) (emphasis added).

¹⁴ Under Rule of Practice 250, 17 C.F.R. § 201.250, motions for summary disposition may be made after documents have been made available to the respondent for inspection and copying pursuant to Rule of Practice 230, 17 C.F.R. § 201.230. We assume that has occurred here. If that is not the case, the parties should notify the Commission and the scheduling order will be modified.

movant is entitled to summary disposition as a matter of law.”¹⁵ An opposition to a motion for summary disposition should precisely specify in the brief the basis for that opposition, identify with particularity the material factual issues in dispute, and address relevant Commission precedent.¹⁶

We believe it appropriate to set the following briefing schedule for the Division’s motion for summary disposition. In doing so, we provide the parties with more time than generally provided in Rule 154(b) for the filing of opposition and reply briefs.¹⁷ Accordingly, IT IS ORDERED that the Division’s motion for summary disposition against Respondent is due by April 23, 2021; Respondent’s opposition is due by May 24, 2021; and the Division’s reply is due by June 7, 2021.¹⁸

The parties’ attention is called to the Commission’s March 18, 2020 order regarding the filing and service of papers, which provides that pending further order of the Commission parties to the extent possible shall submit all filings electronically at apfilings@sec.gov.¹⁹ Also, the

¹⁵ 17 C.F.R. § 201.250(b).

¹⁶ See, e.g., *Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *11 & n.68 (Dec. 12, 2013) (discussing appropriateness of summary disposition in follow-on proceedings and providing citations), *petition denied*, 773 F.3d 89 (D.C. Cir. 2014); *Conrad P. Seghers*, Investment Advisers Act Release No. 2656, 2007 WL 2790633, at *4–6 (Sept. 26, 2007) (discussing unsuccessful attempt to oppose summary disposition), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008).

¹⁷ See 17 C.F.R. § 201.154(b) (providing that briefs in opposition to a motion shall be filed within five days after service of the motion and reply briefs within three days after service of the opposition).

¹⁸ Attention is called to Rules of Practice 150–153, 17 C.F.R. § 201.150–153, with respect to form and service, and Rule of Practice 250(e) and (f), 17 C.F.R. § 201.250(e) and (f), with respect to length limitations. See also *In re: Pending Admin. Proceedings*, Exchange Act Release No. 88415, 2020 WL 1322001, at *1 (Mar. 18, 2020), <https://www.sec.gov/litigation/opinions/2020/33-10767.pdf> (stating that “pending further order of the Commission, all reasonable requests for extensions of time will not be disfavored as stated in Rule 161” (citing 17 C.F.R. § 201.161(b)(1))).

¹⁹ *Id.*

Commission's Rules of Practice were recently amended to include new e-filing requirements, which take effect on April 12, 2021.²⁰

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Secretary

²⁰ *Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 90442, 2020 WL 7013370 (Nov. 17, 2020), 85 Fed. Reg. 86,464, 86,474 (Dec. 30, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-12-30/pdf/2020-25747.pdf>; see also *Instructions for Electronic Filing and Service of Documents in SEC Administrative Proceedings and Technical Specifications*, <https://www.sec.gov/efapdocs/instructions.pdf>. The amendments also impose other obligations on parties to administrative proceedings such as a new redaction and omission of sensitive personal information requirement. *Amendments to the Commission's Rules of Practice*, 85 Fed. Reg. at 86,465–81.

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.

AMENDED ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND NOTICE OF HEARING

I.

On May 13, 2020, the Securities and Exchange Commission (“Commission”) instituted public administrative proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”) against Sergey Pustelnik a/k/a Serge Pustelnik (“Respondent” or “Pustelnik”). The Commission now deems it appropriate and in the public interest to issue this amended order instituting administrative proceedings against Respondent.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From at least October 2010 through September 2016, Respondent was an undisclosed control person of Avalon FA Ltd (“Avalon”), a trading firm based in Kiev, Ukraine. From March 2011 through January 2015, Respondent was also a registered representative associated with Lek Securities Corporation (“Lek Securities”), a broker-dealer registered with the Commission.

B. CIVIL INJUNCTION

2. On April 14, 2020, a final judgment was entered against Respondent permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933

(“Securities Act”) and Sections 9(a)(2) and 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Lek Securities Corporation, et al., Civil Action Number 17-cv-1789, in the United States District Court for the Southern District of New York (the “District Court Litigation”). Entry of this injunction followed a jury trial in the District Court Litigation, in which, on November 12, 2019, the jury found Respondent liable on all counts against him in the Complaint filed by the Commission on March 10, 2017 (the “Commission’s Complaint”). On February 9, 2021, an amended final judgment was entered in the District Court Litigation again permanently enjoining Respondent from future violations of Section 17(a) of the Securities Act and Sections 9(a)(2) and 10(b) of the Exchange Act and Rule 10b-5 thereunder.

3. The Commission’s Complaint in the District Court Litigation alleged that Respondent, acting with others, participated in and substantially assisted two manipulative trading schemes executed by Avalon. The first scheme is known as “layering” and involved manipulating the markets of U.S. stocks. The second scheme is referred to as “cross-market manipulation” and involved trading in stock to move the prices of options to artificial levels. The schemes were executed by Avalon through Lek Securities. As an undisclosed control person of Avalon and a registered representative at Lek Securities, Respondent was directly involved in Avalon’s manipulative schemes and played a central role in ensuring their success.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act.

IV.

IT IS ORDERED that a public hearing before the Commission for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed by further order of the Commission, pursuant to Rule 110 of the Commission’s Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220(b) of the Commission’s Rules of Practice, 17 C.F.R. § 201.220(b).

IT IS FURTHER ORDERED that the Division of Enforcement and Respondent shall conduct a prehearing conference pursuant to Rule 221 of the Commission’s Rules of Practice, 17

C.F.R. § 201.221, within fourteen (14) days of service of the Answer. The parties may meet in person or participate by telephone or other remote means; following the conference, they shall file a statement with the Office of the Secretary advising the Commission of any agreements reached at said conference. If a prehearing conference was not held, a statement shall be filed with the Office of the Secretary advising the Commission of that fact and of the efforts made to meet and confer.

If Respondent fails to file the directed Answer, or fails to appear at a hearing or conference after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310.

This Order shall be served forthwith upon Respondent by any means permitted by the Commission's Rules of Practice.

Attention is called to Rule 151(b) and (c) of the Commission's Rules of Practice, 17 C.F.R. § 201.151(b) and (c), providing that when, as here, a proceeding is set before the Commission, all papers (including those listed in the following paragraph) shall be filed with the Office of the Secretary and all motions, objections, or applications will be decided by the Commission. The Commission requests that an electronic courtesy copy of each filing should be emailed to APFilings@sec.gov in PDF text-searchable format. Any exhibits should be sent as separate attachments, not a combined PDF.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that notwithstanding any contrary reference in the Rules of Practice to filing with or disposition by a hearing officer, all filings, including those under Rules 210, 221, 222, 230, 231, 232, 233, and 250 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.210, 221, 222, 230, 231, 232, 233, and 250, shall be directed to and, as appropriate, decided by the Commission. This proceeding shall be deemed to be one under the 75-day timeframe specified in Rule of Practice 360(a)(2)(i), 17 C.F.R. § 201.360(a)(2)(i), for the purposes of applying Rules of Practice 233 and 250, 17 C.F.R. §§ 201.233 and 250.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that the Commission shall issue a decision on the basis of the record in this proceeding, which shall consist of the items listed at Rule 350(a) of the Commission's Rules of Practice, 17 C.F.R. § 201.350(a), and any other document or item filed with the Office of the Secretary and accepted into the record by the Commission. The provisions of Rule 351 of the Commission's Rules of Practice, 17 C.F.R. § 201.351, relating to preparation and certification of a record index by the Office of the Secretary or the hearing officer are not applicable to this proceeding.

The Commission will issue a final order resolving the proceeding after one of the following: (A) The completion of post-hearing briefing in a proceeding where the public hearing

has been completed; (B) The completion of briefing on a motion for a ruling on the pleadings or a motion for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice, 17 C.F.R. § 201.250, where the Commission has determined that no public hearing is necessary; or (C) The determination that a party is deemed to be in default under Rule 155 of the Commission's Rules of Practice, 17 C.F.R. § 201.155, and no public hearing is necessary.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

For the Commission, by its Secretary, pursuant to delegated authority.

Vanessa A. Countryman
Secretary