

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.

MOTION TO ADJOURN

Dear Secretary Countryman,

The below is a motion to adjourn the Administrative Proceeding File No. 3-19798. I am currently representing myself *pro-se*.

On July 24th, 2020 the Commission made a motion to the 2nd Circuit in the underlying case to remand an issue of remedies back to the Lower Court. *See* Exhibit 1. As part of the appellants, I opposed this motion and argued, *inter alia*, that the Higher Court should review all of the claims of errors together and let the final judgment of the Lower Court be complete. On August 6th, 2020 the Commission has replied and thus reiterated that the underlying case should be reopened, reviewed, and issues of remedies be redecided back at the Lower Court. *See* Exhibit 2. As of this writing, the Higher Court has not yet issued a ruling.

Therefore, the current administrative proceeding should be adjourned until there is finality at the Lower Court.

Thank you for your consideration.

Sincerely,

Respondent
Sergey Pustelnik

August 16, 2020

/s/ Sergey Pustelnik
Sergey Pustelnik


Jersey City, NJ 

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: limited remand SEC v. Lek Securities Corp.

Set forth below precise, complete statement of relief sought:
Remand to the district court pursuant to the procedure set out in U.S. v. Jacobson, 15 F.3d 19, 22 (2d Cir. 1994), to address the impact on the ordered remedies, if any, of the Supreme Court's decision in Liu v. SEC, 140 S. Ct. 1936 (2020).

MOVING PARTY: SEC OPPOSING PARTY: Vali Management Partners DBA Avalon Fa LTD, Nathan Fayer, Sergey Pustelnik
Plaintiff Defendant
Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Kerry J. Dingle OPPOSING ATTORNEY: James Wines
U.S. Securities and Exchange Commission Law Office of James M Wines
100 F St. NE, Washington D.C. 20549 1802 Stirrup Lane, Alexandria, VA 22308
(202) 551-6953; dinglek@sec.gov (202) 297-6768; winesj@wineslegal.com

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

Please check appropriate boxes:
Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain)
Opposing counsel's position on motion: Unopposed Opposed Don't Know
Does opposing counsel intend to file a response: Yes No Don't Know

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

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/ Kerry J. Dingle Date: 7-24-2020 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

**MEMORANDUM OF LAW IN SUPPORT OF SECURITIES AND
EXCHANGE COMMISSION'S MOTION FOR A LIMITED REMAND TO
ADDRESS REMEDIES IN LIGHT OF *LIU V. SEC***

The Commission respectfully moves this Court for a limited remand to the district court pursuant to the procedure set out in *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994), to address the impact on the ordered remedies, if any, of the Supreme Court's decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020), which was issued after the appellants instituted this appeal.

The district court’s March 20, 2020, Opinion and Order (“Order”) held Defendants Vali Management Partners d/b/a Avalon Fa Ltd, Nathan Fayer, and Sergey Pustelnik jointly and severally liable to disgorge \$4,495,564 of unjust gains that they obtained from running two market manipulation schemes, plus prejudgment interest in the amount of \$131,750. Dkt. 16 at 429 (Dist Ct. Dkt. 574 at 25). The court also assessed a \$5 million third-tier civil penalty against each defendant. *Id.* The final judgment directs the Commission to “send the funds paid pursuant to this Final Judgment to the United States Treasury.” Dkt. 16 at 435 (Dist Ct. Dkt. 580 at 5).

In *Liu*, the Supreme Court recognized that “a remedy tethered to a wrongdoer’s net unlawful profits [such as disgorgement] . . . [is] a mainstay of equity courts.” *Liu*, 140 S. Ct. at 1943. Consequently, the Court confirmed that the federal securities laws permit the Commission to seek, and federal courts to order, a disgorgement award “that does not exceed a wrongdoer’s net profits and is awarded for victims.” *Id.* at 1940. *Liu* did not resolve whether a disgorgement order directing money directly to the Treasury would be permissible and remanded to the lower court to determine “in the first instance whether [such an] order[, if entered,] would indeed be for the benefit of investors as required by [15 U.S.C.] § 78u(d)(5) and consistent with equitable principles.” *Id.* at 1949.

The district court has “broad equitable power to fashion appropriate remedies” for federal securities law violations. *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996); *SEC v. Razmilovic*, 738 F.3d 14, 32 (2d Cir. 2013) (a disgorgement

order, and its ancillary findings, are reviewed for abuse of discretion). Because the final judgment was entered before *Lin* issued, the district court did not have the opportunity to consider the impact of that decision on the remedies ordered. Indeed, the court suggested that it might reassess its imposition of other remedies if its ability to order disgorgement were disturbed. Order, Dkt. 16 at 429 (Dist Ct. Dkt. 574 at 25 n.13) (“In the event that no order of disgorgement may be enforced, the civil penalty assessed against each Defendant shall be increased to \$7.5 million.”). A limited remand would allow the district court to consider any arguments from the parties, apply the guidance set forth in *Lin*, and make a discretionary determination in the first instance regarding whether modification of the remedies is appropriate. *Cf. Distiso v. Town of Wolcott*, 352 F. App’x 478, 482 (2d Cir. 2009) (remanding to the district court to consider the application of qualified immunity in light of an intervening Supreme Court decision); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 853 (2d Cir. 1987) (remanding to the district court to determine in the first instance whether claims were arbitrable in light of an imminent Supreme Court decision).

Accordingly, the Commission respectfully requests that this Court remand the case to the district court for this limited purpose. Given that briefs have not been filed in this appeal, a limited remand would cause minimal disruption and would avoid piecemeal determination of the various issues in this case. It would also facilitate this Court’s review of the final judgment by ensuring that any disgorgement award would include any findings and legal conclusions appropriate in light of *Lin*. A limited

remand would also serve “the interests of judicial economy and orderly resolution of this matter” by allowing the appeal to be reinstated without need for a new notice of appeal upon notice by either side to the Clerk of Court of the district court’s decision. *Florez v. CIA*, 829 F.3d 178, 189-90 (2d Cir. 2016) (applying the procedure for a remand under *Jacobson* and collecting cases). The Commission conferred with counsel for the defendants-appellants regarding this motion and counsel stated that they intend to file an opposition.

Dated: July 24, 2020

Respectfully submitted,

s/ Kerry J. Dingle

KERRY J. DINGLE

Senior Counsel

Securities and Exchange Commission

100 F Street, N.E.

Washington, D.C. 20549

(202) 551-6953 (Dingle)

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 718 words.

I also certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), as required by Federal Rule of Appellate Procedure 27(d)(1)(E), because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-Point Garamond.

July 24, 2020

s/ Kerry J. Dingle
KERRY J. DINGLE

CERTIFICATE OF SERVICE

I, Kerry J. Dingle, hereby certify that on July 24, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Service was accomplished on the appellants via the CM/ECF system.

July 24, 2020

s/ Kerry J. Dingle
KERRY J. DINGLE

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

**REPLY MEMORANDUM OF LAW IN SUPPORT OF SECURITIES AND
EXCHANGE COMMISSION'S MOTION FOR A LIMITED REMAND TO
ADDRESS REMEDIES IN LIGHT OF *LIU V. SEC***

The parties agree, *see* Opp. 1, that the district court's remedies order, which directed the appellants' disgorgement award to be paid to the Treasury without a finding that the order would be "for the benefit of investors," does not comply with the Supreme Court's intervening decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020).

Where we diverge is in how this Court should deal with the district court's order in

light of *Liu*. As the Commission’s motion for limited remand explained, remanding to allow the district court to consider whether and how *Liu* impacts its remedies order is the most logical and efficient solution. It would also follow the approach this Court typically takes when intervening Supreme Court guidance casts doubt on an aspect of the lower court’s judgment while the appeal is pending.¹ Appellants provide no persuasive reason for this Court to disregard its usual practice and instead consider the remedies order without first giving the district court the opportunity to reassess its remedies in light of *Liu*—a process that would likely result in piecemeal, successive appeals. The Court should grant the Commission’s motion for a limited remand.

Appellants erroneously argue (Opp. 3) that whether ordering disgorgement payable to the Treasury was “for the benefit of investors” is a purely “legal question” or a “matter of strict statutory interpretation” that this Court can determine in the first instance. But the decision to impose an equitable remedy—including disgorgement—is committed to the discretion of the district court, and this Court will reverse only for an abuse of discretion or for a clear error of law. *Osberg v. Foot Locker*,

¹ See, e.g., *Shaaban v. Aviles*, 2020 U.S. Dist. LEXIS 75209, at *2 (S.D.N.Y. Apr. 28, 2020) (on remand for further consideration in light of new Supreme Court precedent that called the lower court’s earlier reasoning into question); *United States v. Afriyie*, 2020 WL 634425, at *1 (S.D.N.Y. Feb. 11, 2020) (on remand for recalculation of the restitution order in light of an intervening Supreme Court decision); *Neroni v. Becker*, 2014 WL 2532479, at *2 (N.D.N.Y. June 5, 2014) (on remand with instructions to consider whether abstention remains appropriate in light of an intervening Supreme Court decision).

Inc., 862 F.3d 198, 206 (2d Cir. 2017) (“Where the award of equitable relief is supported by findings of fact, such findings are reviewed for clear error.”); *see SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996). In addition, *Liu* itself clearly directed the lower courts to make factual findings that would support a conclusion that a disgorgement award payable to the Treasury was “for the benefit of investors.” 140 S. Ct. at 1949 (holding that if an order directing proceeds to Treasury is entered on remand, the lower courts must evaluate whether “*that* order would indeed” comply with its standard) (emphasis added). Indeed, in *Liu* itself, the Ninth Circuit has remanded so that the district court can determine whether to enter findings supporting the imposition of a disgorgement award as the Supreme Court had indicated. *See* 7/31/20 Order, Dkt. 68, *SEC v. Liu*, No. 17-55849 (9th Cir.) (Ex. A); *cf. SEC v. Janus Spectrum, LLC*, 2020 WL 3578077, at *2 (9th Cir. July 1, 2020) (affirming liability but remanding disgorgement so the district court could re-assess its disgorgement determinations in light of *Liu* because the case was fully briefed and argued before *Liu* was decided).²

² Contrary to appellants’ assertion (Opp. 4), the possibility that on remand the district court might increase the penalties in this matter does not argue against remand. If appellants believe such an order would be inappropriate, they may raise that argument before the district court in the first instance and, if such an order is entered, before this Court on appeal.

Dated: August 6, 2020

Respectfully submitted,

s/ Kerry J. Dingle

KERRY J. DINGLE

Senior Counsel

Securities and Exchange Commission

100 F Street, N.E.

Washington, D.C. 20549

(202) 551-6953 (Dingle)

CERTIFICATE OF COMPLIANCE

I certify that this reply complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 628 words.

I also certify that this reply complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), as required by Federal Rule of Appellate Procedure 27(d)(1)(E), because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-Point Garamond.

August 6, 2020

s/ Kerry J. Dingle
KERRY J. DINGLE

Exhibit A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 31 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

U.S. SECURITIES & EXCHANGE
COMMISSION,

No. 17-55849

Plaintiff-Appellee,

D.C. No.

8:16-cv-00974-CJC-AGR

v.

CHARLES C. LIU; XIN WANG, AKA Lisa
Wang,

ORDER

Defendants-Appellants,

and

PACIFIC PROTON THERAPY
REGIONAL CENTER LLC; et al.,

Defendants.

On Remand from the United States Supreme Court

Before: WATFORD and OWENS, Circuit Judges, and PRESNELL,* District
Judge.

The judgment of the district court is vacated and the case is remanded to the
district court for further proceedings consistent with the decision of the Supreme
Court of the United States in *Liu v. Securities and Exchange Commission*, 140 S.

* The Honorable Gregory A. Presnell, United States District Judge for
the Middle District of Florida, sitting by designation.

Ct. 1936 (2020).

CERTIFICATE OF SERVICE

I, Kerry J. Dingle, hereby certify that on August 6, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Service was accomplished on the appellants via the CM/ECF system.

August 6, 2020

s/ Kerry J. Dingle
KERRY J. DINGLE

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
MR. PUSTELNIK'S MOTION TO ADJOURN has been served on

Sarah Nilson
NilsonS@sec.gov

Sincerely,

July 28, 2020

/s/ Sergey Pustelnik
Sergey Pustelnik

[REDACTED]
Jersey City, NJ [REDACTED]