UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 5662 / March 28, 2018

Administrative Proceeding
File No. 3-18127

In the Matter of **Martin Shkreli**	**Order Regarding Notice of Deposition and Document Subpoena Directed to Respondent**

The Division of Enforcement asks that I grant it permission to depose Respondent Martin Shkreli. It also asks that I issue Shkreli a subpoena seeking five categories of documents. Shkreli opposes the Division's deposition request, indicating through his counsel that he will invoke his Fifth Amendment privilege as to all questions. He opposes in part the Division's request for documents.

Deposition

Shkreli, who was recently sentenced to 84 months' imprisonment, is currently being held at the Metropolitan Detention Center in Brooklyn, New York. The Division does not know where Shkreli will be incarcerated on May 21, 2018, when the hearing is scheduled to occur. Based on this circumstance, it asks that I enter an order under Rule of Practice 233(b) allowing it to depose Shkreli. *See* 17 C.F.R. § 201.233(b) (permitting depositions when a witness will be unavailable to testify at hearing). The Division states that in the event Shkreli invokes his privilege against self-incrimination, it will seek an adverse inference against him.

Shkreli concedes unavailability but asserts, through his counsel, that he will invoke his privilege against self-incrimination. Counsel states that Shkreli will supply an affidavit confirming counsel's assertion. In a letter

replying to Shkreli's response, the Division merely notes that Shkreli has not yet submitted an affidavit.[1]

Ordinarily, a blanket invocation of the privilege against self-incrimination is prohibited. *Doe ex. rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1265–66 (9th Cir. 2000); *Nat'l Life Ins. Co. v. Hartford Acc. & Indem. Co.*, 615 F.2d 595, 596 (3d Cir. 1980); *cf. United States v. Thornton*, 733 F.2d 121, 126 (D.C. Cir. 1984) (holding that in "unusual cases," a blanket invocation may be permitted if "'the only relevant matters' that the witness might have testified about were all privileged" (quoting *United States v. Reese*, 561 F.2d 894, 899-900 (D.C. Cir. 1977))). "Only after going through [a] question-by-question process would [an opposing party] be entitled to an adverse inference." *SEC v. Wu*, No. 11-cv-04988, 2016 WL 4943000, at *4 (N.D. Cal. Sept. 9, 2016) (*citing Glanzer*, 232 F.3d at 1266). Given Shkreli's concession of unavailability, the Division is entitled to notice his deposition.

The law, however, "does not require the ritual performance of a useless act." *United States v. Kovel*, 296 F.2d 918, 923 (2d Cir. 1961); *see Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). Given that Shkreli appears determined to invoke his privilege against self-incrimination, the parties may agree to an alternate procedure less likely to waste everyone's time. If the parties are amenable, they may proceed as follows. By April 4, 2018, the Division may supply Shkreli's counsel with the questions that it would pose if it were to depose him. By April 11, 2018, Shkreli may submit an affidavit to the Division invoking his privilege against self-incrimination as to questions that

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[1] In 2016, when it amended its rules of practice, the Securities and Exchange Commission stated that "parties will not be permitted to notice depositions in proceedings," such as this one, "where the initial decision is placed on either the 30- or 75-day timeline under amended Rule 360." Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212, 50,216 (July 29, 2016)). Shkreli does not argue that this policy applies in circumstances where a witness will not be available at a hearing, *i.e.*, when Rule 233(b) applies. *Cf. id.* at 50,217 ("Paragraph (b) of amended Rule 233 retains the existing procedure whereby a party may seek leave of the hearing officer to take the deposition of a witness who will likely be unavailable to attend or testify at the hearing. A deposition granted under paragraph (b) does not count against the moving side's permissible number of depositions by right or additional depositions under paragraph (a).").

implicate the privilege. If the parties follow this procedure, I will entertain the Division's request that I impose an adverse inference.[2]

Subpoena to produce documents

To the extent Shkreli has not previously produced them, the Division seeks the following:

1. All Documents and Communications produced to Respondent in response to subpoenas issued by Respondent in connection with the Proceeding.

2. All Documents and Communications that Respondent intends to introduce as exhibits or otherwise rely on in the Proceeding.

3. All Documents and Communications Concerning Respondent's association with MSMB and MSMB Healthcare, including, but not limited to:

    a. All Documents and Communications Concerning Respondent's position and duties with respect to MSMB and MSMB Healthcare;

    b. All Documents and Communications Concerning any termination or suspension of Respondent's association with MSMB or MSMB Healthcare.

4. All Documents and Communications Concerning Respondent's assertion of his Fifth Amendment Privilege against self-incrimination in response to paragraph II.A.1 of the Order instituting this Proceeding, issued on August 22, 2017.

5. All hearing and trial transcripts, proposed and admitted exhibits, materials submitted in connection with sentencing, Communications and other Documents submitted in connection with sentencing, Communications and other Documents Concerning the Criminal Proceeding, including, but not limited to, the trial and pre-trial and post-trial proceedings, Concerning Respondent's association with MSMB or MSMB Healthcare, including, but not limited to, Communications,

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[2] If the parties are unable to agree, they should notify my office of a proposed date and time for Shkreli's deposition. I will then enter the Division's proposed order.

offering materials or performance reports, and Concerning what punishment should be and was in fact imposed in the Criminal Proceeding as to Respondent.

Shkreli does not oppose disclosure of documents in categories 1 and 2, but asks that I extend the deadline for responding to April 30, 2018. Because prehearing briefs are due April 27, 2018, I extend the date for production by three weeks to April 16, 2018.

Shkreli opposes the disclosure of documents in category 3, saying that "none of these documents [are] in his custody and control" and that it would be "unreasonable" and "oppressive" to require him to pursue them. He also asserts that the Division likely has ready access to the documents described in category 3. The Division's reply does not address Shkreli's assertions. To the extent Shkreli or his counsel possess responsive documents not previously disclosed, they must be disclosed. Otherwise, he is not required to pursue and produce documents he does not possess or control. *Cf. Krause v. Buffalo & Erie Cnty. Workforce Dev. Consortium*, 425 F. Supp. 2d 352, 375 (W.D.N.Y. 2006) ("[T]he federal rule governing the production of documents and things, Fed. R. Civ. P. 34, . . . permits a party to request from another party . . . those documents and things 'which are in the possession, custody, or control of the party upon whom the request is served.'").

Shkreli asserts that documents in category 4 are protected by attorney-client privilege. The Division does not address Shkreli's assertion of privilege. On the face of the Division's request, the documents in category 4 are privileged and irrelevant. Shkreli need not produce documents in category 4.

Shkreli opposes the disclosure of documents in category 5 because the category "essentially" encompasses "the entire record of the . . . criminal proceeding against" him. Although category 5 could be interpreted as encompassing a broader range of documents, the Division does not deny Shkreli's characterization. Assuming the uncontested accuracy of Shkreli's characterization, the Division's request is denied because "[i]t is well established that discovery need not be required of documents of public record which are equally accessible to all parties." *Dushkin Publ'g Grp. v. Kinko's Serv. Corp.*, 136 F.R.D. 334, 335 (D.D.C. 1991) (quoting *SEC v. Samuel H. Sloan & Co.*, 369 F. Supp. 994, 995 (S.D.N.Y. 1973)).

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James E. Grimes
Administrative Law Judge