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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18127

In the Matter of

MARTIN SHKRELI,

Respondent.

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AND IN OPPOSITION TO RESPONDENT'S REQUEST FOR A STAY

Respondent Martin Shkreli ("Shkreli")'s opposition to the Division of Enforcement's motion for summary disposition confirms that he should be barred from the securities industry. He continues to deny intending to defraud "anyone" notwithstanding his criminal conviction on two counts of securities fraud and one count of conspiracy to commit securities fraud. Moreover, he shows no remorse for his conduct and asserts that he should be allowed to continue acting as an investment adviser. His main argument is that there was "no harm, no foul" because ultimately the victims of his fraud made money. However, at the time Shkreli defrauded the hedge fund investors, there was no guarantee that they would ultimately make money. The success of Retrophin, Inc., the public company founded by Shkreli, which was the source of the profits earned by investors, was far is the future. Shkreli refuses to acknowledge that the investors' money was at risk of loss during the time of his fraud. The fortuitous success of Retrophin does not change the fact that by committing securities fraud, Shkreli has shown himself to be unfit to be an investment adviser or otherwise be employed in the securities industry.

In short, there is no doubt that the public interest demands that Shkreli be barred from the securities industry and never again be permitted to act as an investment adviser. The Court should also deny Shkreli's unfounded motion to stay pending appeal.

A. The Steadman Factors Show Shkreli Should Be Barred

As set forth in the Division's moving papers, it is appropriate in the public interest to bar Shkreli from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization under Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. § 80b-3(f). Shkreli was convicted of securities fraud and conspiracy to commit securities fraud. Such an individual cannot be permitted to remain in the industry.

Shkreli has not denied any of the Division's factual allegations in the Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940 and Notice of Hearing ("OIP"). In his answer, he asserted his Fifth Amendment privilege[1] to the Division's allegations in Paragraph 1 of the OIP, and he admitted the Division's allegations in Paragraphs 2-3 of the OIP. Shkreli Answer at ¶¶ 4e-6e [sic]. Thus, summary disposition is appropriate here.

In his opposition brief, Shkreli claims that because the jury did not make specific findings of fact, the criminal convictions do not support the Division's assertion that an associational bar is in the public interest. Shkreli is wrong. His convictions on three separate counts show that he repeatedly engaged in fraudulent conduct with scienter, even if the specific conduct was not

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[1] *Int'l Union (UAW) v. NLRB.*, 459 F.2d 1329, 1339 (D.C. Cir. 1972); *SEC v. Gilbert*, 79 F.R.D. 683, 685 n.3 (S.D.N.Y. 1978); *Matter of Daniel R. Lehl*, 55 S.E.C. 843, 861 n.22 (2002) (The Commission can draw a negative inference from his Fifth Amendment assertion.); *Matter of Guy P. Riordan*, Admin. Proc. File No. 3-12829, 2009 WL 4731397, at *16 (Commission Opinion Dec. 11, 2009).

found. Moreover, Shkreli's opposition brief highlights other factors supporting the Division's motion. Throughout his opposition brief, Shkreli continues to deny that he ever intended to defraud anyone. Op. Br. at 7. And he points to his acquittal on several conspiracy counts. *Id.* at 6.[2] In addition, Shkreli seeks to continue acting as an investment adviser after his release from prison. *Id.* at 8. Shkreli has challenged his conviction on the conspiracy count, and made it clear that he intends to appeal his conviction. *Id.* at 2. This demonstrates that he fails to take responsibility for his misconduct. And by arguing that his perseverance paid off for investors, he fails to acknowledge that he misled investors about the status of their investments. *Id.*

Shkreli also argues that his fraudulent conduct should not be a basis for barring him from the securities industry because the investors in his hedge funds ultimately made money. However, his investors made money not because there was no fraud. At the time that Shkreli deceived his investors, there was no guarantee that his investors would ultimately profit. The fortuity that they did ultimately profit does not in any way support Shkreli's argument that a convicted fraudster should be allowed to act as an investment adviser or otherwise be employed in the securities industry.

In total, Shkreli's arguments in his opposition to the Division's motion for summary disposition weigh heavily in favor of a bar according to the *Steadman* factors. Shkreli's conduct was egregious – lies upon lies. His conduct was not isolated but occurred over a number of years. He acted with a high degree of scienter as evidenced by his conviction. And he has made no assurances against future violations or recognized the wrongful nature of his conduct. Finally, he expresses a desire to be able to serve as an investment adviser in the future. In light of all these

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[2] Of course, the failure of a jury to convict on a particular count simply reflects the jury's conclusion that the Government did not meet its burden of proving its case beyond a reasonable doubt. It is not affirmative evidence that the allegations of the indictment are false.

factors, it is abundantly clear that an industry bar is in the public interest. *See, e.g., Matter of Eric Butler*, Exchange Act Release No. 65204, 2011 SEC LEXIS 3002 (Commission opinion, Aug. 26, 2011) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979)), *aff'd on other grounds*, 450 U.S. 91 (1981). As noted in the Division's opening brief, the Commission routinely upholds bars against securities industry professionals who have been either enjoined or convicted. *See, e.g., Matter of Jeffrey L. Gibson*, Exchange Act Rel. No. 57266 (Feb. 4, 2008) (https://www.sec.gov/litigation/opinions/2008/34-57266.pdf). The Court should apply the Commission's policy and similarly bar Shkreli.

B. The Court Should Not Stay This Proceeding Pending Shkreli's Appeal

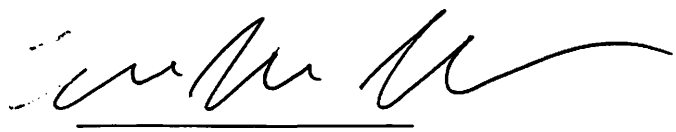
There is no basis for Shkreli's request to stay the matter pending appeal. The Commission has rejected arguments that the costs of litigating an administrative proceeding warrant a stay. *Cf. Matter of Lynn Tilton*, Admin. Proc. File No. 3-16462, 2017 WL 3214456 (Commission Order July 28, 2017). In the unlikely case that Shkreli's appeal is successful (and he is not re-prosecuted), Shkreli can always apply to the Commission to vacate the bar. *E.g., Matter of Kenneth E. Mahaffy, Jr.* Admin. Proc. File No. 3-13481, 2012 WL 6608201 (Commission Order Dec. 18. 2012). In the meantime, the public interest calls for him to be barred from the industry.

CONCLUSION

The Division respectfully submits that the public interest calls for an industry bar as to Respondent Shkreli.

Dated: New York, New York
November 13, 2017

Respectfully submitted,



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Certificate of Service

I hereby certify that I served the Reply Memorandum of Law in Support of the Division of Enforcement's Motion for Summary Disposition and in Opposition to Respondent's Request for a Stay on:

The 13th day of November, 2017, by email on:

The Honorable James E. Grimes
Administrative Law Judge
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The 13th day of November, 2017, by facsimile and UPS (original) on:

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