**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**



**ADMINISTRATIVE PROCEEDING**
**File No. 3-18127**

**In the Matter of**

**MARTIN SHKRELI,**

**Respondent.**

**DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT MARTIN SHKRELI**

The Division of Enforcement hereby moves for summary disposition pursuant to Rule 250 of the Securities and Exchange Commission's Rules of Practice [17 C.F.R. § 201.250]. The Division respectfully submits that summary disposition is appropriate and that the Court should resolve this proceeding in favor of the Division and bar Respondent Martin Shkreli from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization

In support of this Motion, the Division relies upon the accompanying memorandum of law and the Declaration of Eric M. Schmidt. The Division respectfully requests that the Court grant this motion.

Dated: New York, New York
October 11, 2017

Respectfully submitted,

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**Certificate of Service**

I hereby certify that I served (i) The Division of Enforcement's Motion for Summary Disposition Against Respondent Martin Shkreli, (ii) Memorandum of Law in Support of the Division of Enforcement's Motion for Summary Disposition; and (iii) Declaration of Eric M. Schmidt in Support of the Division of Enforcement's Motion for Summary Disposition on:

*The 11th day of October, 2017, by email on:*

The Honorable James E. Grimes
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-2557
ALJ@sec.gov

Benjamin Brafman, Esq.
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*The 11th day of October, 2017, by facsimile and UPS (original) on:*

Brent J. Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
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Eric M. Schmidt
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**In the Matter of**

**MARTIN SHKRELI,**

**Respondent.**

# MEMORANDUM OF LAW IN SUPPORT OF THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION

The Division of Enforcement respectfully submits this memorandum of law in support of its motion for summary disposition. For the reasons set forth below, an industry bar is appropriate and in the public interest as to respondent Martin Shkreli ("Shkreli") based on the application of the *Steadman* factors to the facts of this case. Specifically, a jury convicted him on two counts of securities fraud and one count of conspiracy to commit securities fraud. Nonetheless, he has refused to acknowledge the wrongful nature of his conduct or express any remorse for his wrongdoing. And he has suggested publicly that his illegal conduct was profitable. Accordingly, an industry bar is in the public interest. The Division therefore respectfully requests that the Court order a bar.

## BACKGROUND

A. Respondent

Shkreli, age 34, is a resident of New York, NY. OIP ¶ II.A.1.[1] Shkreli was the managing partner and portfolio manager for two hedge funds, MSMB Capital Management LP ("MSMB Capital") and MSMB Healthcare LP ("MSMB Healthcare") (together, the "MSMB Partnerships"). *Id.* Shkreli obtained a Series 7 license in 2003. *Id.* Shkreli is not currently associated with a registered broker dealer or registered investment adviser. *Id.* In March 2011, Shkreli founded Retrophin LLC, a pharmaceutical company that went public, by way of a reverse merger, in December 2012 and became Retrophin, Inc. (collectively with Retrophin LLC, "Retrophin"). *Id.* Shkreli was Retrophin's President and CEO until September 30, 2014. *Id.* Shkreli admitted in his investigative testimony that he provided investment advisory services to the MSMB Partnerships. (Decl. of Eric M. Schmidt Ex. E).

B. Shkreli's Criminal Conviction

Following a jury trial, Shkreli was convicted on two counts of securities fraud and one count of conspiracy to commit securities fraud in *United States v. Shkreli*, 15-cr- 637-KAM (E.D.N.Y.). (Schmidt Decl. Ex. B, Ex. C); Answer ¶ 5. The counts of the superseding indictment on which Shkreli was convicted charged, *inter alia*, that he employed fraudulent schemes in connection with his management of the MSMB Partnerships. (Schmidt Decl. Ex. A). Shkreli controlled two Delaware limited liability companies that served as the investment advisers to MSMB Capital and MSMB Healthcare. *Id.* (superseding indictment ¶¶ 3-4). At the inception of MSMB Capital, Shkreli induced investors into investing nearly $700,000 in MSMB Capital

[1] Shkreli asserted his Fifth Amendment privilege against self-incrimination to the allegations in this paragraph. *See* Answer of Martin Shkreli ¶ 4 (Sept. 6, 2017).

without disclosing that he had lost all money associated with Elea Capital Management ("Elea"), a hedge fund he had previously managed, and that he was facing a $2.3 million judgment against him for his past trading activity. *Id.* ¶ 8. Shkreli also falsely represented to potential investors that MSMB Capital had retained an independent accountant to provide annual audits. *Id.* Between 2010 and 2011, Shkreli continued to solicit investments through misrepresentations and omissions to investors in MSMB Capital regarding its performance, assets and auditor and administrator. *Id.* ¶ 9. Specifically, he misled one investor into believing that MSMB Capital's assets totaled $35 million, and upon that investor's request, provided the investor with the names of MSMB Capital's supposed independent auditor and administrator. *Id.* In reality, MSMB Capital only had approximately $700 remaining, as Shkreli had spent or lost the bulk of the money invested through trading. *Id.* Moreover, MSMB had not retained an auditor or administrator at that time. *Id.* Based on these misrepresentations and material omissions, that investor invested $1,250,000 in MSMB Capital, while other individuals, based on the same misrepresentations and/or material omissions, invested an aggregate of $1,000,000. *Id.* ¶ 10.

Under Shkreli's management, MSMB Capital suffered substantial trading losses. *Id.* ¶ 11. Shkreli placed a massive short sale in MSMB Capital's account, which resulted in losses of more than $7,000,000, and MSMB Capital lost an additional $1,000,000 in other trades. *Id.* Shkreli concealed MSMB Capital's performance from investors for months following these losses, misleading them into believing that MSMB Capital was actually realizing profits as high as forty percent. *Id.* ¶ 12. In addition, Shkreli misappropriated MSMB Capital's assets, withdrawing funds far in excess of the management fee permitted by MSMB Capital's partnership agreement. *Id.* ¶ 13.

Shkreli was also convicted of engaging in securities fraud in connection with his management of MSMB Healthcare. As alleged in the superseding indictment, following the collapse of MSMB Capital, Shkreli used the newly formed MSMB Healthcare as a vehicle to fraudulently solicit and misappropriate fund assets. While soliciting investments, Shkreli concealed from potential investors his disastrous history as a manager of Elea and MSMB Capital and his personal liability for trading activity, at the same time sharing positive information about himself. *Id.* ¶ 16. He also made misrepresentations regarding the value of MSMB Healthcare assets. *Id.*¶ 17. Consequently, thirteen individuals invested a total of approximately $5 million in MSMB Healthcare. *Id.* ¶ 16.

Thereafter, Shkreli continued to make misrepresentations to MSMB Healthcare investors and ultimately misused MSMB Healthcare assets for his own benefit. *Id.* ¶ 18. To prevent investors from seeking redemption for their investments, Shkreli falsely informed MSMB Capital investors that they had doubled their investments and that MSMB Healthcare had the necessary monthly liquidity to accommodate redemption requests. *Id.* He misappropriated MSMB Healthcare assets by withdrawing funds from MSMB Healthcare that were far in excess of the management fee permitted by the partnership agreement. *Id.* ¶ 19.

Additionally, Shkreli misappropriated MSMB Healthcare assets to pay obligations that were not MSMB Healthcare's responsibility to pay. *Id.* ¶ 19. For example, Shkreli caused assets from MSMB Healthcare to be used to pay money owed by MSMB Capital and Shkreli to settle claims brought in connection with the failed short sale made by Shkreli for MSMB Capital. *Id.* Additionally, Shkreli improperly reclassified a $900,000 equity investment by MSMB Healthcare in Retrophin as an interest-bearing loan through the use of a backdated promissory note. *Id.* ¶ 20. Shkreli thereby caused Retrophin shares that had been purchased by MSMB Healthcare to be

deleted from Retrophin's capitalization table. *Id.* In January 2013, Shkreli caused Retrophin to transfer $150,000 into MSMB Healthcare's bank account as partial payment of the improperly reclassified loan, $125,000 of which he wire transferred for a settlement payment for the losses from the short sale. *Id.*

Shkreli was also convicted of conspiracy to commit securities fraud. As alleged in the superseding indictment, Shkreli schemed to gain control of unrestricted and free trading Retrophin shares. *Id.* ¶ 36. Shkreli's motivation was to use his control over these shares to manipulate the price and trading of Retrophin stock. *Id.* ¶ 37. Shkreli sent an email to several employees saying they were no longer employees so that each could be classified as an independent shareholder capable of holding the unrestricted and free trading stock. *Id.* Contrary to the substance of the emails, each employee was permitted to remain at Retrophin and continue their work there. *Id.* Shkreli and others then acquired shares of Retrophin stock and distributed the shares among the employees so that each person's holdings were below the Commission's five percent ownership reporting requirement. *Id.* ¶ 38. Shkreli succeeded in controlling these unrestricted shares, prevented them from being sold, and directed the transfer of stock to settle debts with MSMB Capital and MSMB Healthcare investors. *Id* ¶ 39. Shkreli concealed in Schedules 13D filed with the Commission that he retained control over the unrestricted shares. *Id.* ¶ 40. Finally, one Schedule 13D falsely reported that MSMB Capital had purchased Retrophin shares with working capital. *Id.*

**ARGUMENT**

It is appropriate in the public interest to bar Shkreli from association with any broker, dealer, investment adviser, 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), which empowers the Commission to bar an investment adviser who has been convicted of fraud, such as Shkreli.

In considering whether sanctions are in the public interest, and if so what sanctions to impose, the Commission typically considers several factors, referred to as the *Steadman* factors. Specifically, the Commission considers the egregiousness of respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. *Matter of Eric Butler*, Exchange Act Release No. 65204, 2011 SEC LEXIS 3002, at *13-14 & n.21 (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). While the inquiry is a "'flexible one, and no one factor is dispositive'" *Id.* at *14 & n.22 (quoting *Matter of David Henry Disraeli*, Exchange Act. Rel. No. 57027, 2007 SEC LEXIS 3015, at *61 (Commission opinion, Dec. 21, 2007)), *petition denied, Disraeli v. SEC*, 334 Fed. App'x 334 (D.C. Cir. 2009), in this proceeding each of these factors supports the imposition of a bar from the securities industry.

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). Advisers Act Section 202(a)(6)specifically defines "conviction" to include a jury verdict. 15 U.S.C. § 80b-2(a)(6). And the Commission has made clear that a respondent cannot contest in the administrative proceeding the fact of the entry of an injunction or a conviction. *E.g., Matter of Joseph P. Galluzzi,* Admin. Proc. File No. 10209 (Commission opinion, Aug.23, 2002) ("a party cannot challenge his injunction or criminal conviction in a subsequent administrative

proceeding"). In addition, Shkreli was, by his own admission, serving as an investment adviser to two hedge funds. (Schmidt Decl. Ex. E). He was convicted for his illegal conduct related to his investment advisory services. (Schmidt Decl. Ex. C). Shkreli should not be permitted to provide investment advice to the investing public in the future.

The undisputed facts and analysis of the *Steadman* factors demonstrate that the public interest weighs heavily in favor of barring Shkreli from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. Shkreli's criminal conviction for two counts of securities fraud and one count of conspiracy to commit securities fraud supports this conclusion. And the facts that gave rise to Shkreli's conviction, as alleged in the counts of the superseding indictment, establish that such a bar is the most appropriate remedy and is necessary for the protection of investors.

Shkreli's conduct was egregious, performed with a high degree of scienter, and was not isolated, but rather characterized by an unchanging persistence to defraud investors. The separate counts of securities fraud on which Shkreli was convicted were virtually identical forms of the same fraudulent scheme. In both instances, he solicited investments based on blatant misrepresentations, concealed substantial trading losses from investors, and misappropriated fund assets for his own benefit. These facts highlight Shkreli's intent to defraud investors and his utter disregard for investors generally. The overlapping nature of each scheme demonstrates that Shkreli's conduct was not isolated or unintentional. And his conduct continued over a period of years. He deliberately preyed on investors, took advantage of their misguided trust, and used their assets to enrich himself, to pay off his personal debts, and to cover the losses he imposed on other victims of his fraud. His actions to control Retrophin's unrestricted shares also demonstrate that in

the future Shkreli will likely exploit any position of power to defraud the investment community for his own benefit.

And the fact that, ultimately, many investors in the MSMB Partnerships made money is a red herring. The investors were repeatedly lied to by Shkreli. More importantly, they did not know that their money was at risk over a period of years. The investors had placed their trust in Shkreli. But he betrayed their trust and acted for his own interests.

It is also clear that Shkreli has neither accepted responsibility for his actions nor provided any reassurances against future violations. Shkreli has filed a motion for dismissal notwithstanding the verdict with respect to his conviction on the conspiracy to commit securities fraud charge (count 8 in the indictment). (Schmidt Decl. Ex. F). In this motion, Shkreli argues that "the evidence of Shkreli's guilt on Count 8 is remarkably thin," and that "[t]he Government was able to secure a conviction on Count 8 only because it provided the jury with an inaccurate and severely prejudicial definition of the term 'affiliate.'" *Id.* In his Answer to the OIP, Shkreli contends that if his motion to dismiss is denied, he will appeal his conviction on all three counts. Respondent's Answer to OIP ¶ 2. Thus, he has not accepted responsibility for his misconduct.

In addition, Shkreli has expressed an utter lack of remorse over social media following his conviction. Within one hour following his conviction, Shkreli set up a livestream through YouTube[2] and discussed his impressions of the conviction with his followers. *E.g.*, *http://www.businessinsider.com/martin-shkreli-live-stream-securities-fraud-guilty-conviction-2017-8.* Shkreli boasted about the ease of his potential "Club Fed" prison sentence, and predicted that life will not change for him going forward. *Martin Shkreli Is Found Guilty of*

[2] Shkreli has since made the video private so that only subscribers whom he permits to view the stream may watch it.

*Fraud* (Aug. 4, 2017), https://www.nytimes.com/2017/08/04/business/dealbook/martin-shkreli-guilty.htm; *Shkreli Criticized For Trash-Talking On YouTube Live Stream After Conviction* (Aug. 3, 2017), http://newyork.cbslocal.com/2017/08/05/shkreli-youtube-live-stream/. In another YouTube livestream, Shkreli boasted[3] that his sentence will be so light that the "risk" he took on in the past five years of his life[4] will have been "worth it" given the profits he made in that time. *Martin Shkreli Explains Conviction on H3H3 Podcast* (Sept. 3, 2017), http://www.youtube.com/watch?v=LuDIGqFW09c&t=10m28s. In other words, Shkreli believes that defrauding investors is acceptable behavior and his illicit profits are a distinguished accomplishment. Shkreli not only denies responsibility for his crimes but also exhibits a willingness to defraud investors again if the benefits outweigh the costs.

Finally, Shkreli's bail was recently revoked, and he was remanded to prison, based on his threat to Secretary Hilary Clinton made to his approximately 70,000 Facebook followers. (Schmidt Decl. Ex. D). In sum, Shkreli's actions following his jury conviction demonstrate an utter lack of remorse or even recognition of the wrongful nature of his conduct. Considering the *Steadman* factors, it is clear that Shkreli should be barred from the securities industry.

[3] The link begins at 43:30, which is when Shkreli begins to speak.

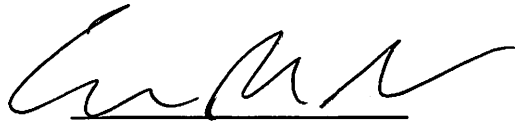
[4] Shkreli contends that the money he made and his jail time are not connected, so he does not explicitly say that his profits from committing fraud were worth the jail time.

## CONCLUSION

In short, Shkreli has no remorse for his illegal conduct. The public interest calls for him to be barred from ever again working in the securities industry.

Dated: New York, New York
October 11, 2017

Respectfully submitted,



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