**In The**

**SUPREME COURT OF THE UNITED STATES**

**October Term, 2019**

**No. _____**

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**MARTIN SHKRELI,**

***Petitioner,***

**-against-**

**UNITED STATES OF AMERICA,**

***Respondent.***

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Questions Presented For Review

1. In mail, wire and bank fraud prosecutions, which require a finding of a loss or an intended loss by the victim, a "no ultimate harm" instruction has been uniformly accepted by the various federal courts of appeals. On the other hand, the crime of securities fraud lacks the element of such loss or intended loss. The first question presented is whether a "no ultimate harm" instruction in a securities fraud prosecution causes prejudicial jury confusion by effectively holding the accused to a higher standard of conduct than the statute specifically requires, thereby unduly undermining a defense of good faith?

2. Pursuant to 18 U.S.C. § 981(a)(2)(B), should the proceeds from defrauded investors be offset by those gains they later realize, as amounting to direct costs which a defendant "incurred in providing the goods or services," before any forfeitable profits by such defendant can be calculated?

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Petitioner Martin Shkreli ("Petitioner") seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, dated August 8, 2019.

## Related Proceedings and Opinions

The summary order of the United States Court of Appeals, Appendix A, reported at ---- F. App'x ----, 2019 WL 3228933) (summary order), affirmed an amended judgment of the United States District Court for the Eastern District of New York (Hon. Kiyo A. Matsumoto), following a jury trial, under Indictment No.15-cr-637 (KAM), dated April 11, 2018, convicting Petitioner of violating 15 U.S.C. §78j(b) (two counts) and 18 U.S.C. §371.

The amended judgment of conviction imposed a term of imprisonment of eighty-four months, all counts to run concurrently, to be followed by a concurrent term of supervised release of three years. Also included was a fine of $25,000 on each count for a total of $75,000, restitution in the amount of $388,336.49 and, pursuant to the Government's motion, forfeiture of substitute assets in the amount of $7,360,450. Appendix B.

Other proceedings within the meaning of Supreme Court Rule 14(1)(d)(iii), and docketed under the caption, *United States v. Shkreli*, are reflected in decisions reported at 15 cr 637, 2018 WL 4344948 (E.D.N.Y. Sept 11, 2018); 15 cr 637, 2018 WL 3425286 (E.D.N.Y. July 10, 2018); 264 F. Supp. 3d 417 (E.D.N.Y. 2017); 260 F. Supp. 3d 257 (E.D.N.Y. 2017); 15 cr 637, 2017 WL 3623626 (E.D.N.Y. June 24, 2017); 15 cr 637, 2017 WL 3608252 (E.D.N.Y. May 16, 2017); 260 F. Supp. 3d 247 (E.D.N.Y. 2017); and 15 cr 637, 2016 WL 8711065 (Dec. 14, 2016).

## Basis for Jurisdiction

The summary order of the United States Court of Appeals, Appendix A, reported at 2019 WL 3228933 was entered on July 18, 2019, and the mandate issued on August 8, 2019. Jurisdiction to entertain this petition for a writ of certiorari lies pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rules 10(c) and 13(1).

## Statutes Involved

### 15 U.S.C. § 78j(b). Manipulative and deceptive devices

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

### 18 U.S.C. § 1343. Fraud by wire, radio, or television

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or

causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

**18 U.S.C. § 981(a)(1). Civil Forfeiture**

The following property is subject to forfeiture to the United States:

Any property, real or personal, which constitutes or is derived from proceeds traceable to ... any offense constituting "specified unlawful activity" (as defined in section l956(c)(7) of this title), or a conspiracy to commit such offense.

**18 U.S.C. §1956(c)(7)(A).Laundering of monetary instruments**

(c) As used in this section--(7) the term "specified unlawful activity" means--

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

**18 U.S.C.A. § 1961 (1)(D). Definitions**

> As used in this chapter--(1) "racketeering activity" means
>
> any offense involving fraud connected with...fraud in the sale of securities...

**18 U.S.C. § 981(a)(2)(B). Civil forfeiture**

> For purposes of paragraph (1), the term "proceeds" is defined as follows: . . . ***
>
> > In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term "proceeds" means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.***

## Statement of the Case

### A. The Indictment and Theory of the Prosecution

Petitioner was charged in the Eastern District of New York under Indictment No. 15-cr-637 (KAM) with eight counts. They included conspiracy to commit Securities Fraud, conspiracy to commit Wire Fraud, and substantive Securities Fraud.

On December 17, 2015, Petitioner was arraigned along with co-defendant Evan Greebel, the former counsel to the pharmaceutical company, Retrophin, which Petitioner had founded. A superseding indictment was unsealed on June 3, 2016, alleging four interrelated fraud schemes.

Included in the charges were the *MSMB Capital Scheme* (Counts One, conspiracy to commit Securities Fraud; Two, conspiracy to commit Wire Fraud; and Three, securities fraud); and the *MSMB Healthcare Scheme* (Counts Four, conspiracy to commit securities fraud; Five, conspiracy to commit Wire Fraud; and Six, securities fraud). Each scheme alleged that Petitioner, as managing partner of these hedge funds, had made material misrepresentations and/or omissions to investors, as well as prevented redemptions from the funds by providing investors with fabricated performance statements and concealing trading losses.

The third alleged scheme (Count Seven, conspiracy to commit Wire Fraud) was the *Retrophin Misappropriation Scheme*. It theorized that the defendants had resolved liabilities using sham

settlement and consulting agreements to repay MSMB investors with the shares of Retrophin and cash. The fourth scheme (Count Eight, conspiracy to commit Securities Fraud) was the *Retrophin Unrestricted Securities Scheme*. It theorized that the defendants conspired to control the price and trading volume of free- trading Retrophin shares. The defense was that Petitioner had *always* acted in good faith, in that he had never intended for any investor to "lose a dime," and that, indeed, every investor had ultimately realized extraordinary gains.

Upon dual motions, the district court severed the trials, with Petitioner proceeding first, on June 28, 2017. After five weeks of testimony and following argument of counsel, the case was given to the jury.

### B. The Court's Charge, Jury Deliberations and Verdict

Over Petitioner's objection, Appendix C and G, the district court gave the jury a "no ultimate harm" (NUH) charge. Contrary to the uniform instruction that had been alternatively requested by Petitioner for both sets of charges, the court gave two disparate versions concerning the securities fraud-related counts on the one hand, and the wire fraud-related counts on the other. Appendix D and E. Then, toward the end of the district court's charge, *both versions* were incorporated by reference when the court instructed the jury on Petitioner's good faith defense. Appendix F.

Specifically, upon instructing with respect to the substantive Securities Fraud charges under Counts Three, Six and Eight, *of which Petitioner was convicted*,

the district court, similar to the instruction that had been condemned in *United States v. Rossomando*, 144 F.3d 197 (2d Cir. 1998), stated:

> In considering whether or not a defendant acted in good faith, you are instructed that a belief by the defendant, if such belief existed, that ultimately everything would work out so that no investors would lose any money does not require a finding by you that the defendant acted in good faith. No amount of honest belief on the part of a defendant that the scheme ultimately will make a profit for the investors will excuse fraudulent actions or false representations by him.

Appendix D.[1]

On the other hand, with respect to the wire fraud charges under Counts Two, Five and Seven, *of which Defendant was acquitted*, the court included the

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[1] In *Rossomando,* the district court instructed:

> No amount of honest belief on the part of the defendant that the scheme would not ultimately result in a financial loss to the New York City Fire Department or its Pension Fund will excuse fraudulent actions or false representations by him to obtain money, provided, of course, that the government proves beyond a reasonable doubt that the defendant acted with the specific intent to defraud.

144 F.3d at 199.

additional language approved in *United States v. Berkovich*, 168 F.3d 64 (2d Cir. 1999), stating:

> You are instructed that if the defendant conspired to commit wire fraud, then a belief by the defendant, if such a belief existed, that ultimately everything would work out so that no one would lose any money does not require you to find that the defendant acted in good faith. No amount of honest belief on the part of the defendant that the scheme would, for example, ultimately make a profit for investors, will excuse fraudulent actions or false representations caused by him to obtain money or property. I reiterate, however, that an "intent to defraud" for the purposes of the wire fraud statute means to act knowingly and with specific intent to deceive *for the purpose of causing financial loss or property loss to another*. As a practical matter, then, you may find intent to defraud if the defendant knew that his conduct as a participant in the scheme was calculated to deceive and, nonetheless, he associated himself with the alleged fraudulent scheme *for the purpose of causing loss to another*.[2]

Appendix E (emphasis added).

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[2] In *Berkovich*, the Second Circuit held that the italicized language rescued the conviction from the fate of *Rossomando*.

As noted, at the end of its charge, and hence, for the third time, the court cross-referenced *both* disparate instructions regarding the good faith defense. Appendix F. Petitioner again took exception to any NUH instruction. Appendix C and G.

During its deliberations, the jury asked for clarification of "fraudulent intent." Appendix H. In response, the court directed it to *re-read both* its earlier disparate instructions regarding "no ultimate harm." Appendix H, at p. H-2. Soon thereafter, the jury returned a split verdict, thereby convicting Petitioner of the two substantive securities frauds and one charge of conspiracy to commit securities fraud, while acquitting him of the other two securities fraud conspiracies and all the wire fraud conspiracies, based on precisely the same evidence.

### C. The Motion for Forfeiture

Prior to sentencing, the Government moved for forfeiture pursuant to 18 U.S.C §981(a)(1)(C). As to Count Three, the Government requested forfeiture in the amount of $2,998,000; for Count Six, it requested $3,402,450; and, for Count Eight, it requested $960,000. Petitioner responded, in part, that because §981(a)(2)(B) "'targets the profits that [Petitioner] enjoyed, not net gains or intended losses,' the forfeiture proceeds should be reduced by the money that was returned to investors, as these payments are in this case, part of the direct costs incurred in providing goods and services." In support, Petitioner cited *United States v. Hollnagel*, 10 cr 195, 2013 WL 5348317, at *4 [(N.D. Ill. 2013)] ("deducting the funds paid back to the

investors from the forfeiture analysis under 18 U.S.C. § 98l(a)(2)(B) as these payments were 'direct costs incurred in providing the goods or services.'").[3]

Following further submissions and oral argument, the district court ruled in favor of the Government. Appendix B. In doing so, it summarily relied, in significant part, on its earlier ruling that had denied Petitioner's motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c), Appendix B, at p. B-4, n.1, and hence, which had only addressed the distinct issue of the evidentiary sufficiency of those counts resulting in conviction.

## D. The Sentencing

On March 9, 2018, Petitioner was sentenced to a concurrent term of imprisonment of eighty-four months to be followed by a concurrent term of supervised release of three years.[4] A fine of $25,000 on each count was imposed for a total of $75,000. Additionally, restitution in the amount of $388,336.49 and forfeiture of substitute assets in the amount of $7,360,450.00 were ordered, representing the total amount of investments in the various hedge funds. Appendix B.

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3 Analysis of the statutory scheme which results in the provisions of 18 U.S.C. § 98l(a)(2)(B) requires consideration of 18 U.S.C. §§ 981(a)(1), 1956(c)(7)(A), and 1961 (1)(D).

4 The initial judgment was entered on March 26, 2018 and the amended judgment on April 17, 2018.

**E. The Appeal**

On appeal to the Second Circuit, Petitioner argued that his inconsistent acquittals and convictions were easily explained by the district court's disparate jury instructions regarding NUH between the Securities Fraud related counts on the one hand, and the Wire Fraud conspiracies on the other. Petitioner initially maintained that an NUH instruction should never be given with respect to securities fraud since the statute does not contemplate either a loss by the victim or an intended loss, thereby rendering the NUH instruction irrelevant and prejudicial. It was alternatively argued, as concerns the securities fraud counts of which Petitioner was alone convicted, that the district court had improperly failed to instruct the jury -- unlike with respect to the wire fraud counts resulting in acquittal -- by omitting the additional language sanctioned in *Berkovich,* thereby explaining the split verdict.

Petitioner further argued that the district court had improperly determined the amount of forfeiture, by relying solely on its earlier denial of his Fed. R. Crim. P. 29(c) motion. Petitioner maintained, *inter alia,* that, unlike the finding in that motion, which did not involve a quantitative determination of the amount of ill-gotten gains, if any, the forfeiture statute requires a precise determination of the proceeds illegally collected, minus certain offsets which the district court failed to consider. Therefore, because each of the investors had realized extraordinary gains, Petitioner asked the Court, *inter alia,* to adopt the reasoning of the district court in *Hollnagel*, 2013 WL 5348317, at *4, which deducted the funds paid back to the investors from the

forfeiture analysis under 18 U.S.C. § 981(a)(2)(B), ruling that those payments were "'direct costs incurred in providing the goods or services.'"

Thereafter, the Court of Appeals, affirming, stated "[a]t the outset, we see no error generally in the inclusion of an NUH instruction for a securities fraud charge." Appendix A, at p. A-4. The Court noted that "[i]n fact, we have upheld such an instruction in securities fraud cases on multiple occasions. *See, e.g.*, *United States v. Lange*, 834 F.3d 58, 79 (2d Cir. 2016);[5] *United States v. Leonard*, 529 F.3d 83, 91-92 (2d Cir. 2008)." Appendix A, at p. A-4. The Court then added:

> We agree with the government that a securities fraud charge *without* the NUH instruction would actually have constituted a windfall for Shkreli, whose defense was "exactly the kind of improper argument that the NUH instruction was designed to address: that despite his many misrepresentations and omissions to the MSMB Capital and MSMB Healthcare investors, he did not have the requisite intent to defraud those investors because he believed that the investors would ultimately make money from their investments." Appellee's Brief 40.

*Id.* (citing *United States v. Ferguson*, 676 F.3d 260, 280 (2d Cir. 2011) ("upholding NUH instruction because it

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5 *Cert. denied sub nom. cert. denied*, 137 S. Ct. 685 (2017).

'ensured that jurors would not acquit if they found that the defendants knew the [transaction] was a sham but thought it beneficial for the stock price in the long run ... [given that] the immediate harm in such a scenario is the denial of an investor's right to control her assets by depriving her of the information necessary to make discretionary economic decisions.' (internal quotation marks and brackets omitted.))").

As to Petitioner's alternate claim that the same language should have been employed with regard to both sets of charges, the Court held:

> We also disagree with Shkreli that it was error for the terms of the NUH instructions to vary between the securities fraud and wire fraud counts. The two crimes have different elements—there is no basis for inclusion of language requiring the jury find that Shkreli acted "for the purpose of causing some loss to another" in order to convict him of *securities fraud* simply because such a finding is required to convict him of *wire fraud*. And given these differing elements, Shkreli's repeated invocations of *United States v. Rossomando*, 144 F.3d 197 (2d Cir. 1998), and *United States v. Berkovich*, 168 F.3d 64 (2d Cir. 1999)—cases dealing exclusively with wire fraud—are unavailing. The instruction given here correctly stated the law. As such, we disagree with Shkreli that exclusion of additional language describing an element *not* required for the

charged crime constituted a prejudicial error.

Appendix A, at pp. A-4-5.

The Court of Appeals further rejected Petitioner's arguments concerning the amount of forfeiture that had been ordered. Specifically, as relevant to the limited purposes of this petition, the Court stated:

> Lastly, Shkreli argues that we should adopt the reasoning of *United States v. Hollnagel*, 2013 WL 5348317 (N.D. Ill. Sept. 24, 2013)—a district court case from outside our circuit—in which the court concluded that the robust returns received by investors should reduce the forfeiture amount required of the defendant to zero. *See id.* at *4. However, as noted above, we have held that "forfeiture is gain based," *not* based on the losses (or gains) to victims. [*United States v.*] *Torres*, 703 F.3d [194,] 203 [2d Cir. 2012] (internal quotation marks omitted). And even if Shkreli argues that he, like the defendants in *Hollnagel*, "incurred the cost of paying [his] investors," 2013 WL 5348317, at *5, he makes no suggestion that he has not profited from the frauds. To the contrary, the district court found that he misappropriated large sums of the money invested in his funds for his own use. As such, we see no clear error in the district court's conclusion that, *at the very*

> *least*, the gains to Shkreli include the money he caused his investors to invest via fraud. *Cf.* Appendix 376 ("[T]he proceeds [Shkreli] obtained as a result of his misrepresentations enabled him to control millions of dollars that were used to fund and enable the success of Retrophin, pay his personal debts and expenses, and perpetuate additional frauds.")

Appendix A, at pp. A-8-9.

## Reasons for Allowance of the Writ

### A. The Court Should Consider Whether a "No Ultimate Harm" Instruction is Appropriate With Regard to Securities Fraud, Which Lacks the Element of Loss or Intended Loss

In this case, for the first time, a federal court of appeals has specifically addressed the correctness, *vel non*, of an NUH instruction as it pertains to charges of securities fraud. It is submitted that, in ruling that such an instruction is as appropriate in securities fraud cases as it is in mail, wire and bank fraud cases, the Second Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). This Court, therefore, should review this question as one of first impression.

It is certainly questionable -- and only this Court can so determine -- whether the Second Circuit's reliance on *Lange, Leonard* and *Ferguson* does any justice to its conclusion. There was no considered

analysis in those cases of the differences between mail, wire and bank fraud on the one hand, and securities fraud on the other. Rather, there was merely a rote application of an NUH instruction as it affected joint charges of both wire fraud and securities fraud. Therefore, before ruling as it did, a comparison of those distinct statutory provisions should have been, but was not, undertaken by the Court of Appeals in this case.

### 1. Mail/Wire Fraud

The crimes of both mail and wire fraud have several elements: There first has to be a (1) devised or an intention to devise a scheme to defraud or the commission of specified fraudulent acts coupled with the (2) use of the mail or the wires for the purpose of executing, or attempting to execute, the scheme or such specified fraudulent acts. *See Carter v. United States*, 530 U.S. 255 (2000). Further:

> Although the mail fraud and wire fraud statutes contain different jurisdictional elements (§ 1341 requires use of the mails while § 1343 requires use of interstate wire facilities), they both prohibit, in pertinent part, "any scheme or artifice to defraud" *or to obtain money or property* "by means of false or fraudulent pretenses, representations, or promises." The bank fraud statute, which was modeled on the mail and wire fraud statutes, similarly prohibits any "scheme or artifice to defraud a financial institution" *or to obtain any property of a financial institution* "by false or

> fraudulent pretenses, representations, or promises."

*Neder v. United States*, 527 U.S. 1, 20–21 (1999) (emphasis added; footnote omitted).

Thus, with respect to mail, wire and bank fraud, a theory of each must be premised on the actual, or at least intended, obtainment, through fraudulent means, of money or property. And such fraudulent means must be material to the objective of the underlying scheme or artifice to defraud. *Id.* at 23. Otherwise stated, in bringing such charges, as the Second Circuit has itself elaborated,

> the government "must, at a minimum, prove that defendants *contemplated* some actual harm or injury to their victims." *Id.* (emphasis in original). Indeed, "[o]nly a showing of intended harm will satisfy the element of fraudulent intent." *Id.* Thus, the question presented on this appeal is whether Novak, as a part of the kickback scheme, contemplated harming the contractors.

*United States v. Novak*, 443 F.3d 150, 156 (2d Cir. 2006) (citing *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987)).

**2. Securities Fraud**

On the other hand, to prove a violation of 18 U.S.C. § 78j(b), it only must be established, with respect to the purchase or sale of securities, that the

accused,

> "acting with scienter, made a material misrepresentation (or a material omission if the defendant had a duty to speak) or used a fraudulent device. Scienter, as used in connection with the securities fraud statutes, *means intent to deceive, manipulate, or defraud*; or at least knowing misconduct. Whether or not a given intent existed, is, of course, a question of fact."

*VanCook v. SEC*, 653 F.3d 130, 138 (2d Cir. 2011) (emphasis added); *see also Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) ("Scienter is assuredly a 'fact.' In a § 10(b) action, scienter refers to 'a mental state embracing intent to deceive, manipulate, or defraud.' And the state of a man's mind is as much a fact as the state of his digestion. And this fact of scienter constitut[es] an important and necessary element of a § 10(b) violation.") (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 (1976) and *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (quoting *Edgington v. Fitzmaurice*, [1885] 29 Ch. Div. 459, 483)) (internal quotation marks omitted).

Moreover, this Court "has directed lower courts to interpret Section 10(b) and Rule 10b–5 'flexibly' and broadly, rather than 'technically [or] restrictively.'" *VanCook*, 653 F.3d at 138 (citing *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (internal quotation marks omitted). That is because

> [s]ection 10(b) was designed as a catch-all

> clause to prevent fraudulent practices," including not just "garden type variet[ies] of fraud" but also "unique form[s] of deception" involving "[n]ovel or atypical methods."

*Id.* (emphasis added) (*quoting Chiarella v. United States*, 445 U.S. 222, 226 (1980) and *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 11 n.7 (1971); *cf. Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37-38 (2011) (setting forth elements that a private 10b–5 plaintiff is required to prove).

A major difference between mail/wire/bank fraud and securities fraud, therefore, is the issue of loss or intended loss to the victim. In securities fraud cases, neither such a loss nor an intended loss is an element in need of proof. Thus, in *United States v. Litvak*, the Second Circuit explained:

> Litvak contends that the scienter element of Section 10(b) requires proof of "contemplated harm" (or "intent to harm"), that the District Court erred in failing to so instruct the jury, and that the evidence adduced at trial was insufficient to permit a rational jury to find that Litvak had such intent. In ruling on Litvak's post-trial motions, the District Court reaffirmed its view that "intent to harm" is not an element of securities fraud. See [*United States* v.] *Litvak*, 30 F. Supp. 3d [143,] 150–51 [(D. Conn. 2014)]. We agree.

> "Liability for securities fraud [ ] requires proof that the defendant acted with scienter, which is defined as 'a mental state embracing intent to deceive, manipulate or defraud.' " Litvak urges us to read "intent to deceive, manipulate or defraud," in the same manner in which we have interpreted "intent to defraud" in the mail and wire fraud contexts (*i.e.*, as requiring proof of "contemplated harm"), *see, e.g.*, *[Novak*, *supra*, 443 F.3d at 156] (explaining that, in the context of mail and wire fraud, "*[o]nly a showing of intended harm will satisfy the element of fraudulent intent"* (internal quotation marks omitted)). Litvak's view, however, is contrary to our precedent.

808 F.3d 160, 178 (2d Cir. 2015) (quoting *United States v. Newman*, 773 F.3d 438, 447 (2d Cir. 2014) (quoting *Ernst & Ernst,* 425 U.S. at 193, n.12) (emphasis added).

The *Litvak* court then recalled that, earlier, in *United States v. Vilar,* 729 F.3d 62 (2d Cir. 2013), the Second Circuit had also rejected the argument that the "evidence was insufficient to support [the defendant's] conviction for securities fraud because the government failed to prove that he 'intended to steal' from the victim. 808 F.3d at 178. Rather, the Court held that "the government was under no obligation to prove that [the defendant] wanted to steal [the victim's] money, only that he intended to defraud her in connection with his sale of the [securities]." *Id.* at 179; *see also United States v. Dixon*, 536 F.2d 1388, 1398 (2d Cir. 1976).

### 3. The No Ultimate Harm Instruction in the Several Federal Courts of Appeals

Most of the federal courts of appeals have approved the NUH instruction, but almost uniformly with respect to mail or wire fraud. Although the First Circuit has indicated its approval of the NUH instruction, *see United States v. Mueffelman*, 470 F.3d 33, 36-37, 41-42 (1st Cir. 2006), neither the Eleventh Circuit nor the D.C. Circuit has approved or disapproved of it. *But see* Eleventh Circuit's Criminal Pattern Jury Instructions Special Instruction 17. ("An honest belief that a business venture would ultimately succeed doesn't constitute good faith if the Defendant intended to deceive others by making representations the Defendant knew to be false or fraudulent.").

The Second Circuit, though, by far, the most prolific in this area, has, until now, only elaborated upon the use of the instruction in mail and wire fraud cases. First, in *United States v. Rossomando,* upon reviewing that mail fraud conviction even under the higher bar of plain error, the Court of Appeals reversed the conviction, recognizing that Rossomando's defense "was that he did not intend to deprive the Pension Fund of any such monies because he believed his income was well below the cap." 144 F.3d at 203. On that record, *even though the defendant, like Petitioner, had been charged with making affirmative misrepresentations*, the Court ruled that

> the essence of Rossomando's defense was not that he thought the Pension Fund would not "ultimately" lose money, but

> that he thought it was *never going to lose money* because his income was well below the level at which the false information he provided would become relevant. In the absence of a sufficiently clear referent for the court's "no ultimate harm" instruction, there is a substantial risk that the jury could have been confused into believing that the government was not required to prove that Rossomando intended to harm the Pension Fund. *Simply put, the jury could well have been persuaded by Rossomando's defense that he did not intend to harm the Pension Fund, but still have believed that it should convict because "[n]o amount of honest belief on the part of the defendant that the scheme would not ultimately result in a financial loss to the New York City Fire Department or its Pension Fund will excuse fraudulent actions or false representations by him to obtain money."*

*Id.* at 202 (emphasis added).

Next came *United States v. Gole*, 158 F.3d 166 (2d Cir. 1998), where the Court upheld a mail fraud conviction in the face of a similar challenge. Distinguishing *Rossomando*, it was observed that "[a]lthough *Rossomando* arose in nearly identical circumstances concerning income forms completed by another disabled fireman, that case turned on the *defendant's knowledge of the immateriality* of the false statements he made." 158 F.3d at 168. Conversely, "Gole admitted to knowing that lying on his income

report would affect the [New York City Fire Department] Pension Fund's calculation of his pension." *Id.* at 168–69. Thus, the Court limited *Rossomando* to cases where the defendant clearly had no intent to cause *any loss at all*, whether immediate or ultimate.

A year later, the Court decided *United States v. Berkovich*, *supra*, another mail fraud case. There, again reviewing under plain error analysis, the Court noted that the district court had initially instructed in accordance with *Rossomando*. *See* 163 F.3d at 66 & n.1. Immediately thereafter, however, the district court in *Berkovich* added:

> "As a practical matter, then, in order to sustain the charges against the defendant, the government must establish beyond a reasonable doubt that he knew that his conduct as a participant in the scheme was calculated to deceive and, nonetheless, he associated himself with the alleged fraudulent scheme *for the purpose of causing some loss to another*."

168 F.3d at 67.

Upholding the conviction this time, the Court distinguished *Rossomando* on three grounds: First,

> [u]nlike *Rossomando*, the instruction here clearly informed the jury that they could not convict appellant unless *he intended to cause loss to someone*. That this instruction immediately followed the "no

> ultimate harm" language also reduces the impact of that language. See [144 F.3d] at 202 (fact that instruction "came toward the end of the charge only exacerbated the problem"). The possibility of confusion that troubled us in *Rossomando* was, therefore, greatly reduced by this proper restatement of the law.

*Id. (*emphasis added).

Second, "a factual predicate existed to give a 'no ultimate harm' instruction" in that case because "Berkovich was recorded as stating on at least two occasions that only the insurance company and not the client or the bank would lose any money." *Id.* The court ruled that unlike in *Rossomando*, "there was a legitimate reason here for the trial court to indicate to the jury that some of Berkovich's statements regarding who would be harmed did not constitute a defense." *Id.*

Finally, the Court advised that, unlike in *Berkovich*, "the jury in *Rossomando* was clearly troubled by the issue of intent and requested the court to clarify its instructions on this point. As we noted in that case, this was the 'surest signal that the jurors were indeed confused.'" *Id.* "No such signal was sent in this case." *Id.*

Ensuing decisions of the Second Circuit in mail/wire/bank fraud cases routinely upheld NUH instructions. *See United States v. Koh*, 199 F.3d 632, 641 (2d Cir. 1999); *United States v. Stevens*, 210 F.3d 356 (2d Cir. 2000) (summary order); *United States v. Rybicki*, 38 F. App'x 626, 628–29 (2d Cir. 2002) (summary order); *United States v. Cartelli*, 272 F. App'x 66, 69 (2d Cir.

2008) (summary order); *United States v. Ingram,* 490 F. App'x 363, 367 (2d Cir. 2012) (summary order); *United States v. Finazzo*, 682 F. App'x 6 (2d Cir. 2017) (summary order); *United States v. Marzo*, 312 F. App'x 356, 358–59 (2d Cir. 2008) (summary order)). To be sure, *absent any discussion regarding the difference between mail/wire fraud and securities fraud*, the Court upheld NUH instructions in cases where both types of fraud had been charged. *See United States v. Leonard*, *supra*; *United States v. Ferguson*, *supra*; *United States v. Levis*, 488 F. App'x 481 (2d Cir. 2012) (summary order); and *United States v. Lange*, *supra.* In each instance, that Court, affirming, was usually confronted with some variant of the *Berkovich* language while continuing to distinguish *Rossomando.*

The other federal courts of appeals have also embraced an NUH instruction in one form or another -- normally in mail or wire fraud cases, but some with respect to securities fraud under a different section than that involved in this case. *See, e.g.*, *United States v. Boyer*, 694 F.2d 58, 60 (3d Cir. 1982) (**mail and securities fraud under 15 U.S.C. § 77q(a)**), which, in part, unlike 15 U.S.C. § 78j(b), contemplates a loss, as in mail and wire fraud -- absent any discussion between the separate securities statutes. *See also United States v. Allen*, 491 F.3d 178, 188 (4th Cir. 2007) (**wire fraud**); *United States v. Bakker*, 925 F.2d 728, 738 (4th Cir. 1991) (**mail and wire fraud**); *United States v. Painter*, 314 F.2d 939, 940 (4th Cir. 1963) (**mail and wire fraud**); *United States v. Diamond*, 430 F.2d 688, 692 (5th Cir.

1970) **(mail fraud)**[6]; *United States v. Habel*, 613 F.2d 1321, 1325, 1328 (5th Cir. 1980) (**mail fraud**); *United States v. Stull*, 743 F.2d 439, 445 n.6 (6th Cir. 1984) **(mail fraud**); *United States v. Alexander,* 743 F.2d 472, 473–74 (7th Cir. 1984) (**mail and wire fraud**); *United States v. Brandon*, 50 F.3d 464, 468 (7th Cir. 1995) (**wire fraud**); *United States v. Dunn*, 961 F.2d 648, 650 (7th Cir. 1992) (**mail fraud**); *United States v. Hamilton*, 499 F.3d 734, 735–37 (7th Cir. 2007) (**mail and wire fraud**); *United States v. Cheatham*, 899 F.2d 747, 748, 751 (8th Cir. 1990) (**mail fraud**); *United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993) (**bank fraud**); *United States v. Burlingame*, 172 F. Appx 719, 721 (9th Cir. 2006) **(mail and wire fraud**); *United States v. Pappert*, 112 F.3d 1073, 1075–76 (10th Cir. 1997) **(mail and wire fraud**); *United States v. Bailey*, 327 F.3d 1131, 1143 (10th Cir. 2003) (**mail and wire fraud**).

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*Diamond* cites *Greenhill v. United States*, 298 F.2d 405, 411 (5th Cir. 1962) (involving the jury instruction that "[t]he law is that honest belief in the ultimate success of the venture will not justify false representations in the sale of securities"). *Greenhill*, in turn, cites *Danser v. United States*, 281 F.2d 492 (1st Cir. 1960); *Linn v. United States*, 234 F. 543 (2d Cir. 1916); *Proffer v. United States*, 288 F.2d 182 (5th Cir. 1961); *United States v. Crosby*, 294 F.2d 928 (2d Cir. 1961); and *Foshay v. United States*, 68 F.2d 205 (8th Cir. 1933). Yet, for purposes of the issue *sub judice*, none of those cases advance analysis. As in *Boyer*, *supra*, the defendants in each of those prosecutions were charged under a different securities statute, 15 U.S.C. § 77q(a), as well as under mail and wire fraud, thereby entailing either actual or potential losses to the victims, unlike under 15 U.S.C. § 78j(b), charged in this case.

**4. Discussion**

It appears that, other than the Second Circuit's summary order in this case, no decision has been found which specifically addressed the relevance, and hence, the correctness of an NUH instruction in a securities fraud case. Query: if no intended harm, or actual harm need be evidentially established in a securities fraud prosecution, why would an NUH instruction be the least bit relevant? After all, the very essence of the instruction addresses an immediate versus an unintended ultimate loss to the victim?

But, with this difference between mail/wire fraud on the one hand and securities fraud on the other, would not an NUH instruction in the latter instance well approximate the prejudice found in *Rossomando*? For there, no intended harm, either in the short term or certainly the long term, could be proven. Hence, even the Second Circuit -- normally a predictable proponent of such an instruction -- found the NUH charge to be inappropriate. To borrow from *Rossomando*, therefore,

> [s]imply put, the jury could well have been persuaded by [Petitioner's] defense that he did not intend to harm the [investors], but still have believed that it should convict because "[n]o amount of honest belief on the part of the defendant that the scheme would not ultimately result in a financial loss to the [investors] will excuse fraudulent actions or false representations by him to obtain money."

144 F.3d at 202.

On such premise, why should an NUH charge in a securities fraud case not be inherently suspect? The fact is there has been little, if any, discussion by any of the Courts of Appeals of the appropriateness of an NUH instruction in securities fraud cases until the Second Circuit's pronouncement in this case. Consequently, this Court should consider when, if at all, such an instruction is required and under what circumstances.

At the least, if a NUH instruction is approved in a securities fraud case, the Supreme Court should consider whether the additional *Berkovich* language should be employed to avoid the prejudice stemming from the deficient instruction in *Rossomando*. As noted, here, after manifesting similar jury confusion as in *Rossomando* by requesting to be further charged on the definition of intent, and having been instructed on the wire fraud counts with the *Berkovich* "for the purpose of causing some loss to another" language, the jury acquitted. On the other hand, when, notwithstanding counsel's request for similar verbiage, that language was purposely omitted with respect to the Securities Fraud counts, the jury convicted. Yet, just as with *Rossomando*, counsel had argued to the jury that Petitioner had no intent, "*at any time*," for any investor to "lose a dime."

To be sure, in the past, as the Second Circuit noted in its summary order, it had affirmed where the NUH instruction had been given in securities fraud cases, even if intending to cause loss is *not* an element of that crime. *See, e.g.*, *Lange* and *Leonard,* as well as the Third Circuit's decision in *Boyer, supra.* But no rationale in support thereof, as opposed to its employment in mail, wire or bank fraud cases, has ever been addressed, or even raised.

Indeed, the facts in *Lange* and *Leonard* stand in stark contrast, where similar jury confusion as that which occurred herein was avoided. Although those cases also involved *both* securities and wire fraud charges, the subject instructions appear only to have been given once in each case, in conjunction with those defendants' respective good faith defenses -- *not*, as here, with regard to the distinct elements of either of the charged offenses. *See Lange*, 834 F.3d at 79, n.9. Thus, in upholding the instruction as it had done in *Berkovich*, the Second Circuit in *Lange* emphasized three factors: a) there was a factual predicate for the instruction; b) the instruction required the finding of an intent to defraud; and c) there was no jury confusion. 834 F.3d at 79. Likewise, in *Leonard*, 529 F.3d at 91, the Second Circuit upheld the NUH instruction because the defendants had "intended to deprive investors of the 'full information' they needed to 'make refined, discretionary judgments,' *they intended to harm the investors*" (quoting *Rossomando* at 201 n.5 and citing *United States v. Dinome*, 86 F.3d 277, 280, 284 (2d Cir. 1996)) (emphasis added). Thus, "some loss to another," *Berkovich*, 168 F.3d at 67, though not necessarily one that was financial, had been involved.

Similarly, in *United States v. Boyer*, *supra*, involving mail fraud and securities fraud, the Third Circuit, absent any discussion of the differences between the two statutes, simply stated:

> Benson also contends that the court erred in charging that "[n]o amount of honest belief that the enterprise would ultimately make money can justify baseless, false or reckless misrepresentations or promises." Such an instruction was approved in *United States v.*

> *Habel,* [*supra*]. We hold that on this record it was appropriate.

694 F.2d at 60.

But *Habel* was only a mail fraud and conspiracy case. So it does not advance analysis with respect to whether a NUH instruction is appropriate in a securities fraud prosecution. Accordingly, the question presented warrants the granting of this petition.

### B. The Court Should Address Whether, When Calculating the Amount of Forfeiture for Securities Fraud, a Defendant's Actual Gains Must Be Offset by Profits Paid to Defrauded Investors as the "Direct Costs Incurred in Providing the Goods or Services" Pursuant to 18 U.S.C. § 981(a)(2)(B)

In the event of a conviction of securities fraud, which is an "unlawful activity" making the defendant subject to forfeiture pursuant to 18 U.S.C. §§1961(1)(D) and 1956(c)(7)(A), the applicable, and "more lenient definition of 'proceeds,'" *United States v. McIntosh*, 11-Cr-500, 2017 WL 3396429, at *5 (S.D.N.Y. Aug. 8, 2017), is provided in 18 U.S.C. §981(a)(2)(B):

> In cases involving lawful goods or lawful services, that are sold or provided *in an illegal manner*, the term "proceeds" means the amount of money acquired through the illegal transactions resulting in the forfeiture, *less the direct costs incurred in providing the goods or services.* The [defendant] shall have the burden of proof

> with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.

18 U.S.C. §981(a)(2)(B) (emphasis added); *see United States v. Bodouva*, 853 F.3d 76, 79 (2d Cir. 2017) (*citing United States v. Contorinis*, 692 F.3d 136, 145, n.3 (2d Cir. 2012)).

As the Second Circuit noted, because "[c]riminal forfeiture focuses on the disgorgement by a defendant of his 'ill-gotten gains[,]' ...the calculation of a forfeiture amount in criminal cases is usually based on the defendant's actual gain." *Contorinis*, 692 F.3d at 146 (citing *United States v. Kalish*, 626 F.3d 165, 170 (2d Cir. 2010) *(citing United States v. Emerson*, 128 F.3d 557, 566 (7th Cir. 1997); and *United States v. Various Computers & Computer Equip.*, 82 F.3d 582, 588 (3d Cir. 1996)) and *United States v. McGinty*, 610 F.3d 1242, 1247 (10th Cir. 2010)). Although "'[p]roceeds' can mean either 'receipts' or 'profits,'" *United States v. Santos*, 553 U.S. 507, 511 (2008), the statute in that case was less than precise. Therefore, this Court held in *Santos* that

> [u]nder a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.

553 U.S. at 514 (citing *United States v. Gradwell*, 243 U.S. 476, 485 (1917); *McBoyle v. United States*, 283 U.S. 25, 27 (1931); and *United States v. Bass*, 404 U.S. 336,

347–349 (1971)). Accordingly, "proceeds" in both situations means profits. *Santos* at 514*; Hollnagel*, at *3.[7]

In this case, Petitioner argued in the district court with respect to Count Three that the forfeiture amount should also be reduced to zero because, as undisputedly proven at trial, all MSMB Capital investors received a "robust" return for their investments. Reliance, as noted, was placed on *Hollnagel*, which deducted the funds paid back to the investors from the forfeiture analysis under 18 U.S.C. § 981(a)(2)(B) as amounting to "direct costs incurred in providing the goods or services."

The Court of Appeals, however, found that "even if Shkreli argues that he, like the defendants in *Hollnagel*, 'incurred the cost of paying [his] investors,' 2013 WL 5348317, at *5, he makes no suggestion that he has not profited from the frauds.'" Appendix A, at p. A-8. Thus, the Second Circuit refused to consider the holding in that case. Rather, it saw

> no clear error in the district court's conclusion that, *at the very least*, the gains to Shkreli include the money he caused his investors to invest via fraud. *Cf.* Appendix 376 ("[T]he proceeds [Shkreli] obtained as a result of his misrepresentations enabled

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[7] *Santos* addressed the definition of "the proceeds of some form of unlawful activity." 18 U.S.C. § 1956(a)(1). Here, the term "proceeds" specifically "means the amount of money acquired through the illegal transactions resulting in the forfeiture," 18 U.S.C. § 981(a)(2)(B), absent consideration of overhead, but *"less* the direct costs incurred in providing the goods or services*"* – *i.e.* also profits!

> him to control millions of dollars that were used to fund and enable the success of Retrophin, pay his personal debts and expenses, and perpetuate additional frauds.")

Appendix A, at pp. A-8-9

But, the statute is still sufficiently ambiguous so as to reasonably preclude any consideration of a defendant's "gains" until the investors' own gains are ascertained and then subtracted. "Gains," therefore, should mean *net* gains. That is because, in reality, the statute requires any gains realized by Petitioner to be factored only after offsetting those "proceeds" that had been returned to those investors.

In other words, if Petitioner is correct, the profits paid to the investors would have amounted to "the direct costs incurred in providing the goods or services." 18 U.S.C. § 981(a)(2)(B). So, if, after calculating such gains, it becomes clear that Petitioner's own gains have been far more than offset, it is certainly arguable, and the Supreme Court should so consider, that no forfeitable funds, or at least a starkly lower amount, remain extant.

In sum, with due consideration of the rule of lenity which underscored the Supreme Court's holding in *Santos*, 553 U.S. at 514, Petitioner asks the Court to consider whether it should be applied as well to 18 U.S.C. § 981(a)(2)(B). In light of *Hollnagel*, therefore, this Court should undertake to determine whether the forfeitable proceeds realized in fraudulent schemes should first be offset by any gains -- and certainly "robust" gains -- realized by allegedly defrauded investors, as amounting

to direct costs which were "*incurred in providing the services.*" For, if such a determination can be made, it would directly mitigate a defendant's own personal gains, thereby commensurately lowering the amount of forfeitable assets.

## Conclusion

**The Petition for a Writ of Certiorari Should Be Granted**

Dated: New York, New York
October 10, 2019

Respectfully submitted,

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