# APPENDIX

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**Appendix A — Summary Order of the Court of Appeals, dated July 18, 2019**

18-819-cr
United States v. Shkreli

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DAT ABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of July, two thousand nineteen.

Present:

DENNIS JACOBS,
DEBRA ANN LIVINGSTON,
JOSEPH F. BIANCO,
*Circuit Judges,*

18-819-cr

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UNITED STATES OF AMERICA,

*Appellee,*

v.

MARTIN SHKRELI,

*Defendant-Appellant,*

EVAN GREEBEL,

*Defendant.*

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For Appellee:

JACQUELYN M. KASULIS (Alixandra E. Smith, *on the brief*), *for* Richard P. Donoghue, United States Attorney for the Eastern District of New York, Brooklyn, NY.

For Defendant-Appellant:

MARK M. BAKER (Benjamin Brafman, Marc Agnifilo, Andrea Zellan, Jacob Kaplan, Teny R. Geragos, *on the brief*), Brafman & Associates, P.C., New York, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Matsumoto, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED.**

Defendant-Appellant Martin Shkreli ("Shkreli") appeals from an amended judgment of the United States District Court for the Eastern District of New York, dated April 11, 2018, sentencing him to 84 months' imprisonment and ordering him to pay (1) a fine of $75,000; (2) restitution of $388,336.49; and (3) forfeiture in the amount of $7,360,450.00, following a jury verdict convicting him of two counts of securities fraud and one count of conspiracy to commit securities fraud, in violation of 15 U.S.C. § 78j(b) and 18 U.S.C. § 371, respectively. *See* Amended Judgment, No. 15-cr-637 (KAM) (E.D.N.Y. Filed April 17, 2018), ECF No. 583. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

**Jury Instruction**

Shkreli first argues that the district court incorrectly instructed the jury either (1) by including a "no ultimate harm" ("NUH") instruction as to securities fraud, or (2) even if a NUH instruction could properly be included in some form as to securities fraud, by varying the wording of that NUH instruction between the securities fraud and wire fraud counts. He points to his convictions for securities fraud and acquittals for wire fraud as evidence that the instructions were incorrect and confusing to the jury. "We review a jury instruction challenge *de novo,* but we will reverse only where the charge, viewed as a whole, demonstrates prejudicial error." *United States v. Coppola,* 671 F.3d 220, 247 (2d Cir. 2012). "Where . . . a defendant requested a different jury instruction from the one actually given, the defendant bears the burden of showing that the requested instruction accurately represented the law in every respect and that, viewing as a whole the

charge actually given, he was prejudiced." *United States v. Nektalov,* 461 F.3d 309, 313-14 (2d Cir. 2006) (internal quotation marks omitted).

At the outset, we see no error generally in the inclusion of a NUH instruction for a securities fraud charge. In 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); *United States v. Leonard,* 529 F.3d 83, 91-92 (2d Cir. 2008). 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; *see also United States v. Ferguson,* 676 F.3d 260, 280 (2d Cir. 2011) (upholding NUH instruction because it "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)).

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.

**Forfeiture**

Next, Shkreli argues that the district court erred when it ordered forfeiture in the amount of $6,400,450, representing the total amount invested by investors in his hedge funds (Counts Three and Six).[1] He argues that the award of forfeiture was inappropriate for three reasons: (1) not all investors in the hedge funds testified, and thus the government did not prove that the funds associated with the non-testifying investors were acquired by fraud; (2) the amount should be reduced to account for losses he incurred by making trades for the funds; and (3) the large returns seen by investors in the funds should cause his forfeiture to be reduced to zero.

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[1] Shkreli does not appeal the $960,000 in forfeiture ordered due to his conviction for conspiracy to commit securities fraud (Count Eight). *See* Def.-App. Brief 48 at n.18.

"When a forfeiture award is challenged on appeal, this Court reviews the district court's legal conclusions *de novo* and its factual findings for clear error." *United States v. Treacy,* 639 F.3d 32, 47 (2d Cir. 2011). The government sought forfeiture under 18 U.S.C. § 981(a)(l)(C), which renders subject to forfeiture "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to" a number of offenses, including securities fraud. "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." *Id.* § 981(a)(2)(B); *see also United States v. Contorinis,* 692 F.3d 136, 145 n.3 (2d Cir. 2012) (observing that cases involving the sale of securities falls under "lawful goods or lawful services that are sold or provided in an illegal manner," as the "[t]erm unlawful activities in section 981(a)(2)(A) was meant to cover inherently unlawful activities such as robbery that are not captured by the words illegal goods and illegal services" (internal quotation marks omitted)). Defendants have the burden of establishing "direct costs," which "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). "Criminal forfeiture focuses on the disgorgement by a defendant of his ill-gotten gains." *Contorinis,* 692 F.3d at 146 (internal quotation marks omitted); *United States v. Torres,* 703 F.3d 194, 203 (2d Cir. 2012) ("[F]orfeiture is gain based." (internal quotation marks omitted)).

First, we disagree with Shkreli that the lack of testimony by every investor in his hedge funds requires reduction of the forfeiture amount. We rejected a similar argument in *United States v. Kalish,* 626 F.3d 165, 168 (2d Cir. 2010), where we declined to decrease the amount of forfeiture imposed based on the defendant's argument that "only a few customers testified that false promises had been made to them." As in *Kalish,* "false promises were routinely made" to Shkreli's investors. *Id.; see also* Appellee's Brief 56 (describing "the sheer-breadth and depth of the material misrepresentations and omissions made by Shkreli to investors in the course of the two frauds to induce investment, which touched on *every* aspect of the operation of the MSMB Funds"). Moreover, we agree with the government that the continuing misrepresentations sent to all investors in the funds (in the form of false performance reports sent out on a regular basis, for example) clearly link Shkreli's ability to *retain* the invested money to his fraud. As such, we discern no clear error in the district court's factual finding that the money associated with all the investors was traceable to Shkreli's fraud irrespective whether or not the investors testified.

Next, we disagree with Shkreli that his forfeiture award should be decreased based on the trading activities of his hedge funds, which he argues should be deemed "direct costs." As noted above, it was Shkreli's burden to prove his direct costs. *See* 18 U.S.C. § 981(a)(2)(B). We, like the district court, conclude that Shkreli failed to meet such a burden. *See* Special Appendix ("SPA") 123 (noting that Shkreli "provides only bare citations to various government exhibits, with minimal analysis"). For example, although Shkreli argues that for one hedge

fund "[his] net gain, after the investment of the received funds are factored, is a significantly lesser amount" than the full amount originally invested in the fund, he does not explain *what* that net gain might be or how we should calculate it. Def.-App. Brief 66. Similarly, while for the other hedge fund Shkreli argues that the majority of the money originally invested was used to buy an interest in his pharmaceutical start-up Retrophin, he does not grapple with the finding that a large portion of that amount was actually diverted to pay his personal debts. A "cursory argument" is not enough. *United States v. Mandell,* 752 F.3d 544, 554 (2d Cir. 2014). As in *Mandell,* we conclude that Shkreli has failed to meet his burden as to trading losses.

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. *Torres,* 703 F.3d at 203 (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.")

We have considered Shkreli's remaining arguments and find them to be without merit.

Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

**Appendix B — Memorandum and Order of the District Court, dated March 5, 2018**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

**MEMORANDUM AND ORDER**

15-cr-637(KAM)

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UNITED STATES OF AMERICA

- against -

MARTIN SHKRELI,

Defendant.

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MATSUMOTO, United States District Judge:

Before the court is the government's post-trial motion for forfeiture in this criminal securities fraud case, pursuant to Federal Rule of Criminal Procedure 32.2, Title 18 United States Code Section 981(a)(1)(C), Title 28 United States Code Section 2461(c), and Title 21 United States Code Section 853(p) (Government's Motion ("Gov. Mot."), ECF No. 464; Defendant's Response ("Def. Resp."), ECF No. 515; Government's Reply ("Gov. Reply"), ECF No. 523; Defendant's Sur-Reply ("Def. S.R."), ECF No. 523.) The court heard argument on the motion on February 23, 2018. (February 23, 2018 Transcript ("Tr.").) This order presumes familiarity with this court's prior orders in this case, in particular the February 26, 2018 Memorandum and Order denying Mr. Shkreli's Motion for Judgment of Acquittal and discussing the loss amount in this case.

(Memorandum and Order ("Rule 29 Order"), ECF No. 535.)

## I. Standard of Review

### A. Criminal Forfeiture

Pursuant to Title 18, United States Code Section 981(a)(1)(C), a court may order the forfeiture of "[a]ny property . . . which constitutes or is derived from proceeds" of criminal securities fraud, through what the Second Circuit has described as a "roundabout statutory mechanism":

> 18 U.S.C. Section 981(a)(1)(C) allows a court to order forfeiture for 'any offense constituting 'specified unlawful activity' as defined in 18 U.S.C. § 1956(c)(7).' Section 1956(c)(7)(A) incorporates 'any act or activity constituting an offense listed in 18 U.S.C. § 1961(1).' And § 1961(1)(D) lists 'any offense involving . . . fraud in the sale of securities.' While § 981(a)(1)(C) is a civil forfeiture provision, it has been integrated into criminal proceedings via 28 U.S.C. § 2461(c).

*United States v. Contorinis,* 692 F.3d 136, 145 n.2 (2d Cir. 2012) (alterations in the original). "In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes," the term "proceeds" is defined to include "property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture." 18 U.S.C. § 981(a)(2)(A). For cases involving "lawful goods or lawful services that are sold or provided in an illegal manner . . . proceeds means the amount of money acquired through the illegal transactions resulting in the forfeiture, less

the direct costs incurred in providing the goods and services." 18 U.S.C. § 981(a)(2)(B). Such "direct costs "shall not include any part of the overhead expenses of the entity . . . or any part of the income taxes paid by the entity." *Id.*

The government has the burden of establishing that forfeiture is warranted by a preponderance of the evidence. *United States v. Finazzo,* 682 F. App'x 6, 14 (2d Cir. 2017) (citing *United States v. Daudergas,* 837 F.3d 212, 231 (2d Cir. 2016)); *United States v. Capoccia,* 503 F.3d 103, 116 (2d Cir. 2007) (citing *United States v. Fruchter,* 411 F.3d 377, 383 (2d Cir. 2005)). In cases involving "lawful services . . . provided in an illegal manner," the defendant has the burden of proving "direct costs" which may be deducted from the amount to be forfeited. 18 U.S.C. § 981(a)(2)(B).

### B. Substitute Assets

The procedures in Title 21 United States Code Section 853 apply to criminal forfeitures. 28 U.S.C. 2461(c); *United States v. Capoccia,* 402 F. App'x 639, 641 (2d Cir. 2010) (citing, *inter alia, United States v. Kalish,* 626 F.3d 165 (2d Cir. 2010)). Pursuant to Section 853(p), if, because of acts or omissions of the defendant, property subject to forfeiture "cannot be located," "has been transferred," "has been placed beyond the jurisdiction of the court," "has been substantially diminished in value," or "has been commingled with other property which cannot be divided without difficulty," "the court shall order the forfeiture of any other property of the defendant, up to the value of [the forfeitable] property." 21 U.S.C. § 853(p).

## II. Discussion

### A. Counts Three and Six

The government requests forfeiture of $2,998,000 on Count Three and $3,402,450 on Count Six. These amounts represent the total investments by defrauded investors into Mr. Shkreli's MSMB Capital and MSMB Healthcare hedge funds. (Gov. Mot. at 5.) Mr. Shkreli argues that no forfeiture is appropriate on either count.[1] In the alternative, Mr. Shkreli argues that any forfeiture amount for Counts Three and Six "should [ ] be significantly reduced by the amount of [investors'] money used to provide goods and services – *i.e.* purchase securities." (Def. S.R. at 5.) In support of this argument, he provides only bare citations to various government exhibits, with minimal analysis.

The court agrees with the parties[2] that the applicable definition of "proceeds" for this case is set

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[1] In opposing the government's motion for forfeiture, Mr. Shkreli also argues that (1) investors in his MSMB hedge funds did not rely on his representations in choosing to invest in MSMB Capital and MSMB Healthcare, and (2) the forfeiture amount should be zero for both Counts Three and Six because "each of the[ ] investors received a robust return for their investments." (*See* Def. Resp. at 5.) The court has considered, and rejected, these arguments in a prior order. (Rule 29 Order.)

[2] In their opening briefs, the parties agreed that the court should apply Section 981(a)(2)(B). (Gov. Mot. at 3 ( "as the Second Circuit has held in the context of insider trading securities fraud cases, the applicable definition of proceeds is set forth in 18 U.S.C. § 981(a)(2)(B)"); Def. Resp. at 2.) Although the government acknowledged that the court should apply Section 981(a)(2)(B), the government noted in its reply brief and during oral argument that Mr. Shkreli's conduct was "more like the fraud and inducement cases where the Second Circuit has held no costs or expenses should be deducted." (Tr. 42:10-11

forth in Title 18 United States Code Section 981(a)(2)(B), which governs forfeiture for "lawful goods or lawful services . . . sold or provided in an illegal manner." 18 U.S.C. § 981(a)(2)(B). For such transactions, "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." *Id.* The Second Circuit has explained that Section 981(a)(2)(B) "supplies the definition of 'proceeds' in cases involving fraud in the purchase or sale of securities," whereas Section 981(a)(2)(A) is reserved for cases involving "inherently unlawful" activity, such as "the sale of foodstamps[ ] or a robbery." *United States v. Contorinis,* 692 F.3d 136, 145 n.3 (2d Cir. 2012).

Although the court will apply the definition of "proceeds" set forth in Section 981(a)(2)(B), the court concludes that Mr. Shkreli is not entitled to deduct "direct costs" from the forfeiture amounts in Counts Three and Six, for two related reasons: First, he has not borne his burden of proving direct costs, and, second, the few purported direct costs he specifically references in his papers would not be deductible.

With regard to Count Three, Mr. Shkreli argues that MSMB Capital's trading losses, brokerage fees and trading commissions constitute "direct costs" under Title 18 United States Code Section

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(Section 981(a)(2)(B) is the "definition of proceeds to be applied here"); *id.* at 42:12-15 (contrasting this case with insider trading cases); Gov. Reply at 6 n.5; ("it is far from clear that [Section 981(a)(2)(B)'s] more limited definition [,] as opposed to the gross definition of 'proceeds' set forth in Section 981(a)(2)(A) should apply to . . . fraud cases[ ] such as this").)

981(a)(2)(B), such that they reduce the forfeitable amount to, at most, $505,414. (Def. S.R. at 5.) As support, he cites MSMB Capital's bank records, without any detailed analysis. (*Id.*) At oral argument, defense counsel also referenced MSMB Capital's loss resulting from conduct in the OREX trade (see Rule 29 Order at 15-16 (testimony of Steven Stitch, describing the OREX trade)), as an example of the "direct costs" Mr. Shkreli incurred at MSMB Capital. (Tr. 45:16-23.)

Not only does the defense fail to provide any detailed analysis of the various government exhibits Mr. Shkreli now proffers in support of his argument on direct costs, but the defense also ignores the jury's verdict in this case. By the time Mr. Shkreli lost MSMB Capital's investment capital in the OREX trade, he had repeatedly lied to his investors regarding the size, nature, and performance of his fund. (*See, e.g.,* Rule 29 Order at 58-62 (describing investor testimony).) Investors believed, based on Mr. Shkreli's representations, that MSMB Capital had tens of millions of dollars in assets, with a diversified investing strategy and third-party oversight. (*See id.*) Although MSMB Capital investors recognized the risks of investing in a hedge fund, they believed, also based on Mr. Shkreli's representations, that the fund was diversified in long/short investments and had a record of positive performance. (*See, e.g., id.* at 8 (testimony of Sarah Hassan); 40-41 (testimony of John Neill).)

With regard to the OREX trade in particular, Mr. Shkreli falsely claimed to his execution broker, Merrill Lynch, that MSMB Capital's prime broker, Interactive Brokers, had been able to obtain the necessary "locate" on OREX shares to enable the

short trade. (*Id.* at 15 (testimony of Steven Stitch explaining the purpose of a "locate").) In part as a result of Mr. Shkreli's failure to follow the proper procedures in executing the trade, MSMB Capital suffered a multiple-million dollar loss, in excess of its assets. Far from being a "direct cost" of "lawful services" within the meaning of Section 981(a)(2)(B), the costs related to the OREX trade are the result of the fraudulent conduct for which Mr. Shkreli was convicted: he deceived investors into believing that they were invested in a sophisticated and diversified hedge fund, but chose instead to gamble the money entrusted to him on a series of improperly-conducted trades in a single stock.

To the extent Mr. Shkreli's other investments on behalf of MSMB Capital could be characterized as "lawful services" within the meaning of Section 981(a)(2)(B), he has not provided *any* detailed analysis or breakdown of MSMB Capital's "direct costs" related to such investments, nor explained how any such costs of MSMB Capital should be deducted from his own forfeiture obligations. *See Contorinis,* 692 F.3d at 145 n.3 (Noting that because the defendant's employer, and not the defendant himself, bore "all direct costs" in an insider trading case, "any money that [the defendant] can fairly be considered as having 'acquired' as a result of his [illegal] activities may be subject to forfeiture under § 981.") Therefore, he has failed to carry his burden. *See United States v. Mandell,* 752 F.3d 544, 554 (2d Cir. 2014) (holding that a defendant who "failed to present any evidence and no more than cursory argument" regarding direct costs "failed to meet his burden")).

As to Count Six, Mr. Shkreli argues that MSMB Healthcare invested $2,535,000 million into Retrophin, such that "the forfeiture amount would be, at most, $867,450." (*Id.*) As with Mr. Shkreli's arguments on Count Three, he has failed to provide any analysis or detailed explanation of why the court should deduct $2,535,000 million as "direct costs" from the total forfeiture amount. Indeed, as the court has already explained, the trial evidence showed that (1) Mr. Shkreli improperly used MSMB Healthcare to funnel money to Retrophin, notwithstanding his representations that MSMB Healthcare was a diversified fund; and (2) Mr. Shkreli improperly used approximately $1.1 million of the money MSMB Healthcare invested into Retrophin for his own personal and unrelated professional obligations. (Rule 29 Order, ECF No. 535 at 64-67; 86-88.) Even if Mr. Shkreli were to have made a more detailed submission regarding direct costs of MSMB Healthcare for Count Six, he would not be able to establish that his acts of improperly funneling investor money into Retrophin resulted in "direct costs" of providing a "lawful service[ ]." Furthermore, as with Count Three, Mr. Shkreli has failed to provide any analysis to establish that any other trading activity in MSMB Healthcare resulted in legitimate "direct costs" to him. *See Mandell,* 752 F.3d at 554; *Contorinis,* 692 F.3d at 145 n.3.

### B. Count Eight

With regard to Count Eight, the evidence at trial showed that Mr. Shkreli conspired with Retrophin's attorney, Evan Greebel, and others, to control the price and trading of shares in Retrophin. (Rule 29 Order at 67-78.) In order to achieve this control, Mr. Shkreli and Mr. Greebel directed the distribution of

the Fearnow shares to various Retrophin insiders. (*Id.* at 68-71 (describing the "Fearnow shares").) In addition to using his control over some of the Fearnow shares to attempt to increase the trading price of Retrophin shares in the market, Mr. Shkreli used the shares to mollify frustrated investors in his MSMB Capital and MSMB Healthcare hedge funds. (*Id.* at 71-75.)

The government now seeks forfeiture of $960,000, which it argues is the amount of the benefit Mr. Shkreli received, both indirectly and directly, from having his co-conspirators transfer Fearnow shares held in their names to two MSMB investors (Dr. Lindsay Rosenwald and Richard Kocher), to a Retrophin investor (Thomas Koestler), and to Mr. Shkreli himself. (Gov. Mot. at 7.) Mr. Shkreli argues that the government's request is improper, because it has "nothing to do with the alleged conduct in Count Eight" and is instead related to the alleged conduct in Count Seven, of which the jury acquitted Mr. Shkreli. (Def. Resp. at 5-6.) Mr. Shkreli also argues that Mr. Shkreli's co-conspirators transferred their Fearnow shares to the dissatisfied MSMB investors for their own legitimate reasons. (*Id.* at 6 ("these three Fearnow recipients had their own financial interests in mind when they helped settle [the MSMB] claims as they stood to gain handsomely if Retrophin succeeded . . . and was not smothered in its infancy with lawsuits by MSMB investors.")

The court concludes that the Fearnow shares used to satisfy the demands of Dr. Rosenwald, Mr. Kocher, Mr. Koestler and Mr. Shkreli constituted property which "derived from" the transactions at issue in

Count Eight. *See* 18 U.S.C. §§ 981(a)(1)(C), (a)(2)(B).[3] The court has previously described in detail how Mr. Shkreli and Mr. Greebel obtained the Fearnow shares and distributed them to Retrophin and MSMB insiders. (Rule 29 Order at 68-71.) As this court has also explained, Mr. Shkreli and Mr. Greebel extensively discussed how to use the Fearnow shares to compensate MSMB investors, and took action to try and prevent another "Pierotti problem" – a Fearnow share recipient refusing to accede to Mr. Shkreli's directives regarding trading or not trading their Fearnow shares. (*Id.* at 74-75.) Indeed, Mr. Shkreli specifically wrote in an email to Mr. Greebel that he wanted to make the transfers from the Fearnow shareholders "anonymous" if possible, so that the Fearnow shareholders "don't know exactly where [their shares] are going." (*Id.* (quoting GX 271.)) Mr. Shkreli wrote to Mr. Greebel that after the Fearnow shares held in "escrow" were used to satisfy dissatisfied MSMB investors, "the rest" should be transferred to him. (*Id.* (discussing GX 268); *see id.* at 50 n.8 (describing the shares held in "escrow").) The government also introduced documentary evidence demonstrating that Mr. Shkreli and Mr. Greebel specifically directed the transfer of Retrophin shares to Mr. Koestler. In February 2013, Mr. Greebel asked Mr. Shkreli whether to use "Fearnow stock or new restricted grant from company" to provide Mr. Koestler with the shares he should have received for investing in

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[3] For substantially the reasons stated in its discussion of Counts Three and Six, the court concludes that the definition of "proceeds" for Count Eight is determined by the application of Title 18 United States Code 981(a)(2)(B). *See Contorinis,* 692 F.3d 145 n.3.

Retrophin in 2012. (GX 370.) Mr. Shkreli responded "combo would be great." (*Id.*)

The trial evidence, therefore, supports the government's position that Mr. Shkreli and Mr. Greebel – not the Fearnow shareholders themselves – made the decision to transfer the shares to Dr. Rosenwald, Thomas Koestler, Richard Kocher, and Mr. Shkreli. The evidence also establishes that Mr. Shkreli used these transfers to stave off lawsuits or government investigations which may have targeted him personally, or which might have resulted in government investigations of the various improprieties in the MSMB hedge funds. (*See, e.g., id.* at 22-23 (describing testimony of Dr. Rosenwald, in which he stated that prior to settlement he had involved his legal counsel).) Mr. Shkreli thereby received a personal benefit from the distribution of these shares.

**II. Substitute Assets**

The government asks the court to approve the seizure of substitute assets, pursuant to Federal Rule of Criminal Procedure 32.2(e) and Title 21 United States Code Section 853(p). (Gov. Mot. at 9.) The government provides the sworn declaration of FBI Special Agent Sean Sweeney to support its position that Mr. Shkreli has "transferred," "substantially diminished," or "commingled" the forfeitable assets, and thus mandating that "the court shall order the forfeiture of any other property of the defendant, up to the value of the [forfeitable property]," here $7,360,450.00. (*See* Declaration of Special Agent Sean Sweeney, ECF No. 464-2 at ¶¶ 8-9 (stating that Special Agent Sweeney and other agents "have made a diligent effort to locate

traceable proceeds to the offenses subject to forfeiture" but that such assets "appear to have been dissipated or otherwise disposed of.") The evidence at trial shows that direct proceeds of Mr. Shkreli's criminal conduct were either dissipated (i.e. the OREX trade) or transferred to Retrophin or the MSMB investors, or Mr. Shkreli.

Mr. Shkreli has opposed the forfeiture of substitute assets, in part because he owes significant amounts of money to New York State, the Internal Revenue Service, his accountants, and his attorneys.[4] (Def. Mot. at 7.) Mr. Shkreli has provided no authority, however, for the proposition that otherwise forfeitable proceeds should not be subject to forfeiture because the defendant owes money to other potential creditors.

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[4] Mr. Shkreli also noted that one of the substitute assets listed in the government's initial proposed preliminary order of forfeiture had already been seized by New York State. (Def. Mot. at 7.) The government has addressed this issue in its revised proposed preliminary order of forfeiture. (*See* Revised Proposed Preliminary Order of Forfeiture, ECF No. 539-1.) To address Mr. Shkreli's concerns about a premature "fire sale" of his stake in Vyera Pharmaceuticals (formerly known as Turing Pharmaceuticals), the government has also indicated that it does not oppose a stay of "that portion of a [preliminary order of forfeiture] authorizing the seizure of substitute assets . . . until completion of the appeal that [Mr.] Shkreli intends to file," on the condition that the substitute assets be preserved pending any final decision on appeal. (Gov. Reply at 10.)

## Conclusion

For the foregoing reasons, the court concludes that the government has established that forfeiture of substitute assets, up to $7,360,450.00, is warranted in this case. As the government has requested, the court will so-order the government's proposed preliminary order of forfeiture, which includes provisions ensuring the preservation of assets and appropriately staying seizure of assets pending appeal. (*See* Revised Proposed Preliminary Order of Forfeiture at ¶¶ 10-11.)

**SO ORDERED.**

Dated: March 5, 2018
Brooklyn, New York

/s/
KIYO A. MATSUMOTO
United States District Judge
Eastern District of New York

## Appendix C — Excerpt of Defense Exception to Instruction on No Ultimate Harm at End of Charge Conference

Proceedings

[5145]

* * *

MR. AGNIFILO: One thing just to round out one issue. On the no ultimate harm charge --

THE COURT: Right.

MR. AGNIFILO: -- I know it's a recognized charge in the Second Circuit, and Your Honor's absolutely following Second Circuit law in giving it, and I don't have any good faith argument to the contrary. I don't know how this issue would ever be raised in future matters, but it is our position that -- for what it's worth -- that the Second Circuit is wrong on the no ultimate harm charge; that

[5146]

there were concerns that were raised in the earlier cases like *Rossomando* and whatnot, that the no ultimate harm charge arose to establish good faith charge is our position.

And that I think we're also mindful of the fact that in my research, no other circuit gives the charge. So there's no doubt Your Honor is following establish -- well established, repeatedly establish Second Circuit law. It's our position, though, that with all respect to the Second Circuit that they're not right on this issue.

I don't know what value there is in putting that on the record, but now it's on the record.

THE COURT: Well, maybe somebody can seek the juror instruction before the Supreme Court and get some clarification.

MR. AGNIFILO: Thank you, Judge.

THE COURT: But I think we are going to follow --

MR. AGNIFILO: Yes.

THE COURT: -- the Second Circuit at this point.

MR. AGNIFILO: Yes.

THE COURT: And the Supreme Court.

MR. AGNIFILO: Thank you, Judge.

* * *

## Appendix D — Excerpt of No Ultimate Harm Jury Instructions on Securities Fraud

**Jury Instructions**
**July 28, 2017 Court Ex. 5**

* * *

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.

As a practical matter, then, to prove the charge against a defendant, the government must establish beyond a reasonable doubt that 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.

* * *

## Appendix E — Excerpt of No Ultimate Harm Jury Instructions on Wire Fraud

**Jury Instructions**
**July 28, 2017 Court Ex. 5**

* * *

There is another consideration to bear in mind in deciding whether or not the defendant acted in good faith. 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.

* * *

## Appendix F — Excerpt of No Ultimate Harm Jury Instructions on the Defense of Good Faith

**Jury Instructions**
**July 28, 2017 Court Ex. 5**

* * *

### III. Defenses

#### 1. Good Faith

Good faith is a complete defense to the charges in this case. If the defendant believed in good faith that he was acting properly, even if he was mistaken in that belief, and even if others were injured by his conduct, there would be no crime.

If you believe that Mr. Shkreli believed in the truth of the representations that he made, then it does not make any difference if the representations were untrue. The burden of establishing lack of good faith and criminal intent rests on the government. A defendant is under no burden lo prove his good faith; rather, the government must prove bad faith or knowledge of falsity beyond a reasonable doubt.

As a reminder, I instruct you that when considering the defense of good faith, you consider it in conjunction with my instructions on pages 41 and 68, regarding the defendant's belief, if such belief existed, that ultimately everything would work out so that no one would lose money.

* * *

## Appendix G — Renewed Defense Exception to the No Ultimate Harm Instruction

Sidebar Conference

[5605]

(The following occurred at sidebar.)

MR. BRAFMAN: Your Honor --

MS. KASULIS: So -- go ahead.

MR. BRAFMAN: Your Honor, we obviously reserve the objections we made and if we leave in that with respect to no ultimate harm but other than that, we have no objections to the Court's Charge, other than what was previously named.

* * *

## Appendix H — Court's Response to Jury Question Regarding the Definition of Intent

[5634]

* * *

THE COURT: All jurors are present. Please have a seat, everybody.

The jurors sent out a note this afternoon, which we have designated as Court Exhibit 8. My response will be designated as Court Exhibit BA. I will read you my response, and I will also give you a copy for you to take back to the jury room.

The question was as follows: Do assets under management refer to a particular fund being discussed or to all assets managed by the portfolio manager slash general partner? The second question was: Can we have a legal definition of assets under management? And the third question was: Can you expand or elaborate your definition of fraudulent intent?

In response first to questions one and two, I advise you as follows: There is no legal definition of assets under management, or AUM, in the record. What Mr. Shkreli intended when he used the term assets under management, or AUM, when he conveyed information regarding the MSMB Capital or MSMB Healthcare funds to potential investors and investors, the SEC,

[5635]

his employees, and alleged co-conspirators is an issue in dispute for you, the jury, to resolve.

Answer to question three. Fraudulent intent is defined separately for the counts relating to securities fraud and securities fraud conspiracy -- that is, counts one, three, four, six, and eight -- and conspiracy to commit wire fraud as charged in counts two, five, and seven. Please refer to the elements and definitions in the jury instructions regarding those counts at pages 33 through 42 for counts related to securities fraud and securities fraud conspiracy, and pages 62 through 68 for counts related to conspiracy to commit wire fraud. Please also refer to pages 79 through 81 for instructions relating to the defenses of good faith and reliance on counsel.

* * *