# IN THE
# SUPREME COURT OF THE UNITED STATES

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App. No. _____

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MARTIN SHKRELI,
*Applicant*,

v.

FEDERAL TRADE COMMISSION, ET AL.,
*Respondents*.

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## APPLICATION TO THE HON. SONIA SOTOMAYOR FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pursuant to Rule 13(5) of this Court, Applicant respectfully requests a 30-day extension of time, to and including May 22, 2024, to file a petition for a writ of certiorari. Absent an extension, the deadline for filing the petition will be April 22, 2024.

In support of this request, Applicant states as follows:

1. The United States Court of Appeals for the Second Circuit issued its judgment below by summary order on January 23, 2024 (Exhibit 1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

2. This case implicates an acknowledged intercircuit conflict over the scope of the equitable disgorgement remedy under federal law—namely, the extent to which a federal court sitting in equity may order a defendant to "disgorge" unlawful profits that were realized exclusively by his or her codefendants. The Fifth

and Eleventh Circuits limit a defendant's disgorgement liability to only those profits that he or she personally accrued from conduct judged unlawful, *SEC* v. *Blatt*, 583 F.2d 1325, 1335-36 (5th Cir. 1978), on the grounds that "[a]ny further sum would constitute a penalty assessment" beyond the scope of a federal court's equitable powers. *Id*. at 1335. By contrast, the Second Circuit's 2-1 decision in *SEC* v. *Contorinis*, 743 F.3d 296 (2d. Cir. 2014) permits a federal court to order a defendant to disgorge not only his or her own profits from conduct judged unlawful, but also any additional profits that may have accrued to other parties. *Id*. at 304-06. The *Contorinis* panel acknowledged its departure from Fifth Circuit precedent, *id*. at 305, n.5, but reasoned in part that a wrongdoer's generation of profits for third parties might produce "indirect or intangible" benefits for the wrongdoer, such as "enhanced reputation" or "psychic pleasures," which the court concluded should not be permitted to escape the reach of the disgorgement remedy. *Id*. at 306. As a result of this conflict, plaintiffs within the Second Circuit can currently pursue a much broader incarnation of equitable disgorgement than is available to plaintiffs within the Fifth and Eleventh Circuits. *See*, *e.g.*, *SEC* v. *Megalli*, No. 1:13-cv-3783-AT, 2015 U.S. Dist. LEXIS 197881, at *3-4 (N.D. Ga. Dec. 15, 2015) (noting that district courts within the Eleventh Circuit are bound by *Blatt* over *Contorinis*).

3. Although *Contorinis* remains the law of the Second Circuit, this Court has now twice explicitly questioned it as an example of a disgorgement remedy that "is in considerable tension with equity practices." *Liu* v. *SEC*, 140 S. Ct. 1936, 1946 & n.3 (2020) (citing *Contorinis*, 743 F. 3d at 304-306); *see also Kokesh* v. *SEC*, 581

U.S. 455, 466 (2017) (citing Contorinis, 743 F. 3d at 302). These observations echoed criticisms by amici remedies scholars before this Court in *Liu*. *See* Brief of Amici Curiae Law Professors Samuel L. Bray and Henry E. Smith, *Liu* v. *SEC*, Case No. 18-1501, p. 25 (citing *Contorinis*, 743 F.3d at 302). Commentators too have been in accord: A 2018 article in the Yale Journal on Regulation described this Court's unanimous decision in *Kokesh* as a "warning shot" against *Contorinis*. Daniel B. Listwa and Charles Seidell, *Penalties in Equity: Disgorgement After Kokesh v. SEC*, 35 YALE J. ON REG. 698-99 (2018) ("Justice Sotomayor cites *Contorinis* disapprovingly and notes that the practice of disgorging profits gained by others 'does not simply restore the status quo; it leaves the defendant worse off.'") (quoting *Kokesh*, 137 S. Ct. at 1639).

4. In this case, a federal district court, sitting in equity over a rule-of-reason antitrust case, applied *Contorinis* to order a corporation's former CEO to disgorge $64.6 million in profits that were realized solely by his corporate codefendants. Corporate entities Vyera Pharmaceuticals and Phoenixus Pharmaceuticals AG, along with Applicant-Petitioner Martin Shkreli (Vyera's former CEO and largest shareholder), were all found liable for violations of antitrust law under the rule of reason—Shkreli after trial and his corporate codefendants by settlement. It was undisputed that Shkreli did not personally realize any profits from the conduct found to be anticompetitive: his averments that he took no salary and received no profits or dividends from Vyera were uncontested at trial. But relying on *Contorinis*, the district court concluded that "the plaintiffs

did not need to show that the illegal gains personally accrued to Shkreli." *FTC* v. *Shkreli*, No. 20-cv-706-DLC, 2022 U.S. Dist. LEXIS 75079, at *10 (S.D.N.Y. Apr. 25, 2022) (citing *Contorinis*, 743 F.3d at 305-06). It thus ordered Shkreli jointly and severally liable for the disgorgement of $64.6 million in profits that Vyera alone realized. *See FTC* v. *Shkreli*, 581 F. Supp. 3d 579, 641-43 (S.D.N.Y. 2022). Moreover, the corporate codefendants' total liability was capped by settlement at a maximum of $40 million, *see FTC* v. *Shkreli*, No. 20-cv-706-DLC, 2022 U.S. Dist. LEXIS 47725, at *2 (S.D.N.Y. Mar. 17, 2022), effectively leaving Shkreli individually liable for the remainder.

5. Among Shkreli's arguments on appeal,[1] he maintained that the disgorgement award violated this Court's intervening guidance in *Liu*, 140 S. Ct. 1936. Pointing out that *Liu* cited disapprovingly the Second Circuit's decision in *Contorinis*, Def. Br. [Dkt. No. 102] at 33, Shkreli argued that ordering him to disgorge profits realized exclusively by his codefendants failed to conform with the traditional equitable principles of disgorgement described in *Liu*, Def. Br. at 33-34 (*citing* 140 S. Ct. at 1949-50); *see also* Reply Br. [Dkt. No. 157] at 16, and noted that it was uncontested that he earned no profits or salary from Vyera. *Id*. The state plaintiffs-appellees responded that *Liu* should be read broadly to authorize joint-

[1] Constrained by *Contorinis* below, Shkreli's first argument to the panel was that the district court's entry of joint-and-several disgorgement liability for antitrust violations that implicated both federal and New York state statutes should have been subject to additional equitable limitations under New York state law. Def. Br. [Dkt. No. 102] at 27-31. The panel denied this argument as waived, Ex. 1 at 3, and further held that the applicable New York statute should "generally be construed considering federal precedent." *Id*. at 4, n.2 (citation omitted). Applicant does not intend to seek further review of these holdings.

and-several disgorgement upon any finding of "concerted wrongdoing" among codefendants—regardless of whether each individual codefendant actually realized any personal gains from the conduct judged unlawful. See States Br. [Dkt. No. 134] at 24-29. The Second Circuit summarily dismissed Shkreli's argument without discussion, *see* Ex. 1 at 8 ("We have carefully considered Shkreli's remaining arguments and find them to be without merit."), thus adopting the district court's reliance on *Contorinis* and continuing the split of authority.

6. The district court also entered a permanent injunction that banned Shkreli for life from any future participation in the pharmaceutical industry, *Shkreli*, 581 F. Supp. 3d at 638; *see also* Ex. 1 at 4, or from making any future "public statements" that are intended to "influence . . . the . . . business of any Pharmaceutical Company." *FTC* v. *Shkreli,* No. 20-cv-706-DLC, 2022 U.S. Dist. LEXIS 20542, at *8 (S.D.N.Y. Feb. 4, 2022); *see also* Ex. 1 at 6. The court justified the scope of the injunction in part on a finding that Shkreli had "not expressed remorse or any awareness that his actions violated the law," *Shkreli*, 581 F. Supp. 3d at 640, opting instead to defend his conduct at trial. Conversely, the Third Circuit has rejected the consideration of a defendant's "purported unrepentance" or "refus[al] to acknowledge the wrongful nature of its conduct" as factors to guide the issuance of injunctions in antitrust. *Howard Hess Dental Labs. Inc.* v. *Dentsply Int'l, Inc.*, 602 F.3d 237, 250-51 (3d Cir. 2010); *see also FTC* v. *AbbVie Inc.*, 976 F.3d 327, 381 (3d Cir. 2020).

## REASONS FOR GRANTING AN EXTENSION OF TIME

Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case for the following reasons:

- Undersigned counsel was only recently retained by Applicant[2] and seeks the 30-day extension to familiarize himself with the record below.
- As described above, this case presents a substantial issue of law that currently divides the courts of appeals. Counsel requests the additional time to fully research the legal issues and prepare an appropriate petition for consideration by this Court.
- Counsel also has conflicting obligations between now and the due date of the petition, including collateral discovery obligations as court-appointed CJA counsel in a longstanding national security case (*United States* v. *Al-Timimi*, 1:04-cr-385-LMB (E.D. Va.); 14-4451 (4th Cir.)), and anticipated litigation obligations in a federal criminal prosecution in Virginia.
- Respondents would not be prejudiced by the extension, as the district court's orders remain in effect.

## CONCLUSION

Applicant respectfully requests that the time to file a petition for a writ of certiorari in this case be extended thirty days to and including May 22, 2024.

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[2] Undersigned counsel did file an amicus curiae brief with the Second Circuit below on behalf of the Pensmore Foundation [Dkt. No. 179] that focused on a discrete legal issue unrelated to the disgorgement remedy. *Id*. Both Applicant and the Pensmore Foundation have consented to counsel's representation of Applicant before this Court.

Respectfully submitted,

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