UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS P. KOESTLER, Petitioner, *-against-* MARTIN SHKRELI, Respondent.	Civ. No. 16-cv-7175-AJN

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR TURNOVER AND APPOINTMENT OF A RECEIVER

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Petitioner/Judgment Creditor Dr. Thomas P. Koestler (the "Petitioner" or "Creditor"), by his attorneys, Scarola Zubatov Schaffzin PLLC, submits this Reply Memorandum in support of his application for an order for the turnover of the stock Respondent/Judgment Debtor Martin Shkreli (the "Judgment Debtor") owns in Phoenixus AG ("Phoenixus" and, as to Shkreli's ownership interest in it, the "Phoenixus Stock") to a receiver to be sold to satisfy the Judgment against Mr. Shkreli in this case and requiring that Mr. Shkreli take any steps and execute any documents necessary to effect delivery and sale of the Phoenixus Stock.[1]

Summary of Argument

The Phoenixus Stock at issue is among those assets, so-called "substitute assets" subject to a forfeiture order in a criminal case against the Judgment Debtor pursuant to which

1 This Reply Memorandum is made in accordance with the Court's schedule set out at ECF #54, allowing for this reply from Petitioner to the Judgment Creditor's opposition brief (ECF #56) and to the position stated by the United States Attorney for the Eastern District of New York (herein, the "government") at ECF #58. The Court has also given the Judgment Debtor permission to respond to the government's submission (ECF #61) on April 23, 2021, the date of this filing, and has given Petitioner a week to reply to that submission. Petitioner will reply to the Judgment Debtor's supplemental filing on April 30, 2021, in accordance with the Order at ECF #61.

he is incarcerated, *United States v. Shkreli*, 15-CR-637 (E.D.N.Y.) (Matsumoto, J.) (the "Criminal Case"). The forfeiture order is at ECF #48-8 (the "Forfeiture Order").

As discussed below in §I, the government was offered the opportunity to address this application and has done so (ECF #58) — in substance, (i) agreeing to it being granted on the condition that the Shkreli debt to the government be paid first from proceeds marshaled by the receiver and also (ii) undertaking to coordinate related relief in the Criminal Case to amend the Forfeiture Order to be consistent with the relief sought here. In light of the government's position, there is no obstacle to the Court granting that relief.

Petitioner submits that time is now of the essence given the unusual character of the Judgment Debtor and unusual nature of the assets in question. As discussed below in §§II-VI, the Judgment Debtor has shown no legal basis to oppose relief, and has in fact not only continued on a course of obstruction (*see* ECF ##31-45 (seeking to compel his cooperation with judgment enforcement proceedings)), but has also posed arguments suggesting that more obstruction can be expected. With the Judgment Debtor now seeing the government effectively following the same path forward as Petitioner, and the imminent threat of losing what he has heretofore somehow kept in his control despite millions in judgment debt, swift and firm action from this Court is needed to avoid that obstruction.

Argument

I. THE GOVERNMENT HAS CLEARED ANY OBSTACLE TO THE RELIEF SOUGHT

The government has had the Forfeiture Order, as a final order, since September 10, 2018 (ECF #58, p. 2, n.1), but has not liquidated the forfeited substitute assets to satisfy the Shkreli forfeiture debt (some part has been paid). The government now agrees, in substance,

that this application may (and should) be granted so that the government, and then Petitioner, can finally be paid: "the government does not oppose the Application, provided that, in the event it is granted and this Court orders a receivership, the forfeiture judgment entered against Shkreli is first fully satisfied from any liquidation of [the judgment debtor] Shkreli's interest in Phoenixus AG." (ECF #58, p. 1) (Petitioner consents to the government's condition, *viz*., that the outstanding balance due pursuant to the Forfeiture Order be paid first out of proceeds of liquidation of the Phoenixus Stock" by a receiver, stated by the government to be in the amount of $2,238,482.30 (ECF # 58, p. 2).) The letter goes on to state that "in the event that this Court grants Petitioner's request for a receiver and orders that Outstanding Balance of the Forfeiture Money Judgment to be paid first [to the government], the government would apply to the Court in the Criminal Case to release Shkreli's interest in Phoenixus AG, or any portion thereof as required." (ECF #58, p. 2)

Thus, there is nothing arising from the Forfeiture Order to stand in the way of the relief now requested. In fact, the government's position tacitly makes clear that that relief is in the interest of the government as well as Petitioner, and, more specifically, is the practical and efficient way to enforce the Judgement Debtor's judgment obligations against what appears to be his most valuable known asset.

II. MR. SHKRELI ARGUES NO LEGALLY COGNIZABLE REASON NOT TO GRANT THE RELIEF REQUESTED

Mr. Shkreli has no colorable opposition — not only because of the compelling fact that the government does not oppose the relief requested and sees it as a path to payment, but also because his opposition brief relies principally on a statute that is inapposite here.

The principal opposition argument raised is that this Judgment Creditor may not have relief because he is barred from seeking such relief both substantively and procedurally by 21 U.S.C. §853 — a statute that governs criminal forfeitures generally. But all Shkreli arguments predicated on §853 are misplaced, because they rest on §853 provisions addressing an issue irrelevant here: who, when and how a non-party, non-criminal defendant may assert a specific "legal" interest in property that might be forfeited in a criminal case (in particular, pursuant to §835(n)(2)) by some criminal defendant and protect their own ownership interest from being caught up in that criminal defendant's forfeiture penalties. For example, §853 addresses assertions by a non-party/third-party such as its actual ownership in fact of property up for forfeiture (in other words, that the property belongs to that party and does not belong to the criminal defendant), a lien on the subject property (such as a mortgage) and similar interests. Essentially, all scenarios in which property that might be forfeited does not belong to the criminal defendant to forfeit in the first instance.

These rules have nothing to do with this scenario where a judgment creditor seeks to enforce against the assets in question — seeking to enforce a judgment against any and all assets of the judgment debtor — but does not claim any prior ownership or other prior, specific legal interest in the particular asset in question (the subject of §853(n)). As the Shkreli opposition brief itself states (at p. 15), "§853 was designed to protect the Government's title to forfeited assets against potential indefinite claims from … [parties] such as their rightful owner."[2]

[2] For the avoidance of any doubt, the principal case upon which the judgment debtor relies, *DSI Assocs. LLC v. United States*, 496 F.3d 175, 177 (2d Cir. 2007), confirms that §853 has nothing to do with this scenario. In that case, the issue actually presented was an attempt to intervene in a criminal case by a non-party claiming a prior interest or entitlement to certain forfeited assets, but holding neither a judgment nor even a legal claim of the sort recognized by §853(n) — it was merely a general unsecured creditor seeking to use the FRCP 24 intervention procedure to avoid

(continued…)

To the extent of Mr. Shkreli's assertion that the Forfeiture Order stands in the way of relief here, as discussed above, the government's position removes that obstacle. (ECF #58) The fact that the substitute assets at issue are subject to the Forfeiture Order makes no difference here and presents no other obstacle to the Petitioner recovering against those assets by the relief requested here. First, such substitute assets are available to the government only to the extent of satisfying the dollar amount of the government's forfeiture order — as here (*see* Criminal Case ECF #540, ¶ 12; 21 U.S.C. §853(p)); after such satisfaction, those assets are similarly available to satisfy other judgment debts (just as any surplus proceeds would be returned to the judgment debtor if they were not subject to execution by a judgment creditor). Second, to the extent anyone could object to this relief, it might be the government, but the government does not object. Because: (i) such substitute assets are only available to satisfy the criminal defendant's forfeiture obligation until the obligation is satisfied; (ii) once satisfied, what remains as surplus or otherwise is available to a judgment creditor such as the Petitioner here (and are in any event subject to Petitioner's restraining notice in this case (ECF #48-10)); and (iii) the government has effectively concurred that the relief now requested, so long as the government is paid first (a condition to which this Petitioner has agreed), makes sense and will be efficient and should be effective, the Forfeiture Order is no basis for Mr. Shkreli's opposition.

At bottom, such substitute assets which the Petitioner and the government both see as appropriate for liquidation by a receiver do not, as the Judgment Debtor implies, magically

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§853's more limited provisions directed to those who might claim some direct legal interest in assets to be forfeited. Again, the Petitioner Judgment Creditor here does not stand in any such position and his rights are not governed by §853. Rather, he has a right to enforce his Judgment against any of the Judgment Debtor's assets, and the government has cleared a path for that to happen as to the Phoenixus Stock in an orderly way (with the government's interests protected insofar as being paid first).

become forever exempt from execution by other judgment creditors because they had status as "substitute assets."

III. MR. SHKRELI'S ARGUMENTS THAT RELIEF HERE IS UNNECESSARY AND THAT PETITIONER SHOULD PURSUE OTHER OPTIONS ARE FRIVOLOUS

After asserting: "Petitioner simply must wait his turn" (p. 15), the Judgment Debtor turns in his brief's Sections II and III[3] to arguments that are pure hubris and which also threaten further obstruction. Section II asserts (at pp. 15-16) that Petitioner "has not demonstrated that [Petitioner] has exhausted all, or even some, of his alternative remedies; and in fact, has demonstrated an unwillingness to even consider pursuing alternative solutions …. [such as] discussing potential settlement alternatives." To begin, while the Judgment Debtor suggests that Petitioner has a duty to "settle" with him, in fact, this Court's judgments are to be paid, not "settled."

But more, this argument is pure hubris because the Judgment Debtor has ignored all collection efforts, while paying not a penny of the Judgment, necessitating a motion to compel compliance before this Court. (ECF ## 31-45) In fact, as the government agrees (at least tacitly), the incarcerated, convicted felon Judgment Debtor here is not likely voluntarily to satisfy this Judgment, or his obligations to the government, and receivership and liquidation of assets as the law allows after these many years is exactly the step the law contemplates in these circumstances.

[3] As discussed below, Section III of Mr. Shkreli's' opposition brief duplicate one of his Section II arguments — *viz*. that the Petitioner cannot demonstrate that the receivership will result in collection. As also discussed below, that is not true, and such demonstration is not, in any event, even necessary here. The arguments in the Shkreli §§II and III are dealt with together in this section of this brief.

The Judgment Debtor cites a case cited by Petitioner's opening brief, *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 318 (2010), mentioning considerations a court may consider in appointing a receiver, and each supports that relief here. *Hotel 71* is actually on all fours with the facts presented here and squarely supports the requested relief — appointing a receiver in the face of a closely held company interest not readily marketable by a more traditional method such as a state court sheriff's sale, a judgment debtor who has ignored enforcement discovery and a judgment debtor whose overall financial picture is precarious:

> "plaintiff argues that the appointment of a receiver is warranted due to the complexity of defendants' intangible ownership interests in various limited liability companies and defendants' disregard for Supreme Court's discovery orders (with respect to their finances). Also, there appears to be a danger of insolvency if a receiver is not appointed. Supreme Court noted that plaintiff submitted 'extensive documentation that strongly suggests Defendants' precarious financial condition, and that an identifiable risk exists that Defendants will be unable to satisfy a future judgment.' Further, given the lack of marketability of defendants' intangible property interests (there is no ready market for them), turning the property over to the sheriff would not be helpful in trying to satisfy the judgment."

Id. at 317-18.

Further, each of the three considerations taken from *Hotel 71* by Mr. Shkreli also support relief here. First, as to "alternative" remedies, as noted above (and at ECF ##31-45), Mr. Shkreli has obstructed *all* remedies (as he would this one), and is in any event incarcerated for years to come with no visible assets (he has of course refused to disclose his assets) except the substitute assets he has turned over to the government. Second, *Hotel 71* addresses the degree to which the remedy will increase the likelihood of satisfaction of the Judgment. A receiver — especially one with a background in finance and the industry in which Phoenixus operates — will self-evidently increase the value of the asset as compared with the value that would be realized from any less sophisticated liquidation such a state court sheriff's sale. Hence, the substantially enhanced likelihood of satisfaction of the Judgment through a receivership, in part if not whole, is self-

evident. Third, the Judgment Debtor refers to *Hotel 71* to posit a consideration of whether a risk of fraud or insolvency is present. Although no case is cited holding that such risk is essential to appointing a receiver (and none is known to exist after research conducted), such risks are in fact articulated specifically in the opening application papers, including not only the Judgment Debtor's criminal conduct but the ongoing litigation against him by the government (through the FTC) and his fellow shareholders (the Wormwood litigation (ECF #48-7)). At bottom, as this application demonstrates, there is nothing here except what meets the eye: a Judgment Debtor with value in the Phoenixus Stock at issue, a demonstrated history of avoiding paying this Judgment coupled with no disclosure of other assets that have not been forfeited and meaningful risk that the Judgment Debtor's ongoing conduct may be unlawful even today, making it time of the essence for an existing, legitimate Judgment Creditor to collect.

IV. MR. SHKRELI'S ARGUMENTS SUGGEST MORE OBSTRUCTION AND CONFIRM THE TIME OF THE ESSENCE NEED FOR RELIEF

Further, adding to the time of the essence need presented here, arguments advanced by the Judgment Debtor at his opposition brief's Section III actually demonstrate not only the need for a receiver, but the prospect of further obstruction. Bizarrely, Mr. Shkreli's counsel asks for "sufficient time to thoroughly research and brief" purported issues of "corporate governance," "international law" and value. To the extent there are any real issues of that sort, those are issues for a receiver, not a reason not to have one (and not a reason to effectively remove the asset in issue here from Judgment enforcement by either the Petitioner or the government while Mr. Shkreli's counsel studies up on obstruction efforts). Here, Mr. Shkreli owns the Phoenixus Stock, has turned his shares over to the government (ECF #58, p. 2, n.2) *and has a legal duty*, under the Forfeiture Order (*see* Criminal Case ECF #540, ¶¶10-11) and NY CPLR 5225, both (i) to take such steps as are necessary to ensure that nothing impairs the value of those shares or

their availability to satisfy his judgment debts and (ii) to take whatever affirmative steps are necessary, including execution of any documents required, to ensure that his ownership interest in the Phoenixus Stock may be readily sold to satisfy the government and petitioner judgments. Thus, this is not a time for this incarcerated felon's counsel to be afforded more time to "research" ways in which Mr. Shkreli could further obstruct in violation of the Forfeiture Order, the Judgment Creditor's restraining notice to him and the requirements of FRCP 69 and NY CPLR 5201 *et seq*. This Court's firm and swift relief is needed.

V. MR. SHKRELI'S ARGUMENT UNDER 28 C.F.R. §9.6 IS ALSO IRRELEVANT

Finally, and just as inapposite as his §853 argument, the Judgment Debtor asserts (at §IV of his brief) that the Petitioner cannot have relief here because his money judgment does not constitute a lien, citing 28 C.F.R. §9.6(f). This again misses the point. It is irrelevant to the relief sought whether Petitioner has a "lien." The rule addresses, just as 21 U.S.C. §853 does, those claiming prior legal interest in property subject to forfeiture. Petitioner, by contrast, does not make such a claim, but instead seeks to enforce the Judgment against the Judgment Debtor's property. He requires no "lien," only his Judgment, to do that. As discussed above, the Phoenixus Stock in question is such property and the position taken by the government clears any obstacle to enforce against such property as requested in this application.

VI. ADDITIONAL STEPS THAT MAY ADVANCE THIS PROCESS

The Judgment Creditor has not yet, but will, propose an order with respect to the proposed receivership and related issues after review of Mr. Shkreli's supplemental submission in response to the government's position (permitted at ECF #61). The proposed order will hopefully collect the various issues in the state court CPLR 5228 receivership process, mostly technical in nature, that need to be addressed in an order appointing a receiver, and also address

the condition requested by the government that it be paid first from any proceeds. It is submitted that it makes sense to file that proposed order when Mr. Shkreli is heard from through his supplemental filing so that issues he might still raise can be taken into account in the proposal.

Two additional issues are identified here because while they are not presented on this motion, they may affect (and possibly require) future proceedings (certainly if the receivership is granted, and also if it is not). First, as the government notes (ECF #58, p. 2, n.3), the disclosure due from the government pursuant to an information subpoena (ECF #48-10) has not been provided. We hope that issue can be worked out. That disclosure will be essential to the work of the receiver in maximizing value. It could be an issue for judicial intervention. (Relatedly, the disclosure subject to the pending motion to compel against Mr. Shkreli/his counsel (ECF ##31-45) is intended to garner important information for similar reasons.)

Second, for the avoidance of doubt, the Petitioner has not given up on the option of seeking enforcement against other Shkreli assets, including, possibly, by requesting that they be included within the mandate of a receiver to liquidate if satisfaction through sale of the Phoenixus Stock is obstructed or fails for any other reason. Mr. Shkreli had/has other assets that were made subject to the Forfeiture Order. Unlike the Phoenixus Stock, those assets are likely to be of lesser value based on current appearances. But with no disclosure from Mr. Shkreli or even the government, the possibility that those assets are the best avenue to recovery remains open.

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