

22-728

Federal Trade Commission, et al. 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 DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit, held at the
2 Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the
3 23rd day of January, two thousand twenty-four.
4

5 PRESENT:

6 BARRINGTON D. PARKER,
7 MYRNA PÉREZ,
8 SARAH A. L. MERRIAM,
9 *Circuit Judges.*

10 _____
11
12 Federal Trade Commission, State of New York,
13 State of California, State of Ohio, Commonwealth
14 of Pennsylvania, State of Illinois, State of North
15 Carolina, Commonwealth of Virginia,
16

17 Plaintiffs-Appellees,

18
19 v.

No. 22-728

20
21 Martin Shkreli, individually, as an owner and
22 former director of Phoenixus AG and as a former
23 executive of Vyera Pharmaceuticals, LLC,
24

25 Defendant-Appellant,
26

27 Vyera Pharmaceuticals, LLC, Phoenixus AG,
28 Kevin Mulleady, individually, as an owner and
29 director of Phoenixus AG and as a former
30 executive of Vyera Pharmaceuticals, LLC,

1 Defendants.

2 _____
3 **FOR PLAINTIFF-APPELLEE**

4 **FEDERAL TRADE COMMISSION:** BRADLEY D. GROSSMAN, Attorney, Federal
5 Trade Commission, Washington, D.C.

6
7 **FOR STATE PLAINTIFFS-APPELLEES:** PHILIP J. LEVITZ, Assistant Solicitor General, for
8 Letitia James, Attorney General for the State of
9 New York, for the State Appellees.

10
11 **FOR DEFENDANT-APPELLANT:** KIMO S. PELUSO (Noam Biale, *on the brief*),
12 Sher Tremonte LLP, New York, NY.

13
14 Appeal from a judgment of the United States District Court for the Southern District of
15 New York (Cote, *J.*).

16 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
17 **DECREED** that the February 4, 2022, judgment of the district court is **AFFIRMED**.

18 Plaintiffs-Appellees Federal Trade Commission (“FTC”); the commonwealths of
19 Pennsylvania and Virginia; and the states of California, Illinois, New York, North Carolina, and
20 Ohio filed suit against Defendant-Appellant Martin Shkreli and others in the United States
21 District Court for the Southern District of New York. Plaintiffs-Appellees alleged violations of
22 federal and state antitrust laws for conduct involving the distribution of Daraprim, a brand-name
23 drug used to treat a parasitic infection called toxoplasmosis. Shkreli’s co-defendants settled
24 before trial.

25 Following a seven-day bench trial, the district court found that Plaintiffs-Appellees
26 carried their burden of establishing that Shkreli committed antitrust violations. The district court
27 issued a final judgment that, among other things: (1) ordered disgorgement against Shkreli
28 jointly and severally with defendant Vyera; and (2) entered a permanent injunction imposing a
29 lifetime ban on Shkreli from the pharmaceutical industry. This appeal followed.

1 For the reasons set forth below, we affirm. We assume the parties' familiarity with the
2 underlying facts, the procedural history of the case, and the issues on appeal, which we reference
3 only as necessary to explain our decision.

4 **I. Disgorgement**

5 Shkreli argues for the first time on appeal that the district court erred by relying on
6 federal law remedies in imposing joint and several disgorgement on him under New York law.
7 Though Shkreli does not dispute that New York law allows for disgorgement relief, he contends
8 that New York law precludes disgorgement on a joint and several basis. Shkreli never made this
9 argument to the district court, and he proffers no reason now for his failure to raise the arguments
10 there. Additionally, in the district court, Shkreli himself relied exclusively on federal equity
11 jurisprudence in contending that he should not be ordered to disgorge profits. *See* Dist. Ct. ECF
12 No. 462 at 4-6; *see also* Dist. Ct. ECF No. 860 at 1234-35 (Shkreli's trial counsel arguing "in
13 terms of equitable monetary relief, your Honor, the *Liu* [*v. SEC*, 140 S. Ct. 1936 (2020),] case
14 from the Supreme Court says that disgorgement should not be a joint and several remedy").
15 Therefore, the circumstances here do not persuade us that we should exercise our discretion to
16 address this new argument on appeal. *See Greene v. United States*, 13 F.3d 577, 586 (2d Cir.
17 1994) ("Entertaining issues raised for the first time on appeal is discretionary with the panel
18 hearing the appeal."); *see also Doe v. Trump Corp.*, 6 F.4th 400, 410 (2d Cir. 2021). Given his
19 strategic decision in the district court, there is no injustice to Shkreli by us declining to address
20 his new argument.¹

¹ Even if this argument were not waived, it would still fail. We do not read Shkreli's principal case, *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 37 N.Y.3d 552 (N.Y. 2021), to hold that joint and several disgorgement relief is unavailable against codefendants engaged in concerted wrongdoing to wrongfully obtain profits under New York equity jurisprudence.

1 **II. Permanent Injunction**

2 Next, Shkreli provides three unpersuasive reasons to disturb the district court’s entry of
3 the permanent injunction in this case.

4 First, Shkreli contends that the district court abused its discretion by entering an
5 overbroad injunction against him that imposes a lifetime ban from the pharmaceutical industry.
6 Second, Shkreli argues that the injunction unconstitutionally limits his public speech. Third,
7 Shkreli asserts that the injunction is not specific enough and that it thus violates Federal Rule of
8 Civil Procedure 65(d). We address each argument in turn below.

9 First, we note that Section 13(b) of the Federal Trade Commission Act authorizes the
10 FTC to bring actions seeking injunctive relief for violations of the Act. *See* 15 U.S.C. § 53(b).
11 Section 13(b) imposes prospective, not retrospective, relief. *See AMG Cap. Mgmt, LLC v. FTC*,
12 141 S. Ct. 1341, 1347-48 (2021). Upon a proper showing, a district court may issue a permanent
13 injunction. *See id.*²

14 In general, a district court has broad discretion in framing an injunction in terms it deems
15 reasonable to prevent wrongful conduct. *See Seibert v. Sperry Rand Corp.*, 586 F.2d 949, 951
16 (2d Cir. 1978). Appellate review of the terms of the injunction is limited to whether there has
17 been an abuse of that discretion. *See SEC v. Posner*, 16 F.3d 520, 521-22 (2d Cir. 1994). A
18 district court has abused its discretion if it: (1) based its ruling on an erroneous view of the law,
19 (2) made a “clearly erroneous factual finding,” or (3) rendered a decision that “cannot be located
20 within the range of permissible decisions.” *SEC v. Dorozhko*, 574 F.3d 42, 45 (2d Cir. 2009)
21 (internal citations and quotation marks omitted).

² The Donnelly Act was modeled on the federal Sherman Act of 1890, and thus should generally be construed considering federal precedent. *See People v. Rattenni*, 81 N.Y.2d 166, 171 (1993).

1 We conclude that the district court did not abuse its discretion by imposing a lifetime ban
2 from the pharmaceutical industry on Shkreli because an injunction of that scope was within the
3 range of permissible decisions. The district court found, and Shkreli does not dispute, that
4 Shkreli’s illegal scheme was “egregious, deliberate, repetitive, long-running, and ultimately
5 dangerous.” Special App’x at 140. The district court found that Shkreli’s comprehensive and
6 effective scheme led to the price increase of a life-saving drug, Daraprim, from \$17.50 to \$750
7 per tablet and successfully blocked the entry of generic drug competition to maintain Daraprim’s
8 inflated price. The district court further found that Shkreli’s scheme was far-reaching and was
9 implemented using many means. It pointed to the record demonstrating that Shkreli facilitated
10 extensive research; established at least two companies; recruited and worked through others even
11 while in prison; and took advantage of regulatory requirements designed to safeguard the
12 pharmaceutical industry to carry out his illegal scheme.

13 The district court’s injunction was a reasonable measure to protect the public from the
14 risk of recurring anticompetitive conduct in the pharmaceutical industry by Shkreli. In his direct
15 written testimony, Shkreli indicated that after release from prison, “[i]f I do pursue employment
16 within the pharmaceutical industry... I hope to continue playing a role in the discovery of cures
17 and treatments for rare and life-threatening diseases... and focus on experimental and research-
18 based opportunities related to discovery of new medicines and new uses for existing medicines.”
19 App’x at 801. Given Shkreli’s pattern of past misconduct, the obvious likelihood of its
20 recurrence, and the life-threatening nature of its results, we are persuaded that the district court’s
21 determination as to the proper scope of the injunction was well within its discretion.

22 Shkreli fares no better in his challenge to Paragraph II(D) of the permanent injunction.
23 Shkreli argued in the district court that imposing Paragraph II(D) without limits would infringe

1 his free speech rights by prohibiting him entirely from, among other things, using social media to
2 discuss the pharmaceutical industry. In response to Shkreli's concerns, the record reflects that
3 the district court added the following text to Paragraph II(D):

4 Shkreli's public statements about a Pharmaceutical Company will be
5 deemed an action taken to influence or control the management or business
6 of any Pharmaceutical Company if Shkreli intended the statement to have
7 that effect or if a reasonable person would conclude that the statement has
8 that effect.

9
10 Special App'x at 166.

11 The district court added this language to set limitations in light of Shkreli's concerns,
12 while also enjoining possible future antitrust violations. In light of that addition, we are
13 persuaded that Paragraph II(D)'s public statement ban is in the range of permissible decisions,
14 preventing possible future antitrust violations without treading on Shkreli's free-speech rights.
15 *See Nat'l Soc'y. of Pro. Eng'rs v. United States*, 435 U.S. 679, 697-98 (1978) ("In fashioning a
16 remedy, the District Court may, of course, consider the fact that its injunction may impinge upon
17 rights that would otherwise be constitutionally protected, but those protections do not prevent it
18 from remedying the antitrust violations."); *see also Jews for Jesus, Inc. v. Jewish Cmty Rels.*
19 *Council of N.Y., Inc.*, 968 F.2d 286, 296 (2d Cir. 1992) ("[T]he First Amendment provides no
20 defense to persons who have used otherwise protected speech or expressive conduct to force or
21 aid others to act in violation of a valid conduct-regulating statute.").

22 Lastly, we conclude that the terms of the district court's injunction are sufficiently clear,
23 specific in terms, and described in reasonable detail to satisfy Federal Rule Civil Procedure
24 65(d). We review de novo whether the injunction complies with Rule 65(d). *See City of New*
25 *York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 143 (2d Cir. 2011). "To comply with the
26 specificity and clarity requirements" of Rule 65(d), "an injunction must be specific and definite

1 enough to apprise those within its scope of the conduct that is being proscribed.” *S.C. Johnson*
2 & Son, Inc. v. *Clorox Co.*, 241 F.3d 232, 240-41 (2d Cir. 2001) (quotation marks omitted); *see*
3 *also* Fed. R. Civ. P. 65(d)(1). Shkreli contends that the injunction is vague because it lacks
4 definitions for two of its key terms: “participating” in the pharmaceutical industry and
5 “pharmaceutical industry.” But the district court was not required to define unambiguous terms.
6 Terms of an injunction are construed “according to the general interpretive principles of contract
7 law.” *Mastrovincenzo v. City of New York*, 435 F.3d 78, 103 (2d Cir. 2006). Therefore,
8 undefined terms should be given their plain meaning and construed in light of normal usage. *See*
9 *id.*

10 To be sure, “participating” is “taking part” in an undertaking.³ In this case, the
11 undertaking is the pharmaceutical industry. And the district court’s injunction, read in context, is
12 sufficiently clear to put Shkreli on notice as to what the “pharmaceutical industry” consists of.
13 The injunction even defines Pharmaceutical Company, and Pharmaceutical Companies
14 undoubtedly make up the pharmaceutical industry. Therefore, the plain language is hardly
15 vague. It squarely forbids Shkreli from directly or indirectly *taking part* in any manner in the
16 pharmaceutical industry, including taking any action to directly or indirectly influence or control
17 the management or business of any Pharmaceutical Company.⁴

18 The language of the permanent injunction requires Shkreli to notify the Plaintiffs-
19 Appellees if he wishes to accept “Qualified Employment” in order to provide an opportunity to
20 object. *See* Special App’x at 166-67. As the district court made clear, if Shkreli feels that the

³ Merriam-Webster Online Dictionary, <https://perma.cc/W6FM-G5PC> (last visited January 5, 2024).

⁴ The injunction contains a few exceptions: “Shkreli may retain an Ownership Interest in securities that are under the control of the receiver appointed in *Koestler v. Shkreli*, 1:16cv7175;” and may accept “Qualified Employment” “with a Pharmaceutical Company that is not *primarily* involved in the research, Development, manufacture, commercialization, or marketing of Drug Products or [active pharmaceutical ingredients] and” derives less than 10% of its gross revenues from such activity. Special App’x at 165-66 (emphasis added).

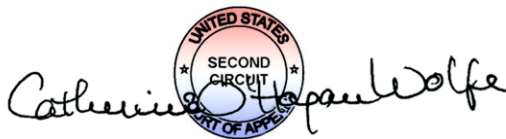
1 Plaintiffs-Appellees have unreasonably objected to appropriate employment, he may apply for
2 relief. *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437 (1976) (“[S]ound judicial
3 discretion may call for the modification of the terms of an injunctive decree if the circumstances,
4 whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since
5 arisen.”) (quoting *Sys. Fed’n No. 91, Ry. Emps.’ Dep’t v. Wright*, 364 U.S. 642, 647 (1961)).

6 * * *

7 We have carefully considered Shkreli’s remaining arguments and find them to be without
8 merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

9
10
11
12

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk of Court

The block contains a handwritten signature in cursive that reads "Catherine O'Hagan Wolfe". Overlaid on the signature is a circular seal. The seal has a red outer ring with the text "UNITED STATES" at the top and "COURT OF APPEALS" at the bottom. Inside the ring, the words "SECOND" and "CIRCUIT" are written in blue, separated by two small stars.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: January 23, 2024
Docket #: 22-728cv
Short Title: Federal Trade Commission v. Vyera
Pharmaceuticals, LLC

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 20-cv-706
DC Court: SDNY (NEW YORK
CITY)
DC Judge: Cote
DC Judge: Lehrburger

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: January 23, 2024
Docket #: 22-728cv
Short Title: Federal Trade Commission v. Vyera
Pharmaceuticals, LLC

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 20-cv-706
DC Court: SDNY (NEW YORK
CITY)
DC Judge: Cote
DC Judge: Lehrburger

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature