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September 18, 2020

VIA ECF
Honorable Denise L. Cote
U.S. District Court for the Southern District of New York
500 Pearl Street, Room 1910
New York, NY 10007

Re: *FTC, et al. v. Vyera Pharmaceuticals, LLC, et al.*, Case No. 1:20-cv-00706 (DLC)

Dear Judge Cote:

On behalf of Martin Shkreli, we write in response to plaintiffs' letter at ECF No. 264. Plaintiffs' letter shows why the Court correctly ordered plaintiffs to screen from review all communications between Mr. Shkreli and his attorneys over the TRULINCS system—the only practical and efficient way for Mr. Shkreli to communicate with his attorneys—and why the Court should not reconsider that decision and order Mr. Shkreli to produce a privilege log. Plaintiffs' letter concedes that the large majority of the communications they seek to review are totally irrelevant to this case. Moreover, their argument that Mr. Shkreli should be required to log every communication with two of the attorneys because they allegedly concern business, not legal advice, is meritless.

In September 2019, at the conclusion of its four-year investigation, the FTC requested from the BOP an enormous amount of Mr. Shkreli's communications over the TRULINCS system. Exhibit A. Although plaintiffs refuse to disclose to Mr. Shkreli the FTC's pre-complaint requests, plaintiffs' document productions show that the FTC took no steps to exclude communications between Mr. Shkreli and his attorneys. And based upon plaintiffs' letter, it appears they have reviewed Mr. Shkreli's communications with his lawyers. Also troubling is that plaintiffs grossly mischaracterize these communications.

As plaintiffs acknowledge, the vast majority of the matters handled by Kang Haggerty, *i.e.*, those identified in Nos. 1-15 and 18-23 on the Statement at ECF 248, are irrelevant, and thus any documents relating to those matters should not even be in discovery. Plaintiffs claim that the matters identified in Nos. 16 and 17 are relevant and that, therefore, Mr. Shkreli should produce a privilege log for *all of Ms. Kovalsky's communications*. In support of their relevance argument, plaintiffs point to two topics: (1) a blind voting trust agreement; and (2) discussions about the removal of Averill Powers. Plaintiffs claim that the blind trust topic is relevant because the FTC "was concerned that Mr. Shkreli might be trying to shield his Phoenixus assets from any disgorgement judgment." This reckless statement has no factual support. As Mr. Shkreli identified

in the Statement filed at ECF No. 248-1, Ms. Kovalsky provided legal advice on a trust agreement – *a legal document.* Ms. Kovalsky was acting as Mr. Shkreli's legal counsel, *not* business advisor.

In October 2019, before Mr. Shkreli learned about the FTC's investigation, Vyera, through their executives Averill Powers and Akeel Mithani, approached Ms. Kovalsky with the idea of asking Mr. Shkreli to enter into an irrevocable voting trust agreement. On October 10, 2019, Vyera sent Ms. Kovalsky a draft agreement. Exhibit B. In sum, Vyera believed it would be better for the company and its business relationships with others if Mr. Shkreli were no longer a voting shareholder on its books and records. Mr. Shkreli was willing to help the company, and he retained Kang Haggerty to represent him regarding the trust document. At all times, Mr. Shkreli and his counsel anticipated presenting the trust agreement to the Department of Justice before consummating the transaction. *See* Exhibits C and D (Redline Section 32 regarding Final Forfeiture Order).

Eventually, the negotiations about the voting trust broke down after Mr. Shkreli became adverse to Vyera over the company's refusal to indemnify him relating to the FTC antitrust action. For example, on January 7, 2020, Edward Kang wrote to Mr. Powers, explaining Mr. Shkreli's concern about Vyera's attempt to tie the company's agreement to pay for Mr. Shkreli's legal fees to Mr. Shkreli's agreeing to the blind voting trust, when the two topics were unrelated. *See* Exhibits E-F. Mr. Shkreli believed (correctly) that Mr. Powers was opposing the company's indemnification. It is in the context of these disputes with Vyera that the topic of removing Mr. Powers arose, and Kang Haggerty provided Mr. Shkreli with legal advice regarding his rights as a shareholder in this regard. These two topics – the voting trust agreement and Mr. Shkreli's right to remove Mr. Powers based on the indemnification and advancement issues – have nothing to do with this case, and, moreover, to the extent that Kang Haggerty advised Mr. Shkreli on these topics, the advice was legal, not business, advice.

Plaintiffs further claim "Ms. Kovalsky appears to have acted as a conduit for communications from others to Mr. Shkreli." But the documents they use to support this claim, (Exhs. A-B) fall short. In the July 11 conversation, Mr. Shkreli merely suggested to Mr. Mulleady that he could talk to Ms. Kovalsky about removing Mr. Powers rather than talking with Mr. Shkreli if Mr. Mulleady thought the topic was "too sensitive to talk about" over the BOP-monitored line. Mr. Shkreli then said that they should be able to openly discuss the changing of CEO, because the FTC would not be concerned about this topic as it *does not relate to* a "price increase." ECF 264-2. This conversation in no way supports the claim that Ms. Kovalsky was acting as a "conduit."[1]

In sum, plaintiffs have provided the Court with no reasons why they should be permitted to now review Mr. Shkreli's communications with Ms. Kovalsky and Mr. Vernick. Mr. Shkreli respectfully requests the Court deny the FTC's demand that Mr. Shkreli log these communications.

[1] Similarly, the argument that Scott Vernick's communications relate solely to business advice is not supported.

Very truly yours,

/s/ Christopher H. Casey
Christopher H. Casey

CHC