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April 18, 2000

VIA HAND DELIVERY

Food and Drug Administration
Dockets Management Branch (HFA-305)
5630 Fishers Lane
Room 1061
Rockville, Maryland 20852

Re: **FDA Docket No. 92N-0412**

Dear Sir/Madam:

Enclosed please find Respondent's Petition For Termination Of Debarment for filing in the above-captioned case.

I have also enclosed an extra copy of the pleading for you to stamp as filed and return to me in the enclosed envelope. Thank you for your time and attention in this matter.

Very truly yours,



Christopher B. Mead

CBM:mjs

Enclosures

92N-0412

AST 1

DEPARTMENT OF HEALTH AND HUMAN SERVICES
UNITED STATES OF AMERICA

2154 '00 APR 18 P1:43

In re

RAJARAM K. MATKARI
1304 Riverglen Way
Berthoud, Colorado 80513

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FDA Docket No. 92N-0412

PETITION FOR TERMINATION OF DEBARMENT

In 1989, Petitioner Rajaram K. Matkari pled guilty to a one-count Criminal Information charging him with paying an illegal gratuity to FDA review chemist Charles Y. Chang, in violation of 18 U.S.C. 201(C)(1)(A). At Matkari's sentencing, the Government agreed that Matkari had not intended to influence any specific act by Chang. After his conviction, FDA debarred Matkari under the mandatory provisions of 21 U.S.C. 335a(a)(2).

In 1999, the Supreme Court held that the illegal gratuity statute required a specific link between the payment to a federal official and a particular official act. United States v. Sun Diamond Growers, 526 U.S. 398 (1999). Matkari then filed a petition for error coram nobis, arguing that, under the reasoning of Sun Diamond Growers, he was actually innocent of the charge on which he was convicted. On February 22, 2000, the Honorable Frederic N. Smalkin, United States District Judge for the District of Maryland, granted Matkari's Petition for Error Coram Nobis. See Memorandum Opinion and Order, attached as Exhibit 1. Judge Smalkin's Order overturned the conviction that was the predicate for Matkari's debarment.

21 U.S.C. 335a(d)(3)(B)(i) provides that "[i]f the conviction which served as the basis for the debarment of an individual under subsection (a)(2) of this section or clause (i), (ii), (iii), or (iv) of subsection (b)(2)(B) of this section is reversed, the Secretary shall withdraw the order of

debarment” (emphasis added). Accordingly, under the clear language of the debarment statute, FDA must terminate Matkari’s debarment.

Respectfully submitted,

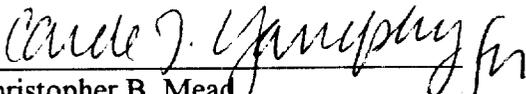

Christopher B. Mead
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(202) 331-3334
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition For Termination Of

Debarment was mailed, first class postage prepaid, this 18th day of April, 2000 to:

Annamarie Kempic, Esquire
Associate Chief Counsel of Enforcement
United States Food and Drug Administration
5600 Fishers Lane (GCF-1)
Rockville, Maryland 20857


Christopher B. Mead

EXHIBIT

1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RAJ K. MATKARI

v.

UNITED STATES OF AMERICA

*
* Crim. No. HAR 89-0159
*
* Civ. No. S 99-3827
*

* * * * *

ORDER GRANTING WRIT OF ERROR *CORAM NOBIS*

For the reasons stated in a Memorandum Opinion entered herewith, it is, by the Court, this 22nd day of February, 2000, ORDERED:

1. That the petition of Raj K. Matkari for a Writ of Error *Coram Nobis* BE, and it hereby IS, GRANTED;
2. That the Writ of Error *Coram Nobis* BE, and it hereby ISSUED in respect of the criminal case captioned above; and
3. That the Clerk of this Court mail copies hereof and of the said Opinion to counsel.



Frederic N. Smalkin
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RAJ K. MATKARI

v.

UNITED STATES OF AMERICA

*
* Crim. No. HAR 89-0159
*
* Civ. No. S 99-3827
*

* * * * *

MEMORANDUM OPINION

Having pleaded guilty to a criminal information charging him with violation of 18 U.S.C. section 201(c)(1)(A), in the wake of a wide-ranging investigation of corruption within the Food and Drug Administration's generic drug regulation branch, Raj K. Matkari was given a minimal sentence by the late Judge Hargrove of this Court (probation, a fine, and community service). He has served his sentence, but he remains debarred by the Food and Drug Administration from dealing with that agency in a professional capacity. Promptly in the wake of the Supreme Court's decision requiring, as a basis for a section 201(c) conviction, proof of a specific link between the giving of a gratuity to a federal official and a particular official act, *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999), Mr. Matkari, by counsel, sought *coram nobis* relief in this Court. The transcript of the Rule 11 colloquy furnished in support of the present petition shows without any question that the Government never contended (nor could it have contended) that Mr. Matkari engaged in conduct within the proscription of the statute as the Supreme Court has interpreted it. The Government has opposed the petition, and no oral argument is needed. Local Rule 105.6, D.Md.

First, as in the case of *United States v. Mandel*, 672 F.Supp. 864 (D.Md. 1987), *aff'd.*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989), the Court is dealing with a statute that

was long used by the Justice Department to criminalize conduct that Congress never intended to be within its scope. Its misuse was sanctioned by federal trial and appellate courts for years, as was the case with the mail fraud statute in *Mandel*, but long misuse of a statute still cannot criminalize that which is not criminal.

Here, the Government's entire case against the petitioner was built on the premise that he gave a corrupt Government official, Dr. Chang, \$2,000 in cash when Chang advised Matkari of his need for money. The Government (represented by the late Gary Jordan, then First Assistant U.S. Attorney) made it clear in the original proceedings that Mr. Matkari was not intending to influence any specific act by Chang, but was simply hoping to get or remain on Chang's good side. (One might also characterize Chang's conduct (he later became a co-operator) as an old-fashioned shakedown.) The conduct of Mr. Matkari was not criminal when it was committed, and it is not criminal now. Hence, the case is essentially indistinguishable from the situation in *Mandel, supra*, and it would be an abuse of this Court's discretion, see *United States v. Shamy*, 886 F.2d 743 (4th Cir. 1989), to deny the writ, especially since there was a prompt petition and, like the lawyer-defendant in *Mandel*, this defendant remains under a significant civil disability connected with his profession arising out of his conviction.

The fact that the criminal information here properly charged the offense is inconsequential, as was the case in *Mandel* and *Shamy*, where the indictments also charged the elements of the crime. More to the point, the fact that this defendant pleaded guilty, rather than face the prospect of an expensive trial sure to result in a conviction under prevailing law, and that his counsel could not foresee the *Sun Diamond* holding ten years beforehand, do not sufficiently distinguish this case from *Mandel* and *Shamy* to warrant denial of the present petition. In fact, in some ways, this is a stronger

case than those of Messrs. Mandel and Shamy, who went to trial, because there is no doubt here as to the facts. The facts were firmly established and fully acknowledged by both sides, and there simply never was -- nor is there now -- a possibility that Mr. Matkari actually engaged in conduct that really was criminal by seeking to influence a specific official act.

Despite the Government's efforts to show that Mr. Matkari did something morally wrong (not to mention its reliance on out-of-circuit case law), the precedent of this Court and of the Fourth Circuit demands that when someone has been convicted of a serious statutory offense on the basis of conduct that never was within the scope of the statute, he be granted *coram nobis* relief to correct this most fundamental of errors, if he acts promptly to seek it and remains under the appropriate level of stigma arising from the conviction, as is the case here.

Accordingly, an Order will be entered separately, granting the relief sought.

Dated: February 22nd, 2000



Frederic N. Smalkin
U.S. District Judge