IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. $1,810,490.34 SIEZED FROM TOUCHMARK NATIONAL BANK ACCOUNT NUMBER XXXXXX0855, AND $1,225,827.11 SEIZED FROM BANK OF AMERICA ACCOUNT NUMBER XXXXXX1840, Defendants.	Case No. 1:17-cv-04442-CAP

MOTION TO DISMISS THE GOVERNMENT'S VERIFIED COMPLAINT FOR FAILURE TO STATE A CLAIM

Comes now, Hi-Tech Pharmaceuticals, Inc. ("Hi-Tech"), Claimant in the above-captioned matter, and pursuant to Rule G of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions, hereby submits its Motion to Dismiss the Government's Verified Complaint for Failure to State a Claim, respectfully showing this Court as follows:

I. INTRODUCTION

In essence, the Government has zeroed out Hi-Tech's operating accounts to the tune of over $3 million based upon two allegedly illegal product sales. In apparent acknowledgement that the facts surrounding these limited sales is not a sufficient basis to state a forfeiture claim against that amount of money, with respect to a company that conducts extensive legitimate business no less, the Government includes several factually unsupported and vaguely-worded paragraphs concerning what it "believes" and what it "expects discovery will show." These belief and expectation paragraphs, however, do not put Hi-Tech or this Court on notice of the conduct alleged to include the "specified unlawful activity" supposedly underlying the seizure over of $3 million, and cannot therefore serve to state a claim for civil forfeiture. Indeed, when a civil forfeiture complaint fails to sufficiently identify the nature of the crimes the Government intends to prove, it certainly falls far short of stating "sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof [with respect to that crime] at trial." Supp. R. G(2)(f).

The Complaint, however, not only fails to allege sufficient facts as to the crimes allegedly underlying the seizure, but also fails to make any reasonable attempt to trace the over $3 million in funds to the supposed crimes. The Complaint

merely traces proceeds from the two described sales and refers to unstated amounts of "tainted" funds in a conclusory manner. Under these circumstances, the Government has not stated sufficiently detailed facts to create a reasonable belief that the Government will be able to show that over $3 million is forfeitable, and has therefore failed to state a claim with respect to those funds.

II. STATEMENT OF FACTS

A. Related Criminal Case and Procedural Posture

On September 28, 2017, a federal grand jury in the Northern District of Georgia returned a First Superseding Indictment (hereinafter "indictment") against Jared Wheat, John Brandon Schopp, and Hi-Tech. EXHIBIT A, *United States v. Jared Wheat*, *et al*., Case No. 1:17-cr-00229-AT-CMS, at Doc. 7 (N.D.Ga.) (hereinafter the "Criminal Case")[1] The eighteen-count indictment includes charges of conspiracy, wire fraud, money laundering, introduction of misbranded drugs, and manufacture and distribution of a controlled substance. *Id*. The counts relating to

[1] This Court may consider these filings without converting the current motion into a motion for summary judgment. *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (A court may take judicial notice of a document filed in case not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings); *Horne v. Potter*, 392 Fed.Appx. 800, 802 (11th Cir. 2010) (finding the district court properly took judicial notice of pleadings from a prior case of the plaintiff's when evaluating a motion to dismiss).

controlled substances involve five Hi-Tech products: 1-AD, 1-Testosterone, Superdrol, Equibolin, and Androdiol. *Id*. at ¶¶ 36-43.

The Government obtained various warrants related to the charges in the indictment, two of which were seizure warrants for the entire balance of the funds in two of Hi-Tech's bank accounts. EXHIBIT B, Seizure Warrant 1-17-MJ-839 (Touchmark National Bank account number XXXXX0855, dated October 3, 2017), Doc. 36-1 in the Criminal Case, and EXHIBIT C, Seizure Warrant 1-17-MJ-840 (Bank of America account number XXXXXXXX1840, dated October 3, 2017), Doc. 36-2 in the Criminal Case. Following the seizure of these accounts, Hi-Tech filed an Emergency Motion for Release of Improperly Seized Assets with respect to the funds taken from the Bank Accounts, arguing that the indictment and affidavits in support of the seizure warrants did not establish probable cause that any amount of funds over $1,148.75 was "tainted" and therefore subject to seizure. EXHIBIT D, Doc. 36 in the Criminal Case. The Government then circumvented substantively responding to this motion, thereby circumventing having to argue that probable cause existed for the Government to seize over $3 million, by filing the current civil forfeiture Complaint. *See* EXHIBT E, Doc. 42 in the Criminal Case; Doc. 1. This effort by the Government only delayed resolution of the problem it has created by

seizing the entirety of Hi-Tech's operating accounts without sufficient evidence to justify the seizure.

B. Allegations in Complaint

The Complaint in this case alleges that the bank accounts are subject to forfeiture pursuant to 18 U.S.C. § 981 and 21 U.S.C. § 881. Specifically, the Complaint alleges that the accounts are subject to forfeiture under 18 U.S.C. § 981(a)(1)(C) as property which constitutes and is derived from proceeds traceable to one or more specified unlawful activities as defined in 18 U.S.C. § 1956(c)(7), and conspiracy to commit such offenses, including but not limited to violations of 18 U.S.C. §§ 1341, 1343, 1349, 1956, 1957 and 21 U.S.C. §§ 841(a)(1), 846, 854, and 856. The accounts are also allegedly subject to forfeiture under 21 U.S.C. § 881(a)(6) as money and other things of value furnished by a person in exchange for a controlled substance in violation of Title 21, Subchapter I. Finally, the Government claims that the accounts are subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(A) as property involved in and traceable to one or more transactions or attempted transactions in violation of 18 U.S.C. §§ 1956 and 1957. Doc. 1 at ¶¶ 2-4.

According to the Complaint's "Facts Supporting Forfeiture," "this civil forfeiture action in rem arises in connection with a U.S. Food and Drug Administration Office of Criminal Investigations (FDA-OCI) investigation of Hi-

Tech Pharmaceuticals, Inc.; Diversified Biotech Inc. DBA Hi-Tech Pharmaceuticals; Jared Wheat; John Brandon Schopp; and others …" for various crimes, including those charged in the indictment. Doc. 1 at ¶ 9. The Complaint goes on to state that these "relevant persons and entities" are named in the indictment, although that is not in fact the case as to Diversified. *Compare id*. at ¶¶ 10-13 *with* EXHIBIT A. The civil complaint in this case represents the first time the Government has made criminal allegations against Diversified.

The Complaint alleges that an unspecified investigation has revealed that Hi-Tech, Wheat, Schopp, and "engaged in a widespread practice of manufacturing, marketing, and distributing false, mislabeled, and misbranded controlled substances … [beginning] no later than March 2016 and continu[ing] though at least September 14, 2017. Doc. 1, ¶ 39. The Government's Complaint, however, contains no factual allegations with respect to how or why it has identified this time period. *See generally id*. The Government, rather, sets forth two examples of Hi-Tech's allegedly unlawful sale of false, mislabeled, and misbranded controlled substances. Doc. 1 at ¶ 44. The two examples relate to the Food and Drug Administration's ("FDA") September 2016, undercover purchases of Hi-Tech's 1-AD, 1-Testosterone, Androdiol, Equibolin, and Superdrol products by way of www.hitechpharma.com, and their August 2017 purchase of 1-AD, Androdiol,

Equibolin, and Superdrol through a confidential informant. Doc. 1 at ¶¶ 41-68. Payments to Hi-Tech resulting from these transactions posted to the Touchmark account, *Id.* at ¶¶ 48, 49, 64, but the Complaint fails to note the amount of money exchanged in either transaction.

According to the Complaint, FDA testing of the products purchased by the Government revealed the presence of Schedule III anabolic steroids. *Id*. at ¶¶ 50, 51, 65, 66. Counts 13 through 15 of the indictment apparently relate to these product purchases and testing, EXHIBIT A at pp. 13-16. Indeed, the Complaint's allegations in this regard are essentially copied and pasted from the Government's affidavit in support of the seizure warrants for the Bank Accounts. *Compare* Doc. 1 at ¶¶ 45–68 *with* EXHIBIT F, Doc. 36-3 in the Criminal Case, at ¶¶ 28-34. The allegations relating to these two sales, however, do not include any allegations of illegal conduct on the part of Diversified, but only Hi-Tech. Doc. 1 at ¶¶ 45–68.

While the factual allegations relating to the alleged sale of false, mislabeled, and misbranded controlled substances are limited to two sales taking place within a one-year period, the Government goes on to allege that:

> The United States expects discovery in this case to yield additional evidence to support claims that Hi-Tech, Wheat, and others have engaged in countless, similar acts of manufacturing and selling false, mislabeled, and misbranded controlled substances, as well as additional uses of the United States mail, commercial interstate carriers, and wire communications to execute their schemes and artifices to defraud

> during the course of Hi-Tech's existence that may have commenced as early as 1998.
>
> Moreover, the United States expects discovery to yield evidence that Hi-Tech, Wheat, Diversified, Schopp, and others thereafter invested profits from the above-referenced violations of Title 21, Chapter I.

Doc. 1 at ¶¶ 69, 70.

The two sales and this speculation aside, the Government admits in its Complaint that Hi-Tech conducts legitimate business. *See, e.g., id* at ¶ 10 (referring to Hi-Tech as an "online seller of dietary supplements"); *id* at ¶ 28 (acknowledging that the allegedly steroid-containing products were "among the products that Hi-Tech manufactured, stored, and distributed from the Business Premises"); *id* at ¶ 32 (acknowledging that the allegedly steroid-containing products were "among the products that Hi-Tech offered for sale at www.hitechpharma.com"). The Complaint's allegations also reveal that Hi-Tech conducts extensive business. *See, e.g.*, *id.* at ¶ 25 (alleging that Hi-Tech and Diversified conduct business operations out of 14 business suites at six different addresses); *id.* at ¶ 27 (alleging that Hi-Tech manufactures products out of three different facilities); *id.* at ¶¶ 33, 34 (alleging that Hi-Tech shipped product to customers via United Parcel Service ("UPS"), and that between January 2015 and May 15, 2017, UPS picked up over 60,000 packages from Hi-Tech addresses); *id* at ¶ 57(b)-(c) (acknowledging that in 2017, Hi-Tech had a "family of brands" and distributed "numerous products").

The Complaint goes on to allege that Hi-Tech, Wheat, Diversified, and Schopp laundered proceeds from Hi-Tech's manufacturing, marketing, and distribution of false, mislabeled, and misbranded controlled substances. *Id.* at ¶ 71. According to the Government, tainted funds from the Touchmark account were deposited into the Bank of America account. *Id.* at ¶ 72. The tainted funds in the Bank of America account were then allegedly used to promote the "specified unlawful activity" through the payment of rent and "various" unspecified expenses for Hi-Tech's business premises. *Id*. at ¶¶ 74, 75. The Complaint does not allege the amount of any of these alleged transactions. *Id*.

The Complaint goes on to allege that:

> The United States expects discovery to yield evidence that some of the transactions of funds from both the Touchmark Account and the Bank of America account involved more than $10,000 in specified unlawful activity proceeds.
>
> Moreover, the United States expects that discovery will also identify additional evidence that Hi-Tech, Diversified, Wheat, and Schopp engaged in additional financial transactions between approximately 1998 and continuing into the present that promoted specified unlawful activity and additional monetary transactions in amounts of more than $10,000 in tainted funds, including but not limited to paying rents, payroll, contract labor, packaging materials and supplies, shipping charges, and other costs that promoted the specified unlawful activity using tainted funds from the Touchmark Account, the Bank of America Account, and possibly other accounts.
>
> Finally, the United States expects discovery will yeild additional evidence that funds representing income from investment of profits

> from Hi-Tech's Wheat's, Diversified's, and Schopp's violations of Title 21, United States Code, were among the Defendant Property."

Id. at ¶¶ 76-78.

Again, however, the Complaint makes no mention of any such investments.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Legal Standard

Dismissal of a claim under Federal Rule of Civil Procedure 12(b)(6) is appropriate where the plaintiff does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 547 (2007); *Chandler v. Sec'y of Fla. Dep't of Transp.,* 695 F.3d 1194, 1199 (11th Cir. 2012). A claim is plausible where the plaintiff alleges factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (internal citation omitted). Thus, to state a claim adequately the factual allegations must be sufficient "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 545.

Traditional pleading rules in civil forfeiture actions are, however, modified by the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions ("Supplemental Rules"), which, along with the Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 983, set forth requirements specific to civil forfeiture actions. Pursuant to the Supplemental Rules,

the complaint must, *inter alia*, "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." Supp. R. G(2)(f). Thus, the forfeiture complaint must allege sufficient facts that create a reasonable belief that the property in question is in fact subject to forfeiture. *United States v. Two Parcels of Real Property Located in Russell County, Ala.,* 92 F.3d 1123, 1126 (11th Cir.1996). Given this framework, the Government "may not seize and continue to hold property upon conclusory allegations that the defendant property is forfeitable." *United States v. $4,096.00 in U.S. Currency, More or Less*, 2005 WL 1127138, at *2 (M.D.Ga. May 6, 2005) (internal citation omitted).

The pleading standard under the Supplemental Rules is "more stringent" than the liberal provisions of Federal Rule of Civil Procedure Rule 8, and "is imposed due to the drastic nature of forfeiture actions." *U.S. v. Certain Accounts, Together With All Monies on Deposit Therein*, 795 F.Supp. 391, 394 (S.D.Fla. 1992) (citing *United States v. Real Property on Lake Forest Circle,* 870 F.2d 586, 588 n. 3 (11th Cir. 1989); 12 C. Wright & A. Miller, *Federal Practice and Procedure,* § 3242 (1973)); *see also U.S. v. $1,399,313.74 in U.S. Currency*, 591 F.Supp.2d 365, 369 (S.D.N.Y. 2008) ("The [pleading] requirements [of the Supplemental Rules] are more stringent than the general pleading requirements, an implicit accommodation

to the drastic nature of the civil forfeiture remedy.") (internal punctuation and citation omitted).[2] Further, "[f]orfeitures are not favored in the law; strict compliance with the letter of the [Supplemental Rules] by those seeking forfeiture must be required." *U.S. v. $38,000.00 Dollars in U.S. Currency*, 816 F.2d 1538, 1547 (11th 1987) (citing *U.S. v. One 1936 Model Ford V–8 De Luxe Coach,* 307 U.S. 219, 226 (1939)). In considering a motion to dismiss, however, the Court still accepts the allegations in the complaint as true and construes them in the light most favorable to the non-moving party. *Powell v. Thomas,* 643 F.3d 1300, 1302 (11th Cir. 2011).

B. Forfeiture Claims Under 18 U.S.C. § 981and 21 U.S.C. § 881

As previously stated, the Government contends that the Bank Accounts are subject to forfeiture under 18 U.S.C. § 981(a)(1)(A) as property involved in and traceable to money laundering transactions; 18 U.S.C. § 981(a)(1)(C) as property which constitutes and is derived from proceeds traceable to one or more specified

[2] The *Certain Accounts* and *$1,399,313.74* cases address the pleading standard set forth in the former Supplemental Rule E(2)(a), which was amended in 2006. The applicable pleading standard is now set forth in Supplemental Rule G(2); however, subsection G(2)(f) "carries [Rule E(2)(a)] forfeiture case law forward without change." Supp. R. G, Advisory Committee's Note, 2006 adoption. Thus, under either the old rule, Rule E(2)(a), or the new rule, G(2)(f) the standard is higher than that set forth in Rule 8.

unlawful activities; and 21 U.S.C. § 881(a)(6) as money and other things of value furnished by a person in exchange for a controlled substance. Doc. 1 at ¶¶ 2, 3, 4.

Pursuant to 18 U.S.C. § 981(a)(1), property subject to civil forfeiture includes:

> (A) Any property, real or personal, *involved in* a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property *traceable to* such property.
> …
> (C) Any property, real or personal, which *constitutes or is derived from* proceeds *traceable to* a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 670, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032 or 1344 of this title or any offense constituting "specified unlawful activity" (as defined in section 1956(c) of this title), or a conspiracy to commit such offense.

(Emphasis added).

Additionally, 21 U.S.C. § 881(a)(6) allows for forfeiture of:

> [a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person *in exchange for* a controlled substance or listed chemical in violation of this subchapter, all proceeds *traceable to* such an exchange, and all moneys, negotiable instruments, and securities *used or intended to be used to facilitate* any violation of this subchapter.

(Emphasis added).

The Government's Complaint must therefore "allege sufficient facts that create a reasonable belief that" the Government will be able to show that over $3 million seized is related to Hi-Tech's alleged criminal activities (*i.e.,* subject to

forfeiture under these sections), Supp. R. G(2)(f), and raise the Government's right to relief "above the speculative level." *Twombly*, 550 U.S. at 545. *See also $38,000.00*, 816 F.2d at 1548 ("We [] hold that a section 881(a) forfeiture complaint must allege sufficient facts to provide a reasonable belief that the Government can show the property is subject to forfeiture: in particular, that the government has probable cause to believe that a substantial connection exists between the property to be forfeited and the exchange of a controlled substance.") The facts alleged in the Complaint, however, fall far short of meeting this burden.

C. The Government Did Not Allege a Factual Basis Sufficient to Create a Reasonable Belief that The Government Will Be Able to Demonstrate that the Over $3 Million Seized is Subject to Forfeiture.

The limited facts alleged in the Complaint require rank speculation that two allegedly illegal product sales somehow justify the seizure of over $3 million in operating funds – operating funds of a business which conducts extensive legitimate activities. Simply put, the Government did not have at the time of the seizure and does not now have the facts to support the seizure of over $3 million from Hi-Tech (*i.e.*, the entirety of the money in its operating accounts) based upon allegedly illegal product sales, so its Complaint impermissibly relies upon its unsupported and vaguely stated beliefs and expectations, both with respect to the alleged illegal conduct and unspecified unlawful activity and the traceability of the funds to that

activity. As a result, neither the Government's allegations concerning illegal product sales nor money laundering are sufficient to state a claim with respect to over $3 million.

1. The Government Did Not Allege Crimes Sufficient to Create a Reasonable Belief that the Government will be Able to Demonstrate that Over $3 Million is Subject to Forfeiture.

In attempt to justify the cleaning out the entire balance of Hi-Tech's operating accounts to the tune of millions of dollars, the Government relies upon two sales transactions, relating to only five of Hi-Tech's products. The Complaint, however, conveniently fails to identify the dollar amounts involved in the transactions or the number of units sold. Regardless, the Complaint does not set forth a single fact providing for the inference that these two transactions resulted in proceeds of over $3 million, such that the totality of the funds seized could be traced to the two sales in that manner. Indeed, the Government essentially admits that the two transactions were small in scale by stating that the "events [are] believed to characterize the unlawful manner in which Hi-Tech, its principals, and related entities committed the crimes that led agents to seize the Defendant Property." Doc. 1 at ¶ 44.

What the Government believes, however, and what the Government "expects discovery to show" are not facts worthy of weight on a motion to dismiss. First, the Government's beliefs and expectations themselves are plainly *not* facts. The

Government, in explicitly characterizing the content of those paragraphs as beliefs and expectations, admits as much. Second, the beliefs and expectations stated are unsupported by factual allegations. The Complaint sets forth the details of two allegedly illegal sets of transactions, one in 2016 and one in 2017. Doc. 1 at ¶¶ 45, 54. These two sales alone are hardly sufficient to support a reasonable inference that there was a "widespread practice of manufacturing, marketing, and distributing false, mislabeled, and misbranded substances in violation of U.S. law that may have begun as early as 1997 or 1998," as the Government "expects discovery to show." Doc. 1 at ¶ 39. *See also id*. at ¶ 69 (stating that the "United States expects discovery in this case to yield additional evidence to support claims that Hi-Tech, Wheat, and others have engaged in countless, similar acts … that may have commenced as early as 1998"). These two sales alone are also insufficient to establish a reasonable belief that the Government can show that Hi-Tech, Wheat and others "thereafter invested profits from [such] violations," as the Government also apparently "expects" discovery to show. *Id*. at ¶ 70. This Court simply cannot consider such unsupported and conclusory guesses on a motion to dismiss. *See* Supp. R. G(2)(f) (requiring "sufficiently detailed facts"); *Marshall v. City of Cape Coral, Fla.,* 797 F.2d 1555, 1559 (11th Cir. 1986) ("[I]nferences based upon speculation are not reasonable."); *Penalbert-Rosa v. Fortuno-Burset*, 631 F.3d 592, 595 (1st Cir. 2011) ("[S]ome

allegations, while not stating ultimate legal conclusions, are nevertheless so threadbare or speculative that they fail to cross 'the line between the conclusory and the factual.'") (quoting *Twombly,* 550 U.S. at 557 n. 5); *Twombly*, 550 U.S. at 1965 ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.") (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235–236 (3d ed. 2004)).

This is, of course, not to mention that the Government's stated beliefs and expectations are so vaguely worded that they raise more questions than answers, thereby impermissibly depriving Hi-Tech of notice of the basis of the claims against the property. *See Two Parcels of Real Property*, 92 F.3d at 1126 (acknowledging that there must be "sufficient facts detailed in the complaint to put claimants on notice as to the Government's basis for seizure"). For instance, the Complaint is devoid of detail with respect to the "widespread" and "countless" illegal sales the Government believes occurred. The Complaint fails identify any products with respect to these beliefs and expectations, fails to identify any controlled substances, and fails to identify how the unidentified products were "false, mislabeled, and misbranded." Doc. 1 at ¶¶ 39, 69.

The Government's vagueness in this regard, coupled with its ambiguous language that the two described sales are only "believed to characterize" Hi-Tech's practices in an unspecified manner, and that the Government expects to discover acts that are "similar" in an unspecified manner, leaves Hi-Tech without notice of what the Government believes or expects that it did wrong. Doc. 1 at ¶¶ 44, 69. *See also Id*. at ¶ 44 (referring to unspecified "crimes that led agents to seize the Defendant Property"). Indeed, while also claiming that it "expects discovery to yield evidence that Hi-Tech … and others thereafter invested profits" from the unspecified legal violations, the Complaint is devoid of allegations concerning any investment. The vagueness and ambiguity of these "belief" and "expectation" paragraphs are inexcusable, and this is especially true where, as here, the paragraphs are not "throw ins;" they constitute all but the entire basis for seizing the vast amount of money taken. Such pleading does not suffice under Rule 8, much less the "more stringent" Supplemental Rule standard.

2. The Government Did Not Allege Sufficient Facts to Create a Reasonable Belief that the Government Can Prove the $3 Million is Traceable to the Vaguely-Alleged Crimes.

The Government's Complaint also fails to set forth facts to create a reasonable belief that the Government could show that the funds seized are "traceable" to the alleged crimes as required by Sections 981 and 881. The Government has not met

its pleading burden in this regard because, first, as discussed herein, the Complaint fails to sufficiently allege what crimes the $3 million is supposedly traceable to. The Complaint simply refers to unspecified, "widespread" and "countless" sales that are of unspecified illegality that occurred over the course of the past 20 or so years. Doc. 1 at ¶¶ 39, 69.

Second, even if it could be said that the Government sufficiently identified the illegalities that form the basis for forfeiture of over $3 million, which Hi-Tech contends it cannot, the Complaint sets forth no facts, much less "sufficiently detailed facts," providing for a reasonable belief that the over $3 million seized is traceable to those vague illegalities. When the government seizes property under Section 981 or Section 881, it must prove that the property is itself involved in, or is traceable to property involved in, a proscribed transaction. 18 U.S.C. § 981(a); 21 U.S.C. § 881(a). However:

> The tracing requirement [] poses particular problems in the case of money or other fungible property. After all, once money is deposited into a bank account, the government cannot trace the physical currency. Furthermore, how can the government trace fungible property, like money, back to proscribed conduct once it has been commingled with other fungible property?

United States v. Currency, 300,000 Seized from Bryant Bank Account No. XXX-XX-XXXX, 2013 WL 1498972, at *3 (N.D.Ala. 2013). Indeed, "[t]he mere pooling or commingling of tainted and untainted funds in an account does not, without more,

render the entire contents of the account subject to forfeiture." *See United States v. Puche*, 350 F.3d 1137, 1153 (11th Cir. 2003) (internal punctuation and citation omitted). *See also United States v. $688,670.42 Seized from Regions Bank Account No.* XXXXXX5028, 2011 WL 6759574, at *3 (11th Cir. Dec. 23, 2011) (Finding the trial court erred in granting the Government's motion to forfeit the entire balance of two bank accounts stating, "[w]e have not said that the proceeds forfeiture envisioned by § 981(a)(1)(C) amounts to forfeiture of any property commingled with the illegal proceeds.")

The tracing requirement is especially salient where, as here, the claimant conducts extensive legitimate business not implicated in the crimes alleged in the compliant. *See United States v. Two Parcels of Real Property Located in Russell County, Ala.*, 92 F.3d 1123, 1127 (11th Cir. 1996) (acknowledging that the Supplemental Rules' pleading standard requires the allegation of additional facts where the claimants are not "generally engaged in the drug business over a period of time [and] have no other source of income"); *see also United States v. $121,100.00 in U.S. Currency*, 999 F.2d 1503, 1507 (11th Cir. 1993) ("We hold that a large amount of currency, in and of itself, is insufficient to establish probable cause for forfeiture under 21 U.S.C. § 881(a)(6).")

In this case, however, the Government has pled no facts to support a belief that the over $3 million seized is traceable to "manufacturing and selling false, mislabeled, and misbranded controlled substances." The Government's beliefs and expectations aside, the Government has only alleged two sets of sales, and that proceeds from one of those sales, as well as consumer sales, went into the Touchmark account. Doc. 1 at ¶¶ 45, 49, 54, 57, 64. Even if this Court could reasonably infer from these facts that there were additional sales of the five allegedly illegal products, the Government has given this Court no basis for believing that the over $3 million in the Bank Accounts is traceable to these five products aone. Indeed, the subject products are but five of the "numerous" products distributed by Hi-Tech, and involve but one brand of Hi-Tech's "family of brands." *Id*. at ¶ 57. As acknowledged by the Complaint, Hi-Tech conducts undisputedly legitimate business not at issue in this case (or the indictment), and Hi-Tech conducts extensive business. *Id*. at ¶¶ 10, 25, 27, 28, 32-34, 57

Finally, while the fungible asset provision found in 18 U.S.C. § 984 can authorize seizure of substitute assets, there is a time limit of one year on any seizure sought under that provision. *Id*. § 984(b) ("No action pursuant to this section to forfeit property not traceable directly to the offense that is the basis for the forfeiture may be commenced more than 1 year from the date of the offense.") As a result, the

Government's attempt to broaden the scope of the alleged criminal activity with accusations of "widespread" and "countless" illegal sales dating back to 1997 or 1998 does nothing to further its cause. There are no facts tracing the $3 million seized to these decades of undescribed sales, and Government cannot seize substitute assets with respect to sales occurring before November 6, 2016, to include the Government's September 2016 undercover purchase.

3. The Government's Vague Allegations of Money Laundering Do Not Support the Seizure of Over $3 Million.

In order to state a claim under either 18 U.S.C. § 1956 or § 1957, the Government must first allege facts sufficient to create a reasonable belief that the Government can prove that money in the accounts constitutes the proceeds of or is derived from criminal activity. By definition, "money laundering" encompasses financial transactions "which in fact involve[] the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(A)(i). Similarly, 18 U.S.C. § 1957 prohibits monetary transactions "in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity." *Id*. at § 1957(a). The Government, however, failed to allege facts sufficient to meet its burden with respect to either of these Sections.

As set forth herein, the Government has failed to adequately identify the "specified unlawful activity" sufficient to justify its massive seizures, and has failed to trace the over $3 million seized to unlawful activity. Consequently, the Government has also failed to put forth sufficient facts to create a reasonable belief that the Government could prove that money in the Bank Accounts constitutes proceeds from, or is otherwise derived from, criminal activity as required by 18 U.S.C. §§ 1956 and 1957. The Government's money laundering allegations cannot serve to support a claim for forfeiture of over $3 million for this reason alone.

The Government, however, also fails to sufficiently establish that the over $3 million seized, or any significant portion thereof, was intended to promote unlawful activity as required by 18 U.S.C. § 1956(a)(1)(A)(i). The Complaint refers to "tainted" money being used to pay rent on one or more of Hi-Tech's business premises, Doc. 1 at ¶ 75, but this alone falls far short of materially contributing a reasonable belief that the Government could meet its burden with respect to the over $3 million at trial. While the Complaint goes on to state that it "expects discovery to show" additional transactions, as discussed herein, the Government's expectations are not facts that contribute to stating a claim.

This is, of course, not to mention that given the limited nature of the factual allegations addressing the two sales, coupled with the Government's vague and

sweeping speculation, it is unclear what illegal activity the millions in funds are supposedly promoting.

The Government also makes all but no attempt to meet 18 U.S.C. § 1957's $10,000 threshold requirement. The Complaint does not identify any transaction over $10,000, simply stating that the Government "expects" discovery will yield evidence to that effect. *Id*. at ¶¶ 76, 77. This is not sufficient under Rule 8, much less Supplemental Rule G.

Lastly, in the final paragraph of the "Money Laundering" portion of its Complaint, the Government alleges that "the United States expects that discovery will yield evidence that funds representing income from investment of profits from Hi-Tech's, Wheat's, Diversified's, and Schopp's violations of Title 21, United States Code, were among the Defendant property." *Id*. at ¶ 78. Again, however, the Complaint makes no mention of any investment, no mention of profit relating to any such investment, and fails to trace the money underlying any such investment to criminal activity.

IV. CONCLUSION

While the Complaint in this case may state a claim with respect to a limited amount of money, it utterly fails to do so with respect to over $3 million. The Government has failed to specify what unlawful activity allegedly underlies a

seizure of this magnitude and, in turn, failed to state sufficiently detailed facts to create a reasonable belief that the Government could prove the commission of the currently unspecified crimes relative to the over $3 million seized. Simply put, although the Government need not prove its claims at this point in the proceedings, the Government has the burden of coming forth with enough facts to state a claim for the funds taken. It has not done so, failing to raise its right to relief "above a speculative level."

The Government should not be permitted to infringe upon the property rights of citizens though reliance on speculation and unsupported conclusion. Indeed, as recognized by the Eleventh Circuit, "[w]e must not forget [] that at the core of this system lies the Constitution, with its guarantees of individuals' rights. We cannot permit these rights to become fatalities of the government's war on drugs." *$38,000.*00, 816 F.2d at 1549 (dismissing the Government's complaint for civil forfeiture).

Wherefore, for the aforementioned reasons, Hi-Tech Pharmaceuticals, Inc. respectfully requests that this Court dismiss the Government's Verified Complaint in its entirety.

This 4th day of December, 2017.

Respectfully submitted,

/s/ Arthur W. Leach

Arthur W. Leach
Georgia Bar No. 442025

The Law Office of Arthur W. Leach
5780 Windward Parkway, Suite 225
Alpharetta, Georgia 30005
404-786-6443
Art@ArthurWLeach.com

Counsel for Claimant Hi-Tech Pharmaceuticals, Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to L.R. 5.1C and 7.1D of the Northern District of Georgia, that the foregoing document complies with the font and point selections approved by the Court in L.R. 5.1C. The foregoing document was prepared on a computer using 14-point Times New Roman font.

/s/ Arthur W. Leach
Arthur W. Leach
Ga. Bar No. 442025
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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing MOTION TO DISMISS THE GOVERNMENT'S VERIFIED COMPLAINT FOR FAILURE TO STATE A CLAIM into this District's ECF System, which will automatically forward a copy to counsel of record in this matter.

This 4th day of December, 2017.

/s/ Arthur W. Leach
Arthur W. Leach
Georgia Bar No. 442025
Counsel for Claimant Hi-Tech Pharmaceuticals, Inc.

EXHIBIT A

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA *v.* JARED WHEAT, JOHN BRANDON SCHOPP, AND HI-TECH PHARMACEUTICALS, INC.	**UNDER SEAL** First Superseding Criminal Indictment No. 1:17-CR-0229

THE GRAND JURY CHARGES THAT:

Count One

Conspiracy to Commit Wire Fraud
(18 U.S.C. § 1349)

1. Beginning in or about March 2011, and continuing to on or about at least July 17, 2012, the exact dates being unknown, in the Northern District of Georgia and elsewhere, the defendants, JARED WHEAT, JOHN BRANDON SCHOPP, and HI-TECH PHARMACEUTICALS, INC., did knowingly and willfully combine, conspire, confederate, agree, and have a tacit understanding with each other and with other persons known and unknown to the Grand Jury to devise and intend to devise a scheme and artifice to defraud, and to obtain money and property by means of materially false and fraudulent pretenses and representations, and by the omission of material facts, well knowing and having reason to know that said pretenses and representations were and would be false and fraudulent when made and caused to be made and that said omissions were and would be material, and, in so doing, causing interstate wire communications

to be made in furtherance of the scheme and artifice to defraud, in violation of Title 18, United States Code, Section 1343.

Background

2. The United States Food and Drug Administration ("FDA") is the federal agency charged with the responsibility of protecting the health and safety of the American public by enforcing the Federal Food, Drug, and Cosmetic Act, Title 21, United States Code, Sections 301-399f ("FDCA"). The FDA ensures, among other things, that drugs are safe and effective for their intended uses and that drugs and foods bear labeling containing true and accurate information. The FDA's responsibilities under the FDCA include regulating the manufacturing, labeling, and distribution of all drugs and foods shipped or received in interstate commerce.

3. HI-TECH PHARMACEUTICALS, INC. ("HI-TECH") is a company incorporated in Georgia. HI-TECH manufactures and sells purported "dietary supplements," which are regulated as a "food" by the FDA.

4. JARED WHEAT owns and operates HI-TECH. WHEAT serves as the Chief Executive Officer, Chief Financial Officer, and Secretary for HI-TECH.

5. JOHN BRANDON SCHOPP worked as the Director of Contract Manufacturing for HI-TECH.

Export Certificates

6. Businesses that export products from the United States are sometimes requested by foreign customers to supply "export certificates" for FDA-regulated

products. The FDA is not required by law to issue export certificates, although it does provide this service as agency resources permit.

7. Upon application by a food manufacturer, the FDA's Center for Food Safety and Nutrition ("CFSAN") will issue a "Certificate of Free Sale" for a particular food product, including a dietary supplement, indicating that the food product is marketed in the United States and eligible for export if certain statutory provisions are met.

Current Good Manufacturing Practice Compliance

8. Under the FDCA, a dietary supplement is deemed adulterated if it has been prepared, packed, or held under conditions that do not meet current good manufacturing practice ("GMP") regulations. Because the FDA does not "certify" that dietary supplement manufacturers comply with current GMP regulations, in some instances dietary supplement manufacturers will seek GMP audit reports and certificates from third-party independent companies or bodies. Such GMP audit reports and certificates are sought by dietary supplement manufacturers as a means to, among other things, substantiate the quality of their products. In addition, some foreign countries will not allow the importation of dietary supplements from the United States without documentation that the dietary supplement manufacturer is GMP compliant.

Manner and Means

9. WHEAT, SCHOPP and HI-TECH sought to enrich themselves unjustly by distributing to prospective and current customers, via email, false, fraudulent, and misleading documents and representations

regarding the regulatory compliance of HI-TECH and its products, including false, fraudulent, and misleading FDA Certificates of Free Sale, GMP certificates, and GMP audit reports.

10. WHEAT and SCHOPP caused false and fraudulent documents purporting to be FDA Certificates of Free Sale to be delivered via email to customers and prospective customers of HI-TECH. In fact, the FDA had not issued Certificates of Free Sale to HI-TECH on the dates listed for the products identified therein. The purported Certificates of Free Sale transmitted via email by WHEAT and SCHOPP contained unauthorized signatures of government officials, as well as unauthorized government agency seals, to make them appear legitimate.

11. WHEAT and SCHOPP caused false and fraudulent GMP certificates and audit reports from a purported third-party independent auditor, "PharmaTech", to be delivered via email to customers and prospective customers of HI-TECH. For example, a GMP certificate delivered via email to customer M.M. on or about July 17, 2012, contained a forged and unauthorized signature of an individual with initials G.G., who was falsely identified on the certificate as a "General Manager" for PharmaTech. In fact, G.G. never worked for PharmaTech. In addition, the email communication to customer M.M. contained a material omission in that it failed to disclose that PharmaTech was not an independent third-party auditor of HI-TECH, but was actually operated and controlled by WHEAT himself.

All in violation of Title 18, United States Code, Section 1349.

Counts Two Through Three
Wire Fraud
(18 U.S.C. §§ 1343 and 2)

12. The Grand Jury re-alleges and incorporates by reference the factual allegations set forth above in paragraphs 1 through 11 as if fully set forth herein.

13. Beginning in or about March 2011, and continuing to on or about at least July 17, 2012, the exact dates being unknown, in the Northern District of Georgia and elsewhere, the defendants, JARED WHEAT, JOHN BRANDON SCHOPP and HI-TECH PHARMACEUTICALS, INC., aided and abetted by each other and others known and unknown to the Grand Jury, knowingly devised and intended to devise a scheme and artifice to defraud, and to obtain money and property by means of materially false and fraudulent pretenses and representations, and by the omission of material facts, well knowing and having reason to know that said pretenses and representations were and would be false and fraudulent when made and caused to be made and that said omissions were and would be material.

14. On or about the dates listed below for each count, in the Northern District of Georgia and elsewhere, the defendants WHEAT, SCHOPP, and HI-TECH, aided and abetted by each other and others known and unknown to the Grand Jury, for the purpose of executing and attempting to execute the aforementioned scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent pretenses and representations, and by the omission of material facts, did, with intent to defraud, cause to be transmitted by means of wire communication in interstate and foreign commerce certain

writings, signs, signals and sounds, that is, the following email communications to a customer of HI-TECH identified by initials below:

COUNT	DATE	WIRE COMMUNICATION
2	7/17/2012	Email from WHEAT to customer M.M. transmitting false GMP certificate from PharmaTech
3	7/17/2012	Email from WHEAT to customer M.M. transmitting false GMP audit report from PharmaTech

All in violation of Title 18, United States Code, Sections 1343 and 2.

Count Four
Money Laundering Conspiracy
(18 U.S.C. § 1956(h))

15. The Grand Jury re-alleges and incorporates by reference the factual allegations set forth above in paragraphs 1 through 11 as if fully set forth herein.

16. Beginning in or about March 2011, and continuing to on or about at least July 25, 2012, the exact dates being unknown, in the Northern District of Georgia and elsewhere, the defendants, JARED WHEAT and HI-TECH PHARMACEUTICALS, INC., did knowingly combine, conspire, and agree with each other and with others, both known and unknown to the Grand Jury, to commit offenses against the United States in violation of Title 18, United States Code, Section 1957, to wit: to knowingly engage and attempt to engage in monetary transactions by, through, or to a financial institution, affecting interstate and foreign commerce, in criminally derived property of a value

greater than $10,000, such property having been derived from a specified unlawful activity, that is, wire fraud, in violation of 18 U.S.C. § 1343; in violation of Title 18, United States Code, Section 1957.

All in violation of Title 18, United States Code, Section 1956(h).

Counts Five Through Nine
Money Laundering
(18 U.S.C. §§ 1957 and 2)

17. The Grand Jury re-alleges and incorporates by reference the factual allegations set forth above in paragraphs 1 through 11 as if fully set forth herein.

18. On or about the dates listed below for each count, in the Northern District of Georgia and elsewhere, the defendants, JARED WHEAT and HI-TECH PHARMACEUTICALS, INC., aided and abetted by each other and others known and unknown to the Grand Jury, did knowingly engage and attempt to engage in monetary transactions by, through or to a financial institution, affecting interstate commerce, as described below, each such transaction knowingly involving criminally derived property of a value greater than $10,000, such property having been derived from a specified unlawful activity, that is, wire fraud, in violation of Title 18, United States Code, Section 1343, each transaction constituting a separate count as set forth below:

COUNT	DATE	MONETARY TRANSACTION
5	6/28/2012	Check #2080 issued from Chase Bank Account *0562 in the name of Affiliated Distribution to WHEAT in the amount of $600,000
6	7/6/2012	Check #2112 issued from Chase Bank Account *0562 in the name of Affiliated Distribution to WHEAT in the amount of $350,000
7	7/12/2012	Transfer of $39,080.86 by WHEAT from Chase Bank Account *0562 in the name of Affiliated Distribution to Fifth Third Bank Account in the name of Elite Manufacturing
8	7/19/2012	Transfer of $42,065.87 by WHEAT from Chase Bank Account *0562 in the name of Affiliated Distribution to Fifth Third Bank Account in the name of Elite Manufacturing
9	7/25/2012	Transfer of $44,000 by WHEAT from Chase Bank Account *0562 in the name of Affiliated Distribution to Fifth Third Bank Account in the name of Elite Manufacturing

All in violation of Title 18, United States Code, Sections 1957 and 2.

Count Ten

Conspiracy to Introduce Misbranded Drugs into Interstate Commerce
(18 U.S.C. § 371)

19. The Grand Jury re-alleges and incorporates by reference the factual allegations set forth above in paragraphs 2 through 4 as if fully set forth herein.

20. From in or about July 2009 through at least in or about June 2014, in the Northern District of Georgia and elsewhere, the defendants, JARED WHEAT and HI-TECH PHARMACEUTICALS, INC., did knowingly and willfully combine, conspire, confederate, agree, and have a tacit understanding with each other and with other persons known and unknown to the Grand Jury, to introduce and

deliver for introduction, and cause to be introduced and delivered for introduction, into interstate commerce, with intent to defraud and mislead, a drug within the meaning of Title 21, United States Code, Section 321(g)(1)(C), that was misbranded under Title 21, United States Code, Section 352(a), in violation of Title 21, United States Code, Sections 331(a) and 333(a)(2).

MANNER AND MEANS

The manner and means by which the defendants and others sought to accomplish the objects of the conspiracy included:

21. WHEAT caused HI-TECH to manufacture and produce, among other things, Choledrene, which was labeled and marketed as a dietary supplement.

22. In fact, the Choledrene manufactured and produced by HI-TECH, at the direction of WHEAT, contained lovastatin, the active ingredient in several FDA-approved prescription drugs. Lovastatin was not listed as an ingredient on HI-TECH's labeling of Choledrene. Due to the presence of lovastatin, Choledrene was not a "dietary supplement" under the FDCA, and instead was a "drug" because it was an article other than food intended to affect the structure or function of the human body.

23. WHEAT caused HI-TECH to distribute and sell Choledrene with false and misleading labeling that failed to declare lovastatin as an ingredient.

OVERT ACTS

In furtherance of the conspiracy and to affect the objects thereof, the following overt acts, among others, were committed in the Northern District of Georgia and elsewhere, by at least one co-conspirator:

24. On or about September 17, 2009, WHEAT caused HI-TECH to distribute approximately 24 bottles of Choledrene to a customer in North Carolina.

25. On or about December 1, 2009, WHEAT caused HI-TECH to distribute approximately 36 bottles of Choledrene to a customer in Florida.

26. On or about December 6, 2010, WHEAT caused HI-TECH to distribute approximately 12 bottles of Choledrene to a customer in California.

27. On or about January 31, 2011, WHEAT caused HI-TECH to distribute approximately 36 bottles of Choledrene to a customer in Florida.

28. On or about September 12, 2012, WHEAT caused HI-TECH to distribute approximately 24 bottles of Choledrene to a customer in Louisiana.

29. On or about August 22, 2013, WHEAT caused HI-TECH to distribute approximately 1 bottle of Choledrene to a customer in Louisiana.

30. On or about November 8, 2013, WHEAT caused HI-TECH to distribute approximately 12 bottles of Choledrene to a customer in North Carolina.

31. On or about February 27, 2014, WHEAT caused HI-TECH to distribute approximately 24 bottles of Choledrene to a customer in Florida.

32. On or about May 22, 2014, WHEAT caused HI-TECH to distribute approximately 2 bottles of Choledrene to a customer in North Carolina.

33. On or about June 10, 2014, WHEAT caused HI-TECH to distribute approximately 2 bottles of Choledrene to a customer in Texas.

All in violation of Title 18, United States Code, Section 371.

Count Eleven

Introduction into Interstate Commerce of a Misbranded Drug
(21 U.S.C. §§ 331(a) and 333(a)(2), and 18 U.S.C. § 2)

34. The Grand Jury re-alleges and incorporates by reference the factual allegations set forth above in paragraphs 2 through 4, and 20 through 23, as if fully set forth herein.

35. On or about August 22, 2013, in the Northern District of Georgia and elsewhere, the defendants, JARED WHEAT and HI-TECH PHARMACEUTICALS, INC., aided and abetted by each other and others known and unknown to the Grand Jury, with the intent to defraud and mislead, did introduce and deliver for introduction, and cause the introduction and delivery for introduction, into interstate commerce from Georgia to Louisiana, of a drug, namely Choledrene, that was misbranded within the meaning of Title 21, United States Code, Section 352(a), in that its labeling was false and misleading because it failed to list lovastatin as an ingredient.

All in violation of Title 21, United States Code, Sections 331(a) and 333(a)(2), and Title 18, United States Code, Section 2.

Count Twelve
Conspiracy to Manufacture and Distribute Controlled Substances
(21 U.S.C. § 846)

36. The Grand Jury re-alleges and incorporates by reference the factual allegations set forth above in paragraphs 2 through 4 as if fully set forth herein.

37. Beginning in at least September 2016 through at least August 2017, in the Northern District of Georgia and elsewhere, the defendants, JARED WHEAT and HI-TECH PHARMACEUTICALS, INC., did knowingly and willfully combine, conspire, confederate, agree, and have a tacit understanding with each other and with other persons known and unknown to the Grand Jury, to knowingly and intentionally manufacture, distribute, and dispense, and possess with the intent to manufacture, distribute, and dispense, anabolic steroids, which are Schedule III Controlled Substances, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(E).

MANNER AND MEANS

The manner and means by which the defendants and others sought to accomplish the objects of the conspiracy included:

38. WHEAT caused HI-TECH to manufacture and distribute purported "pro-hormone dietary supplements" for increased muscle gain, which in fact contained Schedule III Controlled anabolic steroids not properly declared as ingredients on the products' respective labeling.

39. For example, WHEAT caused HI-TECH to manufacture and distribute the following purported "dietary supplement" products, all of which contained Schedule III Controlled anabolic steroids:

(a) Superdrol, which contained androstanedione, 4-androstenediol and/or 5-androstenediol, and boldione;

(b) Equibolin, which contained 4-androstenediol and/or 5-androstenediol;

(c) 1-AD, which contained boldione, androstanedione, 4-androstenediol and/or 5-androstenediol;

(d) 1-Testosterone, which contained boldione and androstanedione; and

(e) Androdiol, which contained 4-androstenediol and/or 5-androstenediol.

All in violation of Title 21, United States Code, Section 846.

Counts Thirteen Through Fifteen
Manufacturing and Distributing Controlled Substances
(21 U.S.C. § 841(a)(1) and (b)(1)(E), and 18 U.S.C. § 2)

40. The Grand Jury re-alleges and incorporates by reference the factual allegations set forth above in paragraphs 2 through 4, and 37 through 39, as if fully set forth herein.

41. On or about the dates set forth below, each date constituting a separate count of the Indictment, in the Northern District of Georgia and elsewhere, the defendants, JARED WHEAT and HI-TECH PHARMACEUTICALS, INC., aided and abetted by each other and others known and unknown to the Grand Jury, did knowingly and intentionally manufacture, distribute, and dispense, and possess with the intent to manufacture, distribute, and dispense, purported "dietary supplement" products, which contained Schedule III Controlled anabolic steroids, as more fully described below:

COUNT	DATE	PRODUCTS/ SCHEDULE III CONTROLLED ANABOLIC STEROIDS
13	9/30/16	(a) 1-AD/androstanedione and boldione (b) 1-Testosterone/androstanedione and boldione (c) Androdiol/4-androstenediol and/or 5-androstenediol
14	10/10/16	(a) Superdrol/androstanedione (b) Equibolin/4-androstenediol and/or 5-androstenediol
15	8/21/17	(a) 1-AD/4-androstenediol and/or 5-androstenediol (b) Androdiol/4-androstenediol and/or 5-androstenediol (c) Superdrol/androstanedione, 4-androstenediol and/or 5-androstenediol, and boldione (d) Equibolin, 4-androstenediol and/or 5-androstenediol

All in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(E), and Title 18, United States Code, Section 2.

Counts Sixteen Through Eighteen
Introducing Misbranded Drugs into Interstate Commerce
(21 U.S.C. §§ 331(a) and 333(a)(2), and 18 U.S.C. § 2)

42. The Grand Jury re-alleges and incorporates by reference the factual allegations set forth above in paragraphs 2 through 4, and 37 through 39, as if fully set forth herein.

43. On or about the dates set forth below, each date constituting a separate count of the Indictment, in the Northern District of Georgia and elsewhere, the defendants, JARED WHEAT and HI-TECH PHARMACEUTICALS, INC., aided and abetted by each other and others known and unknown to the Grand Jury, with the intent to defraud and mislead, did introduce and deliver for introduction, and cause the introduction and delivery for introduction, into interstate commerce, drugs that were misbranded within the meaning of Title 21, United States Code, Section 352(a), in that the drugs' respective labeling was false and misleading because such labeling failed to properly declare Schedule III Controlled anabolic steroids in the ingredients, as more fully described below:

COUNT	DATE	MISBRANDED DRUG/ SCHEDULE III CONTROLLED ANABOLIC STEROIDS NOT DECLARED AS INGREDIENT	SHIPMENT
16	9/30/16	(a) 1-AD/androstanedione and boldione (b) 1-Testosterone/androstanedione and boldione (c) Androdiol/4-androstenediol and/or 5-androstenediol	GA to FL

COUNT	DATE	MISBRANDED DRUG/ SCHEDULE III CONTROLLED ANABOLIC STEROIDS NOT DECLARED AS INGREDIENT	SHIPMENT
17	10/10/16	(a) Superdrol/androstanedione (b) Equibolin/ 4-androstenediol and/or 5-androstenediol	GA to FL
18	8/21/17	(a) 1-AD/4-androstenediol and/or 5-androstenediol (b) Androdiol/4-androstenediol and/or 5-androstenediol (c) Superdrol/androstanedione, 4-androstenediol and/or 5-androstenediol, and boldione (d) Equibolin/ 4-androstenediol and/or 5-androstenediol	GA to NC

All in violation of Title 21, United States Code, Sections 331(a) and 333(a)(2), and Title 18, United States Code, Section 2.

FORFEITURE PROVISION

44. Upon conviction of one or more of the offenses alleged in Counts One through Three of this Indictment, the defendants, JARED WHEAT, JOHN BRANDON SCHOPP, and HI-TECH PHARMACEUTICALS, INC., shall forfeit to the United States any property, real or personal, which constitutes or is derived from gross proceeds traceable to such violations, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section

2461(c), including but not limited to a money judgment in the amount of the proceeds of the offenses.

45. Upon conviction of one or more of the money laundering offenses alleged in Counts Four through Nine of this Indictment, in violation of Title 18, United States Code, Sections 1956(h) and 1957, the defendants, JARED WHEAT and HI-TECH PHARMACEUTICALS, INC., shall forfeit to the United States any and all property, real or personal, involved in such offenses and all property traceable to such offenses, pursuant to Title 18, United States Code, Section 982(a)(1), including, but not limited to a money judgment in the amount of the proceeds of the offenses.

46. Upon conviction of one or more of the offenses alleged in Counts Twelve through Fifteen of this Indictment, the defendants, JARED WHEAT and HI-TECH PHARMACEUTICALS, INC., shall forfeit to the United States any property constituting or derived from proceeds obtained directly or indirectly as a result of the offenses and any property used or intended to used, in any manner or part, to commit or facilitate the commission of the offenses, pursuant to Title 21, United States Code, Section 853, including, but not limited to a money judgment in the amount of the proceeds of the offenses.

47. If, as a result of any act or omission of the defendants, JARED WHEAT, JOHN BRANDON SCHOPP, and HI-TECH PHARMACEUTICALS, INC., property subject to forfeiture cannot be located upon the exercise of due diligence; has been transferred to, sold to, or deposited with, a third party; has been placed beyond the jurisdiction of the court; has been substantially

diminished in value; or has been commingled with other property, which cannot be divided without difficulty, it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b) and Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of the defendants up to the value of the forfeitable property.

A True BILL

FOREPERSON

JOHN A. HORN
United States Attorney

Steven D. Grimberg
Assistant United States Attorney
Georgia Bar No. 312144

600 U.S. Courthouse
75 Ted Turner Drive, S.W.
Atlanta, GA 30303
404-581-6000; Fax: 404-581-6181

EXHIBIT B

DUPLICATE

(USAO GAN 6/10) Seizure Warrant t

United States District Court

Northern District of Georgia

SEIZURE WARRANT

In the Matter of the Seizure of:

Any and all funds maintained in Touchmark National Bank bank account number [redacted]0855

Case Number:
1:17-MJ-839
UNDER SEAL

TO: FDA Special Agent Brian Kriplean and any Authorized Officer of the United States:

Affidavit(s) having been made before me by Brian Kriplean who has reason to believe that there is now certain property which is subject to forfeiture to the United States, namely:

Any and all funds maintained in Touchmark National Bank bank account number [redacted]0855

I find that the affidavit(s) establishes probable cause to believe that the property so described is subject to seizure and civil and criminal forfeiture pursuant to 18 U.S.C. §§ 981, 982, and 21 U.S.C. § 853, and 28 U.S.C. § 2461, for violations of 21 U.S.C. §§ 841, 846 and 18 U.S.C. § 1956, as proceeds of, property involved in, and property facilitating the offenses.

YOU ARE HEREBY COMMANDED to seize within 14 days the property specified by serving this warrant in the daytime (6 a.m. – 10 p.m.). You must give a copy of this warrant and a receipt for the property seized to the person from whom, or from whose premises, the property was taken, or leave a copy of the warrant and receipt at the place where the property was seized. The officer executing this warrant, or an officer present during the execution of the warrant, must prepare a written inventory of the property seized as required by law, and promptly return this warrant and inventory to Magistrate Judge Alan J. Baverman.

October 3, 2017 @ 12:15 pm
Date

at Atlanta, Georgia
City and State

Alan J. Baverman
United States Magistrate Judge
Name and Title of Judicial Officer

Signature of Judicial Officer

AUSA Kelly K. Connors /404-581- 4639

(USAO GAN 6/10) Seizure Warrant (Page 2)

RETURN

Case No:	Date and time warrant executed:	Copy of warrant and inventory left with:
Inventory made in the presence of		
[Inventory of the property taken][Name of any persons(s) seized]		

CERTIFICATION

I declare under penalty of perjury that this inventory is correct and was returned along with the original warrant to the designated judge.

_____ _____

Date Executing officer's signature

_____

Printed name and title

EXHIBIT C

DUPLICATE

(USAO GAN 6/10) Seizure Warrant t

United States District Court

Northern District of Georgia

SEIZURE WARRANT

In the Matter of the Seizure of:

Any and all funds maintained in Bank of America bank account number [redacted]1840

Case Number:
1:17-MJ-840
UNDER SEAL

TO: FDA Special Agent Brian Kriplean and any Authorized Officer of the United States:

Affidavit(s) having been made before me by Brian Kriplean who has reason to believe that there is now certain property which is subject to forfeiture to the United States, namely:

Any and all funds maintained in Bank of America bank account number [redacted]840

I find that the affidavit(s) establishes probable cause to believe that the property so described is subject to seizure and civil and criminal forfeiture pursuant to 18 U.S.C. §§ 981, 982, and 21 U.S.C. § 853, and 28 U.S.C. § 2461, for violations of 21 U.S.C. §§ 841, 846 and 18 U.S.C. § 1956, as proceeds of, property involved in, and property facilitating the offenses.

YOU ARE HEREBY COMMANDED to seize within 14 days the property specified by serving this warrant in the daytime (6 a.m. – 10 p.m.). You must give a copy of this warrant and a receipt for the property seized to the person from whom, or from whose premises, the property was taken, or leave a copy of the warrant and receipt at the place where the property was seized. The officer executing this warrant, or an officer present during the execution of the warrant, must prepare a written inventory of the property seized as required by law, and promptly return this warrant and inventory to Magistrate Judge Alan J. Baverman.

October 3, 2017 @ 12:15 pm — at Atlanta, Georgia
Date — City and State

Alan J. Baverman
United States Magistrate Judge
Name and Title of Judicial Officer

AYB
Signature of Judicial Officer

AUSA Kelly K. Connors /404-581- 4639

(USAO GAN 6/10) Seizure Warrant (Page 2)

RETURN

Case No:	Date and time warrant executed:	Copy of warrant and inventory left with:
Inventory made in the presence of		
[Inventory of the property taken][Name of any persons(s) seized]		

CERTIFICATION

I declare under penalty of perjury that this inventory is correct and was returned along with the original warrant to the designated judge.

_____ _____

Date Executing officer's signature

_____

Printed name and title

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, v. JARED WHEAT, JOHN BRANDON SCHOPP, AND HI-TECH PHARMACEUTICALS, INC., Defendants.	No. 1:17-CR-0229

DEFENDANTS' EMERGENCY MOTION FOR RELEASE OF IMPROPERLY SEIZED ASSETS AND BRIEF IN SUPPORT

COME NOW Defendants Jared Wheat, John Brandon Schopp and Hi-Tech Pharmaceuticals, Inc. ("Hi-Tech"), by and through their undersigned counsel, and, pursuant to Fed. R. Crim. P. 41(g), file this Emergency Motion for Release of Improperly Seized Assets and Brief in Support. In support of this motion, Defendants respectfully show this Court as follows:

I. INTRODUCTION

On October 3, 2017, the magistrate judge authorized seizure warrants for two bank accounts belonging to Defendant Hi-Tech. EXHIBIT A, Seizure Warrant 1-17-MJ-839 (Touchmark National Bank account number XXXXX0855, dated October 3, 2017) and EXHIBIT B, Seizure Warrant 1-17-MJ-840 (Bank of America account number XXXXXXXX1840, dated October 3, 2017).[1] Based on those warrants, the Government seized all the funds in both accounts, first on October 4, 2017, and then once again seizing all of the funds from one of the accounts on October 12, 2017. More than $3.4 million of Hi-Tech's funds were seized. The two bank accounts are used by Hi-Tech to accept payments for their products and manufacturing services, and to pay their operating expenses, including rent, payroll, employee health care, taxes, attorneys' fees, and other expenditures of the business. Declaration of Michelle Harris, EXHIBIT E at ¶¶ 14-15.

As will be demonstrated below, contrary to the applicable statutory provisions governing such seizures, and contrary to prevailing case law, the

[1] The same affidavit was used in both seizure applications, so will be referred to in the singular in this motion. The application and the affidavit for the Touchmark account is attached as EXHIBIT C; the application and the affidavit for the Bank of America account is attached as EXHIBIT D.

Government has sought and obtained provisional relief far in excess of what the law allows. By its actions, the Government has wrongfully deprived Hi-Tech of significant funds that were derived from indisputably legitimate business activities, thereby jeopardizing the ability of the business to continue to function, as well as its ability to employ counsel to defend against the actions that the Government has initiated. These seizures violate Defendants' rights under the Fifth Amendment to the United States Constitution, and Defendants are entitled to relief. Moreover, the Government is seeking to gain an unfair and legally unjustifiable tactical advantage in the criminal proceedings through these seizures. Defendants seek emergency relief in light of the substantial and ongoing disruption of their business and their need to defend against the criminal charges in this matter.

For the reasons set out below, Defendants respectfully submit that under Rule 41(g), this Court should return all or at least the portion of the funds that were improperly seized and dissolve the magistrate judge's seizure warrants so that the Government cannot continue to seize funds from these accounts or any other accounts.

II. STATEMENT OF FACTS

A. Hi-Tech's Business

Hi-Tech is a manufacturer, distributor, wholesaler, and retailer of dietary supplement products. Hi-Tech manufactures and sells products under the Hi-Tech brand and several related brands. In total, Hi-Tech manufactures and sells approximately 215 different products under its brand or related brands. Thousands of retailers sell Hi-Tech Products, including major retail outlets such as GNC, Vitamin Shoppe, Kroger, Meijer Drugs, and Seven Eleven. *See* Affidavit of Michelle Harris, EXHIBIT E at ¶¶ 4, 5, 8. Hi-Tech also sells its products directly to consumers though various retail websites, with approximately 195 different products available through these websites. *Id*. at ¶ 6.

Hi-Tech also "contract manufactures" dietary supplements for other sellers in the marketplace. Over the past year, Hi-Tech had approximately 30 contract manufacturing customers, and manufactured approximately 290 different products for these customers. *Id*. at ¶ 7.

Proceeds from the above activities would be deposited in the two accounts subject to the seizure warrants, either account number XXXXXX10855 at Touchmark National Bank ("Touchmark account") or account number XXXXXXXX1840 at Bank of America ("Bank of America account"). *Id*. at ¶¶ 9-

14. The Bank of America account was used to pay the ongoing operating expenses of Hi-Tech. *Id*. at ¶ 15. The Touchmark account was used to pay the company's legal fees and advertising expenses. *Id.*

B. The Allegations in the First Superseding Indictment

On September 28, 2017, a federal grand jury in the Northern District of Georgia returned a First Superseding Indictment (hereinafter "indictment") against Hi-Tech, Jared Wheat, and John Brandon Schopp. Doc. 7. The eighteen-count indictment includes charges of conspiracy, wire fraud, money laundering, introduction of misbranded drugs, and manufacture and distribution of a controlled substance. *Id*.

As will be shown below, the timing of the transactions relied on by the Government to justify a significant portion of the seizures was simply out of sync with the allegations contained in the indictment. This, of course, has a direct impact on the existence of probable cause to conclude that the monies derived from those transactions will ultimately prove forfeitable. As a consequence, it is necessary to set out the charges contained in the indictment, as well as the dates underlying the allegations.

Count One charges a conspiracy to commit wire fraud, in violation of 18 U.S.C § 1349. Doc. 7 at ¶¶ 1-11. The conspiracy is alleged to encompass from "in

or about March 2011, and continuing to on or about at least July 17, 2012, the exact dates being unknown, …" *Id*. at 1.

Counts Two and Three contain the only substantive wire fraud charges, in violation of 18 U.S.C §§ 1343 and 2. *Id*. at ¶¶ 12-14. Count Two relates to an email occurring on July 17, 2012; Count Three relates to a second email, also on July 17, 2012. *Id*. at ¶ 14.

Count Four charges a money laundering conspiracy, in violation of 18 U.S.C. § 1956(h), to violate 18 U.S.C. § 1957. *Id.* at ¶¶ 15-16. The conspiracy is alleged to encompass from "in or about March 2011, and continuing to on or about at least July 17, 2012, the exact dates being unknown, …" *Id*. at ¶ 16. The specified unlawful activity is "wire fraud, in violation of 18 U.S.C. § 1343;…" *Id*. at ¶ 16.

Counts Five through Nine set out five substantive counts of money laundering, in violation of 18 U.S.C. §§ 1957 and 2. The specified unlawful activity is wire fraud, in violation of 18 U.S.C. § 1343. *Id*. at 17-18. Count Five alleges a check in the amount of $600,000, dated June 28, 2012. *Id*. at ¶ 18. Count Six alleges a check in the amount of $350,000, dated July 6, 2012. *Id.* Count Seven alleges a transfer of $39,080.86 on July 12, 2012. *Id*. Count Eight alleges a transfer of $42,065.87 on July 19, 2012. *Id*. And Count Nine alleges a transfer of $44,000 on July 25, 2012. *Id*. at ¶ 18.

Count Ten charges a conspiracy to introduce misbranded drugs into interstate commerce, in violation of 18 U.S.C § 371, in conjunction with 21 U.S.C. §§ 321(g)(1), 352(a) and 331(a) and 333(a)(2). The conspiracy is alleged to encompass "from in or about July 2009 though at least in or about June 2014,…" *Id*. at ¶¶ 19-33. The charge is based on sales of a Hi-Tech product named Choledrene, which the indictment alleges contained lovastatin, the active ingredient in several FDA-approved prescription drugs, without listing it as an ingredient. *Id*. at 22. The indictment alleges ten overt acts, each involve multiple-bottle sales of Choledrene on different dates ranging from September 17, 2009, up to June 10, 2014. *Id.* at ¶¶ 24-33.

Count Eleven charges a single substantive count of introduction of a misbranded drug (Choledrene) into interstate commerce, occurring on or about August 22, 2013, in violation of 21 U.S.C. §§ 331(a), 333(a)(2) and 18 U.S.C. § 2. *Id*. at 34-35.

Count Twelve charges a conspiracy to manufacture and distribute controlled substances, in violation of 21 U.S.C. § 846. *Id.* at ¶¶ 36-39. The conspiracy is alleged to have run from: "[b]eginning in at least September 2016 though at least August 2017, …" *Id*. at 37. According to the indictment, Defendant Wheat caused Hi-Tech to manufacture and distribute "purported 'pro-hormone dietary

supplements,'" that in fact contained Schedule III Controlled anabolic steroids, which were not properly declared as ingredients on the label. *Id.* at 36-39.

Counts Thirteen through Fifteen set out three substantive counts of manufacturing and distributing controlled substances, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(E) and 18 U.S.C. § 2, again involving anabolic steroids. *Id.* at ¶¶ 40-41. Count Thirteen is alleged to have occurred on September 30, 2016; Count Fourteen on October 10, 2016; and Count Fifteen on August 21, 2017. *Id.* at ¶ 41.

Finally, Counts Sixteen through Eighteen charge three counts of introduction of misbranded drugs in interstate commerce, in violation of 21 U.S.C. §§ 331(a), 333(a)(2) and 18 U.S.C. § 2. *Id*. at ¶¶ 42-43. Again, the drug alleged is anabolic steroids. *Id.* Count Sixteen is alleged to have occurred on September 30, 2016; Count Seventeen on October 10, 2016; and Count Eighteen on August 21, 2017. *Id*. at ¶ 43.[2]

[2] The indictment also contains, however, does not identify any specific assets or bank accounts allegedly subject to forfeiture. *Id*. at ¶¶ 44-47.

C. The Government's Seizure of Hi-Tech's Bank Accounts

The magistrate judge authorized the seizure warrants sought by the Government on October 3, 2017. EXHIBITS A and B at 1. In the ensuing days, the Government seized:

1. $1,810,490 from Hi-Tech's account at Touchmark National Bank, on October 4, 2017

2. $1,225,827.11 from Hi-Tech's account at Bank of America, on October 4, 2017; and

3. $424,009.85 from Hi-Tech's account at Bank of America, on October 12, 2017.

EXHIBIT E at ¶¶ 9, 10 and 11.

The total amount seized is **$3,460,326.90**. On each occasion, the Government seized *all* of the monies in each account. Notably, the funds seized in the third seizure, on October 12, 2017, were funds posted into that account after the Government's seizure on October 4, 2017. Once again, the Government took all of the monies in the account.[3]

[3] Defendants are unaware of the issuance of any additional seizure warrants other than the two warrants issued on October 3, 2017, that would justify the second seizure of funds from the Bank of America account. Apparently the Government believes it can treat a seizure warrant as a continuing garnishment, allowing it to seize monies on a continuous basis. Because of this, in addition to seeking return of any seized money as to which the Government cannot show probable cause that the property at issue will ultimately be proved forfeitable, Defendants are requesting that this Court dissolve the seizure order of October 3,

As set out in the Harris declaration, EXHIBIT E at ¶¶ 13-14, the funds seized were the proceeds from *all* of Hi-Tech's activities, including contract manufacturing,[4] and were not limited to proceeds from transactions that the Government specified in its application for a seizure warrant or that corresponded with the allegations contained in the indictment. *Id*.

As a direct consequence of the breadth of the Government's seizures from these two accounts, Hi-Tech's ability to function as a business has been severely disrupted. For instance, again as set out in the Harris Declaration, as a result of these seizures, approximately 30 Hi-Tech checks issued to vendors were returned for insufficient funds, as were three checks written to attorneys. *Id*. at ¶¶ 16, 17. Because of these three seizures, Hi-Tech has already been forced to lay off approximately 70 factory workers. If the bulk of the seized monies are not returned to Hi-Tech in the immediate future, Hi-Tech will be forced to lay off additional employees, including sales representatives and office personnel. *Id*. at ¶ 18.

D. The Government's Affidavit in Support of Application for the Seizure Warrants

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2017, so that the Government cannot continue to seize funds that are deposited in the two accounts.

[4] Customers of Hi-Tech would pay for their purchases through various means, including credit cards, COD, and, in the case of major customers who purchased Hi-Tech products for resale to retail customers, by wire transfers in advance of receiving the products. EXHIBIT E at ¶¶ 14.

The Government in this case did not obtain a finding of probable cause from the grand jury with respect to the forfeiture of these bank accounts, *see* Doc. 7 at ¶¶ 44-47, and the Government did not apply for a pretrial restraining order as provided for by 21 U.S.C. § 853(e). Instead, the Government applied for seizure warrants for "any and all funds" in the Touchmark and Bank of America accounts. EXHIBITS C and D at ¶ 2. In support of its warrant application for both seizures, the Government submitted a 21-page, 45-paragraph affidavit. The affidavit sets out the Government's purported showing of probable cause to support the seizure of the two bank accounts in ¶¶ 20-41, and the information pertaining to the relevant bank records in ¶¶ 42-43, followed by the fact that the Defendants were named in the indictment returned September 28, 2017. *Id*. at ¶ 44.

In summary form, the information contained in the affidavit regarding probable cause to conclude that monies in the two accounts will ultimately prove forfeitable consists of the following:

> (1) Hi-Tech produces and sells its products from six "physical locations" in Norcross, Georgia. EXHIBIT C at ¶¶ 20-24.
>
> (2) Hi-Tech's website indicated in August 2016 that the products it marketed included five different products under the category of "Testosterone & Prohormone Supplements" (1-AD; 1-Testosterone; Androdiol; Equibolin; and Superdol) ("prohormone supplements"). *Id*. at ¶ 27.

(3) In September 2016, undercover agents from FDA-OCI made purchases from Hi-Tech of those five products using undercover names and credit cards. *Id.* at ¶ 28. The affidavit does not reveal the amount of the products purchased nor the cost of the purchases. *Id*. at ¶ 28.

(4) Each of the five prohormone products was tested and found to contain anabolic steroids, and the labeling on each product failed to properly declare this as an ingredient. *Id.* at 29-30.

(5) In August 2017, a cooperating source ordered five bottles each of the four prohormone products from Hi-Tech. They were delivered COD, paid for by a check, and the check was deposited in Hi-Tech's account at Touchmark. *Id*. at ¶¶ 31-32.

(6) A bottle of each product was tested, and each was found to contain anabolic steroids. The labeling on the products did not reveal this ingredient. *Id*. at ¶¶ 33-34.

(7) On September 14, 2017, Hi-Tech's website continued to offer for sale all five prohormone products, and that archives of the website showed that the products had been offered for sale since at least March 2016. *Id*. at ¶ 35.

(8) Hi-Tech made lease payments for its Norcross premises out of the Bank of America account in question. *Id*. at ¶ 38.

(9) Between January 2015 and May 15, 2017, UPS picked up in excess of 3,700 packages for shipping from Hi-Tech, and another 57,000 packages were picked up by UPS through a different Hi-Tech account between December 2015 and May 15, 2017. *Id*. at ¶ 39-40.

(10) Bank records relating to the Hi-Tech account subpoenaed from Touchmark National Bank show that credit card purchases were deposited in that account, and funds from

this account were subsequently transferred to Hi-Tech's account at Bank of America. From January 2016 through June 2017, these latter deposits totaled $7,520,000. *Id.* at ¶ 42.

(11) Bank records relating to the Hi-Tech account subpoenaed from Bank of America show the deposits from the Touchmark account and recurring payments for the operating expenses of Hi-Tech. *Id.* at ¶ 43.

(12) Defendants were charged in an indictment returned on September 28, 2017. *Id*. at ¶ 44.

What is missing in the affidavit is, with the few exceptions that will be discussed below, *any* basis to conclude that any particular proceeds of any of the indicted crimes could be found in either of the two bank accounts, let alone any factual basis that would allow for the segregation of allegedly *illegal* proceeds derived from the prohormone products from the *legal* proceeds of the nearly 200 Hi-Tech products that are not implicated in the charged criminal activity, let alone the 290 products that Hi-Tech "contract manufactures" for over 30 contract manufacturers. Moreover, aside from the small quantities of the products obtained in September 2016 and August 2017, the affidavit contains no evidence as to the quantity of other sales of these products resulting in proceeds from the alleged prohormone sales, other than the broad allegation that sales of these products continued and that Hi-Tech engaged in many thousands of transactions during the

time period, but with no evidence at all as to what products were involved in those thousands of sales.

Also missing from the affidavit is any indication that the Government would be seizing millions of dollars, and that it intended to seize all of the monies in both accounts, and to do so on a continuing basis without seeking additional seizure warrants based on a showing of sufficient probable cause.

As will be demonstrated below, when the well-recognized legal principles governing this type of seizure are considered in light of these facts, the Government has failed to show any legal basis for virtually all of the money it seized.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Due Process Requires that Assets Seized Prior to Trial Must Be Traceable to the Crimes Alleged.

The Supreme Court has recognized that a person's right to enjoy his or her property is a basic protection of the Constitution. The Due Process clause of the Constitution requires notice and an opportunity for a hearing "at a meaningful time and in a meaningful manner," *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), before a person may be deprived of property.

While a presumption of innocence applies in criminal proceedings, the Supreme Court has held that "a pre-trial asset restraint is constitutionally

permissible whenever there is probable cause to believe that the property is forfeitable." *Kaley v. United States*, 134 S.Ct. 1090, 1095 (2014) (citing *United States v. Monsanto*, 491 U.S. 600, 615 (1989)). This determination has two parts: "There must be probable cause to think: (1) that the defendant has committed an offense permitting forfeiture and (2) that the property at issue has the requisite connection to that crime." *Kaley* 134 S.Ct. at 1095 (citing 21 U.S.C. § 853(a)); *Monsanto*, 491 U.S. at 615).

Based on a sufficient showing of probable cause, in order to preserve forfeitable assets for a possible conviction, a district court may restrain a defendant from using the assets before trial. "The restraints may be imposed by way of a restraining order, an injunction, the execution of a performance bond, or a temporary seizure of certain assets which, because of their liquidity, can be readily transferred or hidden." *United States v. Bissell*, 866 F.2d 1343, 1349 (11th Cir. 1989) (citing 21 U.S.C. § 853(e)(1)(A) and (f)). The provision authorizing a warrant of seizure is found in § 853(f).

While a defendant cannot challenge a pretrial asset seizure based upon the first prong of this analysis (*i.e.,* challenge the validity of the indictment itself), a defendant may challenge whether the seized assets could ultimately be proved forfeitable. *Kaley*, 134 S.Ct. at 1097; *Bissell*, 866 F.2d at 1348–49.

Title 18 U.S.C. § 982(b)(1) provides that criminal forfeiture is governed by 21 U.S.C. § 853. Under 21 U.S.C. § 853(a), property subject to criminal forfeiture includes:

> (1) Property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation; and
>
> (2) Property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of such violation.[5]

However, as the Supreme Court explained in *Honeycutt v. United States,* 137 S.Ct. 1626 (2017):

> These provisions [§ 853(a)(1), (a)(2), and (a)(3)] by their terms, limit forfeiture under § 853 to tainted property; that is, property flowing from (§ 853(a)(1)) or used in (§ 853(a)(2)), the crime itself.

137 S.Ct. at 1632. *See also* 18 U.S.C. § 982(a)(1) (stating "that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.")

Thus, assets seized prior to trial must be "tainted" by the alleged crime; there must be a nexus between the particular assets seized and the offenses in the indictment. *Bissell*, 866 F.2d at 1349 (wrongfully restrained assets include those "which are outside the scope of the indictment, not derived from, or used in, criminal activity"). *See also In re Rothstein, Rosenfeldt, Adler, P.A.*, 717 F.3d

[5] 21 U.S.C. § 853(a)(3) also provides for forfeiture relating to a continuing criminal enterprise, which is not applicable here.

1205, 1212 (11th Cir. 2013) ("To the extent that the government is seeking forfeiture of a particular asset, such as the money on deposit in a particular bank account that is alleged to be the proceeds of a criminal offense … the court must find that the government has established the requisite nexus between the property and the offense.") (quoting Fed. R. Crim. P. 32.2(b), Advisory Committee's Note, 2000 adoption).

As recently acknowledged by a plurality of the United States Supreme Court, the distinction between tainted and untainted assets is "an important one, not a technicality. It is the difference between what is yours and what is mine." *Luis v. United States*, 136 S.Ct. 1083, 1091 (2016). While title to tainted property is imperfect and often passes to the Government at the instant a crime is committed, untainted property "belongs to the defendant, pure and simple." *Id*. at 1090. As demonstrated below, almost all of the $3.4 million seized by the Government belongs to Hi-Tech "pure and simple," and the Government's seizure was unjust and improper under the law.

B. "Substitute Assets" Are Not Subject to Pretrial Restraint.

This is, however, not to say that the Government may only seize or forfeit property that is specifically traceable to a crime. Title 21 U.S.C. § 853(p) provides that the Government may forfeit untainted property, or "substitute assets," where

tainted property cannot be located, has been transferred or deposited with a third party, has been placed beyond the court's jurisdiction, has substantially diminished in value, or has been comingled with tainted property which cannot be divided without difficulty. 21 U.S.C. § 853(p)(1)(A)-(E). The law, however, while providing for post-trial seizure of substitute assets does *not* provide for their pretrial restraint.

While the Eleventh Circuit has not directly addressed the issue, every federal appellate court to do so has ruled that post-indictment, pretrial restraints on substitute assets are unavailable. *See United States v. Gotti*, 155 F.3d 144, 149 (2nd Cir. 1998); *In re Assets of Martin*, 1 F.3d 1351, 1359 (3rd Cir. 1993); *United States v. Chamberlain*, 868 F.3d 290, 296–97 (4th Cir. 2017); *United States v. Floyd*, 992 F.2d 498, 501–02 (5th Cir. 1993) ("Congress made specific reference to the property described in § 853(a), and that description does not include substitute assets."); *United States v. Parrett*, 530 F.3d 422, 430–31 (6th Cir. 2008); *United States v. Field*, 62 F.3d 246, 248-49 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359, 363-65 (9th Cir. 1994) ("In the face of clear statutory language to the contrary, we refuse to extend this drastic remedy to the untainted assets of an individual who is merely accused of a crime, and thus is presumptively innocent."); *United States v. Jarvis*, 499 F.3d 1196, 1204-05 (10th Cir. 2007)

(holding that federal government has only a "potential and speculative future interest" in substitute assets prior to conviction and the fulfillment of certain statutory conditions found in § 853(p)(1)(A)-(E)). Even the Fourth Circuit, the only Circuit to have previously allowed the pretrial seizure of substitute assets acknowledged that its prior holding could not stand in light of the Supreme Court's *Luis* decision:

> [T]he Supreme Court [in *Luis v. United States*, *supra*] has signaled that there is a firm distinction between the government's authority to restrain tainted and untainted assets in construing Section 853 and related restraint provisions. Consistent with this important distinction, when Congress intends to permit the government to restrain both tainted and untainted assets before trial, it has clearly provided for such authority. Lacking such express authorization, Section 853(e) does not by its terms permit pretrial restraint of substitute assets.

Chamberlain, 868 at 297. As a result, there is not a single circuit in the country that expressly allows the pretrial seizure of untainted, substitute assets.

Since virtually all of the $3.4 million seized here cannot possibly be traced to the offenses charged in the indictment, the money seized by Government could, at most, be said to consist entirely of substitute assets. The Government has provided no evidence to the contrary, and no basis for departing from the well-established rule that such assets are not subject to pretrial seizure. As a consequence, the Government can only seize funds from the two bank accounts

pursuant to a seizure warrant if it can demonstrate probable cause to conclude that the funds are tainted and not merely substitute assets. *Kaley,* 134 S.Ct at 1095 (citing *Monsanto*, 491 U.S. at 615).

C. The Government Failed to Demonstrate Probable Cause to Justify Pretrial Seizure of All but a Small Amount of the Funds Actually Seized.

As set out *supra* in Section II-D, the Government laid out the facts in its affidavit it contended established probable cause to conclude that the funds to be seized would ultimately be proved to be forfeitable in its affidavit. EXHIBIT C at ¶¶ 20-43. They also relied on the indictment returned on September 28, 2017. *Id.* at 44.

In its affidavit the Government represented that Hi-Tech produced its products for sale at its Norcross facility and sold the products directly to consumers through its website and various retailers. *Id.* at 20-25, 43. The proceeds from many of these sales went into Hi-Tech's account at Touchmark, but proceeds from some sales entities involved in the distribution of dietary supplements went into the Bank of America account. EXHIBIT E at ¶ 14. Hi-Tech was also paid by companies to "contract manufacture" products for those companies to sell, with these payments going into both accounts. *Id.* Money was regularly transferred from the Touchmark account to the Bank of America account, and the funds in the Bank of America

account were used to pay Hi-Tech's ongoing business expenses. EXHIBIT C at ¶ 43. As part of its investigation, the Government arranged for purchases of Hi-Tech products on two occasions: the September 2016 purchases by undercover agents of five Hi-Tech products, and a purchase on August 21, 2017 of additional amounts of four of those same products. *Id.* at ¶¶ 28-29, 31-33. Testing allegedly showed the presence of anabolic steroids, a controlled substance that was not listed as an ingredient in any of the products. *Id.* at ¶¶ 29, 33. According to the affidavit, the proceeds from these sales were deposited in the Touchmark account. *Id.* at 32, 42. The Government showed that Hi-Tech offered these products on its website from at least March 2016 until shortly before the indictment. The affidavit also stated that Hi-Tech shipped over 60,000 packages between January 2015 and May 2017, and that over $7 million was transferred from the Touchmark account to the Bank of America account. *Id.* at ¶¶ 35, 39. The indictment alleged numerous illegal activities, including separate conspiracies to commit wire fraud, to launder money, to introduce misbranded drugs, and to manufacture and distribute controlled substances, as well as related substantive violations of those offenses. Doc. 7 at ¶¶ 1-43. The only products of Hi-Tech that were alleged to be illegal and involved in these offenses were the five products purchased as part of the investigation in September 2016 and August 2017, EXHIBIT C at ¶¶ 29, 33, and a Hi-Tech product

named Choledrene, which the Government alleged contained Lovastatin, an active ingredient in certain prescription drugs. Doc. 7 at ¶¶ 19-33.

When the relationship between the offenses charged in the indictment and the information set out in the affidavit on the one hand, and the funds contained in the two bank accounts seized on the other hand is examined, it is readily apparent the Government failed to show any nexus between the two, and that virtually all of the $3.4 million of Hi-Tech funds seized were not shown to be forfeitable. As a result, this Court should order the immediate return of such funds as to which the Government failed to demonstrate sufficient probable cause to support the authorization of the seizure warrants.

1. The Transactions that Resulted in Forfeitable Monies – The Sales of Products Found to Contain Anabolic Steroids

Since the Government's burden was only to demonstrate probable cause that the funds were the proceeds of an illegal activity, and hence forfeitable, Defendants can concede (for the purposes of this motion only) that the five prohormone products that were purchased during the course of the investigation and allegedly found to contain anabolic steroids were in violation of the law, as charged in the indictment. Defendants can also concede (again, solely for the purposes of this motion) that the proceeds of those sales were deposited to Hi-Tech's Touchmark account.

However, when the facts set out in the affidavit relating to these transactions, read in conjunction with the offenses charged in the indictment, are examined, it quickly becomes apparent that the proceeds traceable to these transactions comprise only a miniscule part of the $3.4 million seized from the two accounts.

The purchases in August 2017 apparently consisted of five bottles each of four substances.[6] *Id*. at 31. According to the affidavit, the price for all of the products was $34.95 per bottle. The total amount of proceeds from the August 2017 purchases was thus $699.00 (20 bottles x $34.95).

As to the purchases in September 2016 the affidavit fails to specify the quantity of the purchases, other than to state that the undercover agents purchased all five prohormone products. *Id.* at 27. 27-28. There is no information of any kind that can be gleaned from either the affidavit or the indictment that indicates how many bottles of each product were purchased. Since the affidavit states that the Government tested each of the five products to find the presence of anabolic steroids, the affidavit establishes that at least five bottles of the product were

[6] Defendants use the word "apparently" because the affidavit confusingly states "five bottles each of the products listed in paragraph 22 above," *id*. at ¶ 31, while paragraph 22 does not specify any substances at all. *Id.* at ¶ 22. However, read most liberally, since the affidavit relates that four products were tested, *id*. at ¶ 33, Defendant will assume for this motion that this purchase was for five bottles each of four different products, *i.e.*, 20 bottles total.

purchased. The affidavit states that these purchases were done online, so, making the assumption that most favors the Government, they were purchased for the retail price of $89.95. EXHIBIT E at ¶ 20. The proceeds from these transactions, then, total $449.75 (5 bottles x $89.95). However, the Government failed to provide this information to the magistrate judge, so there was no way he could determine the amount of forfeitable proceeds from these transactions. Further, even if the Government did, in fact purchase more than five bottles in these undercover transactions, the affidavit does not provide any information to the magistrate judge to support any finding of probable cause as to any more proceeds than the purchases totaling $449.75. Again, Defendants will concede for the purposes of this motion that these funds were deposited in the Touchmark account, and are properly subject to seizure.

As a consequence, in regard to the products purchased in September of 2016 and August of 2017, Defendants will agree that a total of $1,148.75 ($699.00 + $449.75) of the money in the Touchmark account was subject to seizure.

2. The Choledrine Transactions

The only transactions in drugs that the Government alleges were either misbranded or were controlled substances that are set out in the seizure application are the transactions relating to anabolic steroids discussed in the preceding section.

In other words, the affidavit did not specify *any* other allegedly illegal or misbranded substances in any of Hi-Tech's products that were sold during the relevant period, and as to which the proceeds were deposited in either the Touchmark or the Bank of America accounts. However, as stated before, paragraph 44 of the affidavit, referenced the charges contained in the indictment returned on September 28, 2017.

Count Ten of the indictment charged a conspiracy to introduce misbranded drugs into interstate commerce involving another product sold by Hi-Tech as a dietary supplement, Choledrene. The indictment alleges that this product contained lovastatin as an active ingredient. Lovastatin is a prescription drug, so the failure to list it as an ingredient on the label of the Choledrene product, if proven, could constitute misbranding, in violation of 21 U.S.C. §§ 331(a) and 333(a)(2). Doc. 7 at ¶¶ 19-20. The "Manner and Means" portion of that count lists ten sales of Choledrene, occurring between September 17, 2009 and June 10, 2014. *Id*. at ¶¶ 24-33. These ten sales involved a total of 173 bottles. *Id*. The indictment does not set out the price of these bottles, and the affidavit that was presented to the magistrate judge does not mention these transactions at all. However, as set out in the Harris Declaration, EXHIBIT E at ¶ 19, the average price of the Choledrene product was $18.75, so the total proceeds of these transactions would have been

approximately $3,243.75 (173 bottles x $18.75), had this information been provided to the magistrate judge.

Apart from the omission of this information from the affidavit, however, there are other significant barriers to concluding that these were forfeitable proceeds. Neither the affidavit nor the indictment provides any facts that would support a conclusion that the proceeds ended up in either of the target bank accounts. However, again for the purposes of this motion only, Defendants can concede that, since the transactions appear to be retail sales, it could be inferred that if they were paid for by credit card or by the COD process used in the August 2017 purchases by the cooperating source, and they would have been deposited in the Touchmark account. However, the Touchmark account was not opened until May of 2014. EXHIBIT C at ¶ 42. This means that it would have been impossible for any of these proceeds from the first eight transactions to have been deposited in that account, as they all took place prior to May 2014. These proceeds would have been deposited to a different account than either of the two accounts that were covered by the seizure warrants. Only the final two transactions set out in the indictment, on May 22, 2014 and June 10, 2014, Doc. 7 at ¶¶ 32, 33, then, could theoretically have been deposited in the Touchmark account. And, of course, none of this was either presented – or revealed – to the magistrate judge in the

Government's application. Additionally, the proceeds could not have been deposited in the Bank of America account, as that account was not opened until October 2014 – four months *after* the last of the Choledrene transactions. EXHIBIT C at ¶ 43.

In short, the Government's showing of probable cause did not establish that proceeds of any of the Choledrene sales were forfeitable or that the proceeds of these sales were present in either the Touchmark or the Bank of America accounts at the time the seizure warrants were executed.

3. Any Illegal Proceeds Were Comingled with a Vastly Larger Amount of Legal Proceeds.

Regardless of the amount of proceeds the Government's affidavit showed were from sales of products that were in some way illegal, when those proceeds from the sale of those products (the affidavit identified five prohormone products; the indictment identified one additional product, Cholodrene) were deposited to either of the Hi-Tech bank accounts, they would have been comingled with the proceeds from sales of Hi-Tech items that the Government has neither charged nor alleged involved any illegal or misbranded ingredients.

Here, the Government sought and obtained authorization to seize the entire balance of both bank accounts. It made no effort at all to identify for the magistrate judge which funds in each bank account were the proceeds of illegal activity; it

simply represented that an unspecified amount of funds that were illegal proceeds went into these accounts, and represented that that justified seizure of the *entire* account. With the exception of the proceeds from the September 2016 and the August 2017 purchases, which totaled approximately $1,148.75, there was, quite simply, *no* effort to trace funds from the illegal sales into either of the two accounts.

Moreover, the application failed to inform the magistrate judge that these accounts contained not only untainted funds, consisting of proceeds from the sale and manufacture of hundreds of Hi-Tech products not alleged to violate any law, but that the amount of untainted funds was substantial, while the tainted funds were, in comparison, minuscule. *See United States v. Louthian*, 2013 WL 594232, at *5 (W.D. Va. February 15, 2013), *aff'd,* 756 F.3d 295 (4th Cir. 2014) (finding that "[w]here fraudulently obtained funds are comingled with legitimately obtained funds, and additional withdrawals and deposits are made from and to the same account, the government likely cannot meet its burden of showing which funds are traceable to the fraud and which are not.") (footnote omitted).

In contrast to the five Hi-Tech prohormone products the Government alleges contain anabolic steroids and the one product the Government alleges contains lovastatin, Hi-Tech sells over approximately 209 additional products under its own

or related brands, EXHIBIT E at ¶ 5, and "contract manufactures" approximately 290 additional products. *Id*. at ¶ 7. In short, the proceeds from the transactions that are alleged to be illegal are but a small percentage of the proceeds from all these other products, none of which the Government alleges are illegal in any way, and this small amount of funds is comingled with a considerably greater amount of legally obtained funds. In such circumstances, the Government has not shown sufficient probable cause to justify seizures of the entirety of the two bank accounts.

The failure of the Government to demonstrate any nexus between any illegal transactions and the funds that were in the Touchmark and Bank of America accounts in October 2017 is magnified by the timeline of these events. In the indictment, the Government alleges events that occurred beginning in 2011, and many of the charges were completed years before the seizure warrants were obtained.

For instance, Count One of the indictment charges a conspiracy to commit wire fraud, commencing in March 2011 and continuing to "on or about at least July 17, 2012." Doc. 7 at ¶ 1. The only two substantive wire fraud charges are found in Counts Two and Three, and both are alleged to have occurred on July 17, 2012. The Government offers no explanation as to how proceeds from these transactions

or the conspiracy itself could have found their way to the bank accounts that were seized in October 2017. This is especially true in light of the fact that neither of these accounts was opened until 2014. EXHIBIT C at ¶¶ 42-43. The same situation exists as to the Count Four money laundering conspiracy (from March 2011 to at least July 25, 2012), *id*. at ¶ 16, and the five substantive counts of money laundering (all alleged to have occurred in 2012). *Id*. at 17-18. Similarly, the Count Ten conspiracy to introduce misbranded drugs (Choledrine) into interstate commerce encompassed from July 2009 to at least June 2014, *id*. at ¶ 20, with overt acts occurring from September 2009 to June 2014. *Id.* at ¶¶ 24-33. The single substantive count of introducing that misbranded drug in to interstate commerce is alleged to have occurred on August 22, 2013. *Id.* at ¶¶ 34-35.

It stretches credulity to ask a magistrate judge to conclude that any of the completely unspecified, undocumented and unquantified proceeds from any of these alleged illegal activities, even had they been deposited into either the Touchmark or the Bank of America accounts, would have even theoretically remained in either account until October 2017. As the Government's affidavit set out, there were apparently over 60,000 shipments of products from Hi-Tech in the period from January 2015 to May of 2017. EXHIBIT C at ¶¶ 39-40. Beginning in 2014, the two bank accounts were used to receive proceeds from sales and

manufacturing and to pay the operating expenses of Hi-Tech. *Id*. at ¶¶ 42,43; EXHIBIT E at ¶¶ 14, 15. It defies common sense to believe that any proceeds from any sales that occurred prior to 2014 would remain in either account as of October 2017.[7]

As a consequence of both the fact that any illegal obtained proceeds were comingled with a vastly larger amount of indisputably legal proceeds, and the fact that the illegal activities charged in the indictment preceded the seizures by at least three years (and often more), this Court should order the return of $3,459,179.50 consisting of all funds seized in the three seizures, with the exception of the $1,148.75 in proceeds that the Government has shown to be forfeitable.

[7] The only illegal activity charged in the indictment that occurred after 2014 was in Counts Twelve (conspiracy to manufacture and distribute controlled substances), Doc. 7 at ¶¶ 36-39, Counts Thirteen through Fifteen (substantive counts of manufacturing and distributing controlled substances), *id*. at ¶¶ 40-41, and Counts Sixteen through Eighteen (introducing misbranded drugs into intestate commerce). *Id*. at ¶¶ 42-43. All of these counts allege offenses occurring in 2016-2017. *Id*. However, each of these counts set out the prohormone products as the misbranded products. Defendants have conceded, for purposes of this motion, that proceeds from these sales are forfeitable and the seizure of those proceeds from the Touchmark account is uncontested. However, since the Government's affidavit provided information only as to the proceeds from the September 2016 and August 2017 purchases, the amount of illegal proceeds traced into the account is only $1,148.75.

4. The Affidavit Does Not Show That *Any* Illegal Proceeds Were Deposited in the Bank of America Account.

While the Government's Application states that proceeds from the sale of Hi-Tech products were deposited into the Touchmark account, the Government advised the magistrate judge that the funds in the Bank of America account came from two sources, at least during the period from January 2016 through June 2017, the only time frame in which the Government examined the account records. First, according to the affiant, deposits came from "various entities, some of which I know engaged in the distribution of dietary supplements." EXHIBIT C at ¶ 43. Second, the account received transfers from the Touchmark account, and these deposits totaled $7,520,000 for the period from January 2016 through June 2017. *Id.*

Missing from this is the information necessary to demonstrate to the magistrate judge that there is probable cause to believe that *any* of the funds in the Bank of America account were from sales of any product that was shown to be illegal in any way. There is no showing that any of the allegedly illegal proceeds that were deposited in the Touchmark account were in fact transferred to the Bank of America account. There was no showing that the deposits from various entities, "some" of which distributed dietary supplements resulted from the sale of products that were illegal in any way, let alone the amount of such proceeds. Finally, even

assuming that all of the prohormone products purchased in September 2016 and August 2017 were included in one or more of the transfers from Touchmark, as demonstrated above, at most, $1,148.75 of those multiple millions of dollars would be subject to proper seizure.[8]

On October 4, 2017, the Government seized $1,225,827.11 from the account at Bank of American, taking everything in that account on that day. Assuming that the funds from the prohormone supplement related transactions ($1,148.75) made it to that account, the Government has made no showing of any kind to justify the seizure of the remaining $1,224,678.40 in the account. This Court should order the Government to return those funds to Defendants without further delay.

5. There was no justification at all for the second seizure of $424,009.85 from the Bank of America account on October 12, 2017.

As discussed before, there were two seizures from the same Bank of America account, the first on October 4, 2017 (when the entire balance of $1,225,827.11 was seized), and the second on October 12, 2017 (when once again the entire balance of the account was seized, $424,009.85). Unless there is an additional seizure warrant and application that the Government has failed to

[8] And that, of course, would mean that these funds, having made it to the Bank of America account, could not be used to justify their seizure from the Touchmark account.

provide to Defendants, it appears that both seizures were pursuant to the same warrant for the Bank of America account. EXHIBIT B at 1. This appears to be a completely unprecedented event, where the Government is treating the seizure warrant authorized on October 3, 2017 as a continuing Order to seize all the funds in that account. Nothing in the seizure warrant signed on October 3, 2017 indicates that it authorizes multiple or continuing seizures from that bank account. Indeed, the terms of the warrant authorize the seizure of "any and all funds" from the account speaks to a single seizure. *Id*. As the second seizure, on October 12, 2017, was not authorized by the only warrant issued as to this account, that seizure was unauthorized and therefore improper. For this reason alone, this Court should enter an Order requiring the Government to return those funds, in the amount of $440,009.85 to the Defendants immediately.

There is yet another reason why the funds seized on October 12, 2017 were improperly seized. The initial seizure of this account, on October 4, 2017, seized $1.2 million from the Bank of America account. Later that day and in following days, proceeds from other sales were posted into that account. *See* EXHIBIT E at ¶ 12. By the time the Government came in again on October 12, 2017 to conduct yet another seizure of the same account, the balance in the account had been

replenished to $424,009.85. *See id.* The Government, once again, took everything in the account.

Since the Government apparently did not seek a second warrant to authorize this second seizure, there was no effort by the Government to make a showing to the magistrate judge that there was probable cause to conclude that the funds arriving between October 4 and October 12, 2017 were the proceeds of any illegal activity. Nor did the Government attempt to show that in the same interim period there were funds derived from illegal sales that went into the Touchmark account (which had also been completely emptied by seizure on October 4, 2017) and were thereafter transferred to the Bank of America account. Based on the information provided in the affidavit relating to completed sales and the flow of funds into the Hi-Tech accounts, it is clear that none of the funds involved in the $424,009.85 seizure could possibly be the proceeds of illegal activity. In short, the Government has provided absolutely no basis for the second seizure of the Bank of America account on October 12, 2017. These funds, in the amount of $424,009.85, should be returned to Defendants immediately.

6. Neither the Money Laundering Conspiracy nor the Substantive Money Laundering Afford Any Basis for the Seizure Warrants.

Count Four of the indictment charged Mr. Wheat and Hi-Tech with a money laundering conspiracy in violation of 18 U.S.C. § 1956(h). The period of the alleged conspiracy ran from on or about March 2011 to on or about at least July 25, 2012. Doc. 7 at ¶ 15. Counts Five through Nine charged Mr. Wheat and Hi-Tech with substantive acts of money laundering in violation of 18 U.S.C §§ 1957 and 2. *Id.* at 17-18. All of the monetary transactions alleged in Count Five through Nine occurred in June and July of 2012. There is no discussion of the money laundering charges in the affidavit as a basis for the seizure warrants. EXHIBITS C and D at ¶¶ 1-45. These charges do not provide any basis for the seizures authorized by the warrants of October 3, 2017.

First, none of the monetary transactions alleged in Counts Five through Nine show any money being transferred into either the Touchmark or the Bank of America accounts, Doc. 7 at ¶ 18, so there is no basis to conclude that proceeds relating to the money laundering charges could be found – and seized – in either of the bank accounts. Nor could this have occurred, because all of the money laundering charges, and the transactions alleged in the substantive counts, precede by almost two years the existence of the two bank accounts that were seized. The

Touchmark account was opened in May of 2014 EXHIBIT C at ¶ 42. The Bank of America account was not opened until October 2014. *Id.* at ¶ 43.

Finally, while the fungible asset provision found in 18 U.S.C. § 984 can authorize seizure of substitute assets, there is a time limit of one year on any seizure sought under that provision. *Id.* § 984(b). As all of the money laundering activities alleged in the indictment occurred no later than July 25, 2012, Doc. 7 at ¶ 16, 18, this provides no basis to justify the three seizures from the bank accounts in October 2017.

* * * * *

With the exception of the products the Government has allegedly shown contained anabolic steroids, the Government's affidavit upon which the seizure warrants for both bank accounts were authorized fails to demonstrate probable cause to believe the money in those accounts is forfeitable. The Government's affidavit fails to show that any additional funds that were generated by any of the illegal actives charged in the indictment were deposited in either account. As a consequence, the seizures of funds (other than the proceeds from the prohormone products) from the Touchmark and Bank of America accounts were not constitutionally permissible. *Kaley*, 134 S.Ct. at 1095 (citing *Monsanto*, 491 U.S. at 615). The Government's showing of probable cause was sufficient to justify the

seizure of $1,148.75 from the Touchmark account. This Court should order the immediate release of the remaining funds seized from the Touchmark and the Bank of America accounts.

D. Hi-Tech Should Be Granted a Hearing on the Issues Herein.

The Due Process Clause of the Fifth Amendment generally requires notice and the opportunity for a hearing when the Government attempts to seize private property. *See Fuentes*, 407 U.S. at 80. The Government in this case sought to preserve the Defendants' assets by applying for a seizure warrant under 21 U.S.C. § 853(f), a warrant that the magistrate judge granted *ex parte*, as he was entitled to do. *Bissell*, 866 F.2d at 1349.

The Court nonetheless retains the "authority to hold a post-restraint hearing" to assess the likelihood that the seized property actually constitutes or is derived from proceeds of the alleged criminal activity or was used to facilitate the commission of the offense. *Id*. Indeed, the majority of the courts of appeals have held that the Fifth Amendment *requires* such a hearing. *See United States v. Monsanto*, 924 F.2d 1186, 1203 (2d Cir. 1991); *United States v. Long*, 654 F.2d 911, 915-16 (3d Cir. 1981); *United States v. Michelle's Lounge*, 39 F.3d 684, 700-01 (7th Cir. 1994); *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir. 1985); *United States v. Crozier*, 777 F.2d 1376, 1384 (9th Cir. 1985); and *United States v.*

Jones, 160 F.3d 641, 647 (10th Cir. 1998). *Cf. United States v. Register*, 182 F.3d 820, 835 (11th Cir. 1999) (questioning whether the Eleventh Circuit's holding that a pretrial hearing is optional should be re-examined in light of intervening Supreme Court cases).

Such a hearing is important to protect against the type of Government overreaching that has occurred here, because, as the Supreme Court has recognized, "the broad forfeiture provisions carry the potential for Government abuse and 'can be devastating when used unjustly.'" *Libretti v. United States*, 516 U.S. 29, 43 (1995) (quoting *Caplin & Drysdale*, 491 U.S. 617, 634 (1989)). *See also United States v. Riley*, 78 F.3d 367, 370 (8th Cir. 1996) ("Preconviction restraints are extreme measures."); *United States v. Razmilovic,* 419 F.3d 134, 137 (2d Cir. 2005) (noting that the Supreme Court has dubbed pretrial restraint as a "'nuclear weapon' of the law"); *Ripinsky,* 20 F.3d at 363 n.5 ("Given the partly punitive nature of § 853, we must be cautious about construing § 853 liberally.")

Defendants have demonstrated in the preceding sections of this motion that the Government failed to show probable cause to seize all but $1,148.75 of the $3.4 million seized from their accounts. At a hearing, Defendants can show this Court that: (1) Hi-Tech manufactures and sells hundreds of products and "contract manufactures" hundreds of other products for other sellers that do not contain the

ingredients (anabolic steroids and lovastatin) that are implicated in this indictment; (2) the proceeds from sales of these products implicated in this indictment contribute a tiny percentage of Hi-Tech's overall sales; and (3) the extent of the impact that the Government's improper seizure is having on Hi-Tech's ability to conduct its business and defend itself from these improper seizures and the criminal charges brought by the Government.

In light of the scope of the Government's seizures, the patent failure of the Government's showing of probable cause as to almost all of the $3.4 million seized from Hi-Tech, and the strong appearance of Government overreaching in these seizures, this Court should exercise its authority to hold a prompt hearing to resolve the Government's right to continue to deprive Hi-Tech of these funds.

IV. CONCLUSION

The Government's request for the magistrate judge to issue a seizure warrant for all of the funds – over $3.4 million – in Hi-Tech's accounts at Touchmark and Bank of America was a massive overreach. The affidavit the Government presented to the magistrate judge in its application for a seizure warrant utterly failed to show any basis to conclude that the funds in those accounts (excepting the alleged prohormone products that were purchased during the course of the investigation) were forfeitable as either the proceeds of any of the offenses

charged, derived from or used to facilitate any of those offenses. The magnitude of the disconnect between what the law requires the Government to show in order to justify the scope of the seizures sought and what the Government actually presented to the magistrate judge is breathtaking. When the second seizure of all of the deposits in the Bank of America account on October 12, 2017 is factored in – a seizure which was not authorized under the terms of the seizure warrant and for which the Government appears to have had no warrant at all – the extent of the Government's overreach is even more disturbing.

The impact of these improper seizures of over $3.4 million from bank accounts used to conduct the daily manufacturing and sales operations of Hi-Tech is consequential, continuing, and expanding. As set out in this motion, Hi-Tech has already been forced to lay off 70 employees, and further layoffs are inevitable if the improperly seized funds are not returned to Hi-Tech in the immediate future.

Moreover, if the improperly seized funds are not returned in a timely fashion, the ability of all three Defendants – Hi-Tech, Jared Wheat and John Brannon Schopp – to defend against these charges will also be impacted, a threat to Defendants' Sixth Amendment right to counsel.

These effects will ultimately provide a significant tactical advantage to the Government in this litigation, a tactical advantage that is as unjustifiable as it is

unfair. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 517, 634 (1989) ("Forfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly.").

The Government's seizures are far beyond what the law allows. This Court should conduct an evidentiary hearing only if it deems a hearing necessary; otherwise this Court should enter an Order releasing all of the funds seized from Defendants with the exception of $1,148.75. Because of the continuing impacts of these seizures, Defendants respectfully request that this Court take this action on an emergency basis, and expedite all proceedings related to these seizures as much a feasible in light of the Court's schedule.

WHEREFORE, Defendants respectfully pray that this Court enter an Order requiring the Government to release $1,809,342.60 seized from the Touchmark account, $1,649,836.90 seized from the Bank of America account without further delay, and for such other and further relief as this Court may deem just and proper.

This 23rd day of October, 2017.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing filing into this District's ECF System, which will automatically forward a copy to counsel of record in this matter.

This 23rd day of October 2017.

/s/ Arthur W. Leach
Arthur W. Leach
Counsel for Defendant
Hi-Tech Pharmaceuticals, Inc.

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA *v.* JARED WHEAT, JOHN BRANDON SCHOPP, AND HI-TECH PHARMACEUTICALS, INC. DEFENDANTS.	Criminal Action No. 1:17-CR-0229-AT

RESPONSE TO DEFENDANTS' EMERGENCY MOTION FOR RELEASE OF SEIZED ASSETS

The United States of America, by Byung J. Pak, United States Attorney, and Kelly K. Connors, Assistant United States Attorney for the Northern District of Georgia, files this Response to Defendants' Emergency Motion for Release of Seized Assets.

FACTS AND PROCEDURAL HISTORY

This criminal case arises out of a U.S. Food and Drug Administration investigation of Hi-Tech Pharmaceuticals, Inc. ("Hi-Tech"), a company that manufactures and sells dietary supplements, among other products. On September 28, 2017, a grand jury returned a superseding indictment against

Hi-Tech, Jared Wheat, who is an owner of Hi-Tech, and John Brandon Schopp, who is Hi-Tech's Director of Contract Manufacturing ("Defendants"). [Doc. 7]. The indictment charges all three Defendants with conspiracy to commit wire fraud and wire fraud, and it charges Wheat and Hi-Tech with money laundering conspiracy, money laundering, conspiracy to introduce misbranded drugs into interstate commerce, introducing misbranded drugs into interstate commerce, conspiracy to manufacture and distribute controlled substances, and manufacturing and distributing controlled substances. [*Id.* at 1-15]. The indictment also contains a forfeiture provision, stating that upon conviction of one or more offense, the Defendants will forfeit any proceeds or property that was involved in or is traceable to the offenses. [*Id.* at 16-18].

On October 3, 2017, Magistrate Judge Alan J. Baverman authorized seizure warrants for two Hi-Tech bank accounts, Touchmark National Bank account number XXXXXX0855 and Bank of America account number XXXXXX1840. [Doc. 36, Exhibits A & B]. Judge Baverman found that the affidavits in support of the seizure warrants established probable cause to believe the funds were subject to civil and criminal forfeiture. [*Id.*]. Importantly, the seizure warrant applications cited both criminal and civil statutory provisions for forfeiture. [*Id.*].

The following day, October 4, 2017, agents executed the seizure warrants. The Government subsequently received two checks, one from Touchmark for $1,810,490.34, and one from Bank of America for $1,649,836.96.

The Defendants then filed an Emergency Motion for Release of Improperly Seized Assets pursuant to Fed. R. Civ. P. 41(g).[1] [Doc. 36]. The Defendants make numerous arguments for the return of the seized funds and request a hearing. The Defendants also contend that the Government wrongfully seized $424,009.85 from the Bank of America account on October 12, 2017, eight days after the seizure warrant was executed. [*Id.* at 9, 33-35].

After the Defendants filed the instant motion, the Government contacted Bank of America regarding the amount seized. Bank of America informed the Government that the check sent included $424,009.85 in funds that had been deposited into Hi-Tech's account after the day the warrant was executed. Because

[1] The motion was filed on behalf of all three Defendants, but the funds at issue were seized from Hi-Tech's bank accounts. Thus, neither Wheat nor Schopp have standing to contest the seizures.

In addition, the Defendants erroneously filed the instant motion in the criminal action. When a Rule 41(g) motion is filed *before* the Government commences a forfeiture action against the seized property, the motion is treated as a separate action against the United States. *Nottoli v. United States*, 2013 WL 5423586 (E.D. Cal. Sept. 26, 2013).

the Government was not provided notification of the balance of the account when the seizure warrant was executed, the Government accepted the single check sent by Bank of America in good faith. At this time, the Government is not pursuing civil or criminal forfeiture of the excess funds and intends to release the $424,009.85 to Hi-Tech.

In this case, the Government has now filed a bill of particulars, specifically listing the seized funds as assets subject to forfeiture upon conviction. [Doc. 41]. The bill of particulars does not include the $424,009.85 that was improperly sent to the Government. [*Id.*]. Moreover, the Government has filed a parallel civil forfeiture action against the same funds, alleging that they are subject to forfeiture. *See United States v. $1,810,490.34 Seized from Touchmark Nat'l Bank Acct No. XXXXXX0855, et al.*, Civil Action No. ___ (N.D. Ga. Nov. 6, 2017). As will be shown below, because the Government initiated a civil forfeiture action, which provides due process to Hi-Tech, the motion for release of seized assets is now moot and should be denied.

ARGUMENT AND CITATION OF AUTHORITY

A. The Court Lacks Jurisdiction over the Defendants' Rule 41(g) Motion.

Because the Government has initiated a civil forfeiture action, as well as included the funds in a bill of particulars, the Defendants' motion is moot. Rule 41(g)[2] states, in pertinent part, "A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." It is well-established law in the Eleventh Circuit that a Rule 41(g) motion for return of property does not apply to property that is subject to forfeiture. *United States v. Eubanks*, 169 F.3d 672, 674 (11th Cir. 1999); *United States v. Watkins*, 120 F.3d 254, 255 (11th Cir. 1997); *Matter of Sixty Seven Thousand Four Hundred Seventy Dollars ($67,470.00)*, 901 F.2d 1540, 1544 (11th Cir. 1990) ("Rule 41[(g)] . . . is expressly inapplicable to forfeiture of property in violation of a statute of the United States."). Once the Government has filed a civil forfeiture

[2] Rule 41(g) was formerly Rule 41(e). The rules were re-designated in 2002 without substantive change. Thus, courts apply case law on former Rule 41(e) to the current Rule 41(g). *See De Almeida v. United States*, 459 F.3d 377, 380 n.2 (2d Cir. 2006).

action against the seized funds, alleging that the funds are subject to forfeiture,[3] a Rule 41(g) motion is not the proper remedy to obtain the release of seized property.

The Court lacks jurisdiction because Hi-Tech (as well as Wheat or Schopp if they can establish standing) has an adequate remedy at law to seek the return of the seized funds. Exercising equitable jurisdiction over a Rule 41(g) motion is "highly discretionary and must be exercised with caution and restraint." *Eubanks*, 169 F.3d at 674. Where an adequate remedy at law exists, courts cannot exercise equitable jurisdiction. *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). Courts have held that a pending civil or criminal forfeiture proceeding affords "an adequate remedy at law and thereby justifies dismissal of the Rule 41(g) motion." *Almeida v.*

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[3] The fact that the civil forfeiture proceeding was commenced following the filing of the Rule 41(g) motion has no bearing on this Court's lack of jurisdiction to consider the motion. *See United States v. U.S. Currency $83,310.78*, 851 F.2d 1231, 1234 (9th Cir. 1988) (affirming the denial of a Rule 41(g) motion based on the subsequent filing of a civil forfeiture action, observing that the movant apparently "was successful in triggering the instant filing of a forfeiture proceeding wherein she could assert her right to a return of her property"); *Matter of $49,065.00 in U.S. Currency*, 694 F. Supp. 1559, 1560 (N.D. Ga. 1987) (denying a Rule 41(g) motion because the movant would be able to challenge the seizure in a later filed civil forfeiture action); *Return of Seized Prop. v. United States*, 625 F. Supp. 2d 949, 955 (C.D. Cal. 2009) ("[A] Rule 41(g) motion is properly denied once a civil forfeiture action has been filed"); *In re Seizure of One Blue Nissan Skyline Auto.*, 2009 WL 3488675, at *1 (C.D. Cal. 2009) (denying a Rule 41(g) motion after a civil forfeiture action was filed).

United States, 459 F.3d 377, 382 (2d Cir. 2006) (citing opinions from various circuits); *see also United States v. Akers*, 215 F.3d 1089, 1106 (10th Cir. 2000) (noting that "a forfeiture proceeding provides a defendant with an adequate remedy at law for resolving a claim to seized property"). Moreover, the only appropriate use of a Rule 41(g) motion to seek the return of property in a forfeiture case is where no forfeiture proceedings were ever commenced. *See United States v. Sims*, 376 F.3d 705, 708 (7th Cir. 2004) ("The proper office of a Rule 41(g), motion is, before any forfeiture proceedings have been initiated, or before any criminal charges have been filed, to seek the return of property seized without probable cause, or property held an unreasonable length of time without the institution of proceedings that would justify the seizure and retention of the property.").

Here, to seek the return of all of the seized funds, Hi-Tech's appropriate remedy would be to file a claim in the civil forfeiture proceedings following the procedures established in 18 U.S.C. § 983. *See United States v. Castro*, 883 F.2d 1018, 1019 (11th Cir. 1989) ("It is well-settled that the proper method for recovery of property which has been subject to civil forfeiture is not the filing of a Rule 41[(g)] Motion, but filing a claim in the civil forfeiture action."). Further, if the Defendants are convicted, they can challenge the forfeitability of the seized funds in the

forfeiture phase of the criminal proceedings. Like the civil forfeiture proceedings initiated as to the seized funds, the criminal forfeiture proceedings are a sufficient remedy at law to defeat this Court's jurisdiction to consider the Rule 41(g) motion. *See De Almeida*, 459 F.3d at 382 (holding that Rule 41(g) motion offered the petitioner no advantage over the criminal forfeiture proceedings); *Chaim v. United States*, 692 F. Supp. 2d 461, 474 (D.N.J. 2010) (stating that a criminal proceeding presents a petitioner with an adequate remedy at law to seek a return of the seized funds).

Next, to the extent that the Defendants seek return of a portion of the seized funds for attorneys' fees, a Rule 41(g) motion is not the appropriate mechanism for such a request. Finally, to the extent the Defendants seek return of the property to maintain Hi-Tech's business, the appropriate remedy would be to file a motion for release of seized assets pursuant to 18 U.S.C. § 983(f), which provides the exclusive remedy for pretrial release of certain assets and only applies under limited

circumstances.[4] However, that remedy is not available in this case because the entire business was not seized. *See* 18 U.S.C. § 983(f)(8) (specifically prohibiting the release of "currency, or other monetary instrument, or electronic funds unless currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized"). Moreover, due to the release of the $424,009.85, Hi-Tech has received at least some of the relief that it requested and cannot establish hardship.

B. The Defendants' Probable Cause Challenge is Inappropriate in a Rule 41(g) Motion, and a Probable Cause Hearing is Not Warranted.

In their motion, the Defendants make numerous arguments regarding probable cause and they contend that the affidavit in support of the seizure warrants was insufficient. [Doc. 36 at 13-14, 20-37]. The Defendants also contend

[4] Under § 983(f), a claimant "is entitled to immediate release of seized property" if certain requirements are met. In particular, a claimant must demonstrate that: (1) he has a possessory interest in the property; (2) that he has sufficient ties to the community to ensure the property will be available for trial; (3) that if the Government maintains possession of the property, the claimant will suffer substantial hardship; and (4) that the substantial hardship "outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant." *Id. T*he Defendants have not attempted to meet this standard in their instant motion. [*See* Doc. 36].

that a hearing is necessary "to assess the likelihood that the seized property actually constitutes or is derived from proceeds of the alleged illegal activity or was used to facilitate the commission of the offense." [Doc. 36 at 38]. Further, they contend that a hearing is necessary to protect against Government overreaching. [*Id.* at 39].

As previously indicated, the Defendants erroneously filed this motion for return of property in the criminal case, when it should have been filed as a separate action. Along the same vein, the Defendants erroneously focus on the criminal indictment as the benchmark for the seizure and forfeiture of the seized funds. Although some of the facts used to support the seizure warrant application overlap the charges alleged in the criminal indictment, the seizure warrants and civil forfeiture case are independent of the criminal action, rather than inextricably intertwined proceedings as the Defendants attempt to argue. Thus, the Defendants exhaustive emphasis on the charges in the criminal action are misplaced. Indeed, the Government could have initiated a civil forfeiture action against the funds without the Government ever filing a criminal indictment. *See United States v. $734,578.82 in U.S. Currency*, 286 F.3d 641, 657 (3d Cir. 2002) (civil forfeiture is an *in rem* action against the property itself; the forfeiture is "not

conditioned upon the culpability of the owner of the defendant property"). Neither the seizure warrants nor the civil action are predicated exclusively on the criminal indictment, and the Defendants arguments to the contrary are entirely without merit and do not provide any justification for their requested release of funds.

Moreover, even though the Defendants couch their arguments in terms of probable cause, many of their arguments directly challenge the ultimate forfeitability of the funds, which is premature. But, as discussed above, immediately before the seizure of the funds on October 4, 2017, Judge Baverman issued the seizure warrants for Hi-Tech's bank accounts and explicitly found that the Government established probable cause to believe that the funds were subject to seizure and civil and criminal forfeiture.[5] [Doc. 36, Exhibits A & B]. A hearing now to reconsider Judge Baverman's finding of probable cause is not warranted. *See United States v. Any & all Funds on Deposit in Account No. 0139874788, at Regions*

[5] Further, despite the Defendants' assertion to the contrary, the seizure warrant applications make clear that the Government was seeking the seizure of "any and all funds" in the bank accounts. Thus, the language of the application itself supports that Judge Baverman found that all of the funds were subject to seizure and forfeiture.

Bank, held in the name of Efans Trading Corp., 2015 WL 247391, at *14 (S.D.N.Y. 2015) (denying a request for a post-seizure probable cause hearing and concluding that a claimant has no right to a probable cause hearing as to property seized after a magistrate judge found probable cause and issued a seizure warrant). Contrary to the Defendants' arguments that the Government may only seek forfeiture of $1,148.75 as proceeds of the undercover purchases, under 18 U.S.C. § 981(a)(1), the Government may seek civil forfeiture of "[a]ny property, real or personal, *involved in* a transaction or attempted transaction in violation of section 1956 . . . or any property traceable to such property." 18 U.S.C. § 981(a)(1) (emphasis added); *see United States v. Puche*, 350 F.3d 1137, 1153 (11th Cir. 2003) (affirming the forfeiture of entire bank accounts, even though the accounts contained legitimate funds, because the bank accounts were used to facilitate the violations and were therefore "involved in" the money laundering offenses). As such, the Defendants' challenge to the probable cause finding is inappropriate in a Rule 41(g) motion, and their request for a hearing should be denied.

C. A Hearing Regarding Using Seized Funds for Attorney's Fees is Not Required Because the Defendants Have Not Attempted to Meet the Initial Burden.

The Defendants also request a hearing to examine "Hi-Tech's ability to conduct its business and defend itself from these improper seizures and the

criminal charges." [*Id.* at 40]. However, a hearing is not warranted, as the Defendants have not met, nor even attempted to meet, their initial burden.

Again, like the other arguments and requests made by the Defendants, their arguments regarding the return of seized funds to pay attorneys' fees are inappropriate in a Rule 41(g) motion. Moreover, because Wheat and Schopp do not have standing to contest the seizure and forfeiture of funds seized from Hi-Tech, they likewise have no standing to request that the funds be released to pay for their attorneys' fees.

Further, even if this Court were able to entertain Hi-Tech's request for the return of seized assets to pay for attorneys' fees, Hi-Tech has failed, as a threshold matter, to adequately demonstrate its inability to afford its counsel of choice, as required by *United States v. Kaley*, 579 F.3d 1246 (11th Cir. 2009). A defendant is not automatically entitled to a hearing when the defendant simply claims that the pretrial restraint of assets has affected his ability to pay his counsel of choice. *Kaley*, 579 F.3d at 1252. To the contrary, the court's language in *Kaley* makes clear that "a defendant whose assets are restrained pursuant to a criminal forfeiture charge in an indictment, *rendering him unable to afford counsel of choice*," is the only category of defendant potentially entitled to a hearing. *Id.* (emphasis added).

The Eleventh Circuit's view of financial need as a threshold matter is consistent with the well-established line of cases known as *Jones-Farmer*, which collectively require defendants to make a preliminary showing of significant hardship before they are entitled to any post-indictment hearing regarding asset restraint. *See United States v. Jones*, 160 F.3d 641 (10th Cir. 1998); *United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001). In *Jones*, the Tenth Circuit concluded that "the proper balance of private and government interests requires a postrestraint, pre-trial hearing but only upon a properly supported motion by a defendant." 160 F.3d 641, 647 (10th Cir. 1998). The court further explained that "[a]s a preliminary matter, a defendant must demonstrate to the court's satisfaction that she has no assets, other than those restrained, with which to retain private counsel and provide for herself and her family." *Id.* In *Farmer*, the Fourth Circuit likewise held that a defendant is entitled to a pretrial hearing only if he makes "a threshold showing of need to use wrongly seized assets to pay his attorneys." 274 F.3d 800, 804 (4th Cir. 2001). The court reasoned that a defendant's "private interest" in obtaining a pre-trial hearing with respect to seized assets would be absent if the defendant "possessed the means to hire an attorney independently of assets that were seized." *Id.*

Here, in addition to the fact that Hi-Tech has already retained counsel, Hi-Tech has not provided proof regarding a lack of available assets. Rather, all three Defendants prematurely attempt to challenge the connection of the seized assets to the offenses, and they allege that the seizures are "jeopardizing" their ability to afford counsel when all have retained counsel. Also, rather than asserting they have no other available assets, they simply argue that a hearing would afford them the opportunity to show the extent the seizure is impacting Hi-Tech's ability to defend itself. [Doc. 36 at 3, 40]. Such is not the standard, and for Hi-Tech, since $424,009.85 will be returned by the Government, it cannot show financial need. Accordingly, no hearing regarding the ability to afford counsel is warranted.

CONCLUSION

Based on the forgoing, the Court should deny the Defendants' motion for release of seized funds.

Dated this 6th day of November 2017.

Respectfully submitted,

BYUNG J. PAK
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/s/KELLY K. CONNORS
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Certificate of Compliance

I hereby certify, pursuant to Local Rules 5.1 and 7.1D, that the foregoing brief has been prepared using Book Antiqua, 13 point font.

/s/ KELLY K. CONNORS
Assistant United States Attorney

Certificate of Service

The United States Attorney's Office served this document today by filing it using the Court's CM/ECF system, which automatically notifies the parties and counsel of record.

/s/ KELLY K. CONNORS
Assistant United States Attorney

EXHIBIT F

DUPLICATE

FILED IN CHAMBERS

(USAO GAN 6/10) Seizure Warrant t

United States District Court

Northern District of Georgia

OCT 03 2017

U.S. MAGISTRATE JUDGE
N.D.GEORGIA

APPLICATION AND AFFIDAVIT FOR SEIZURE WARRANT

In the Matter of the Seizure of:

Any and all funds maintained in Touchmark National Bank bank account number [redacted]0855

Case Number:
1:17-MJ-839
UNDER SEAL

I, Brian Kriplean and any Authorized Officer of the United States:

I am a Special Agent of the FDA and have reason to believe that there is now certain property which is subject to seizure and forfeiture to the United States, namely:

Any and all funds maintained in Touchmark National Bank bank account number [redacted]0855

which are subject to seizure and civil and criminal forfeiture pursuant to 18 U.S.C. §§ 981, 982, and 21 U.S.C. § 853, and 28 U.S.C. § 2461, for violations of 21 U.S.C. §§ 841, 846 and 18 U.S.C. § 1956, as proceeds of, property involved in, and property facilitating the offenses. The facts to support a finding of Probable Cause are as follows:

SEE ATTACHED AFFIDAVIT

Continued on the attached sheet and made a part hereof. ☒Yes ☐No

Signature of Affiant
Brian Kriplean

Sworn to before me, and subscribed in my presence

October 3, 2017 @ 12:15 at Atlanta, Georgia
Date City and State

Alan J. Baverman
United States Magistrate Judge
Name and Title of Judicial Officer

Signature of Judicial Officer

AUSA Kelly K. Connors /404-581- 4639

AFFIDAVIT IN SUPPORT OF SEIZURE WARRANTS

I, Brian C. Kriplean, a Special Agent with the United States Food and Drug Administration Office of Criminal Investigations ("FDA-OCI"), being first duly sworn, hereby depose and state that:

I. INTRODUCTION

1. I am the Affiant herein and an investigative or law enforcement officer of the United States empowered to conduct investigations of or to make arrests for offenses under the Federal Food, Drug, and Cosmetic Act, Title 21, United States Code, Sections 301-399f ("FDCA").

2. I submit this Affidavit in support of an application for seizure warrants for the following bank accounts (the "SUBJECT BANK ACCOUNTS"):

- Any and all funds maintained in Bank of America account number [redacted]1840, held in the name of Diversified Biotech Inc DBA Hi-Tech Pharmaceuticals;
- Any and all funds maintained in Touchmark National Bank account number [redacted]0855, held in the name of Hi Tech Pharmaceuticals Inc.

3. There is probable cause to believe that Hi-Tech Pharmaceuticals, Inc. ("Hi-Tech") is manufacturing, marketing, and distributing misbranded foods and/or drugs, some of which contain Schedule III controlled substances, namely, anabolic steroids. Accordingly, there is probable cause to believe that Hi-Tech is violating federal law in the Northern District of Georgia and elsewhere, including violations of the following statutes: (a) Title 21, United States Code, Sections 331(a) and 333(a)(2) (introducing or delivering for introduction into interstate commerce misbranded foods and/or drugs); (b) Title 21, United States Code, Sections 331(k) and 333(a)(2) (doing an act to a food and/or drug after shipment in interstate commerce and while held for sale that results in the food and/or drug being misbranded); (c) Title 21, United States Code, Section 841(a)(1) (manufacturing and distributing controlled substances); and (d) Title 18, United States Code, Section 1956 (money laundering).

4. The above-listed items, identified in paragraph 2, are subject to seizure and forfeiture under 18 USC §§ 981, 982, 21 USC § 853, and 28 USC § 2461.

5. The facts set forth in this Affidavit are based on: (a) my personal observations; (b) my training and experience; and (c) information obtained from other agents/officers and witnesses. Because I submit this Affidavit for the limited purpose of showing probable cause, I have not included each and every fact that I have learned in this investigation in this Affidavit. Rather, I have set forth only

facts sufficient to establish probable cause to issue Seizure Warrants for the SUBJECT BANK ACCOUNTS. Additionally, unless indicated otherwise, all statements and conversations described herein are related in substance and part only rather than verbatim.

II. AFFIANT'S BACKGROUND

6. I currently am employed as a Special Agent ("SA") with the FDA-OCI, Nashville Domicile Office, and have been employed by the FDA-OCI since September 2007. Prior to being employed by the FDA-OCI as a Special Agent, I was employed as a Special Agent with IRS-CI. I am a graduate of the Federal Law Enforcement Training Center in Glynco, Georgia. At this training center, I underwent a six-month training program that addressed investigation techniques and other matters.

7. In connection with my official duties, I investigate criminal violations of the FDCA and related offenses. I have received training, both formal and informal, in the enforcement of the FDCA, investigation of the manufacture and distribution of misbranded foods and/or drugs, undercover operations, interviewing techniques, and the use of physical and electronic surveillance.

8. I am familiar with and have used many of the traditional methods of investigation, including, without limitation, visual surveillance, electronic surveillance, informant and witness interviews, consensually recorded telephone

conversations, defendant debriefings, the use of confidential sources, undercover operations, execution of search warrants, the seizure of evidence, and controlled purchases of misbranded foods and/or drugs.

9. Based upon my training and experience, I am familiar with the ways in which manufacturers and distributors of misbranded foods and/or drugs conduct their business, including the use of their place of business to create, send, receive and maintain business records associated with their illegal activity and conduct financial transactions.

III. APPLICABLE STATUTES

The Federal Food, Drug, and Cosmetic Act

10. FDA is the federal agency charged with the responsibility of protecting the health and safety of the American public by enforcing the FDCA. One purpose of the FDCA is to ensure that foods sold for consumption by humans are safe to eat and bear labeling containing only true and accurate information. FDA also ensures that drugs are safe and effective for their intended uses and bear labeling that contains true and accurate information. The FDA's responsibilities under the FDCA include regulating the manufacture, labeling, and distribution of foods and drugs shipped or received in interstate commerce.

11. Under the FDCA, foods and drugs are deemed to be misbranded if their respective labeling is false or misleading in any particular. 21 U.S.C. §§ 343(a)(1)

(foods) and 352(a) (drugs). A drug is also misbranded if its labeling fails to bear adequate directions for use. 21 U.S.C. § 352(f)(1).

12. The FDCA prohibits doing and causing the following acts:

a. Introducing or delivering for introduction into interstate commerce any food and/or drug that is misbranded. 21 U.S.C. § 331(a); and

b. Doing an act to a food and/or drug after shipment in interstate commerce and while held for sale that results in the food and/or drug being misbranded. 21 U.S.C. § 331(k).

The Controlled Substances Act

13. The Controlled Substances Act ("CSA") contains a general definition of anabolic steroids, 21 U.S.C. § 802(41)(A), a list of specific substances that meet the definition of anabolic steroid, 21 U.S.C. § 802(41)(A)(i) – (lxxv), and a complementary definition, 21 U.S.C. § 802(41)(C), that covers other substances that may be considered anabolic steroids under the CSA.

14. Anabolic steroids are Schedule III Controlled Substances. 21 U.S.C. § 812(b), Schedule III(e). With certain exceptions authorized by law, it is unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance. 21 U.S.C. § 841(a)(1).

Money Laundering

15. Under 18 USC § 1956, a violation occurs when an individual, knowing that the property involved in a financial transaction represents the proceeds of unlawful activity, conducts or attempts to conduct a financial transaction with proceeds of specified unlawful activity with the intent to promote the carrying on of the specified unlawful activity or knowing that the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of specified unlawful activity. In addition, an individual violates Section 1956 when he or she transports, transmits, or transfers, or attempts to transport funds from a place inside the United States to a place outside the United States with the intent to promote the carrying on of specified unlawful activity, or knowing that that the funds involved in the transportation represents the proceeds of specified unlawful activity that are designed to conceal the nature, location, source, ownership or control of the funds, is in violation of 18 U.S.C. § 1956.

Forfeiture Statutes

16. Under 21 USC § 853, as adopted by 28 U.S.C. § 2461(c), any property, real or personal, consisting of or derived from proceeds obtained directly or indirectly as a result of a violation of 21 U.S.C. § 841(a)(1) and any property used or intended to be used to facilitate the commission of such a violation shall be subject to criminal and civil forfeiture.

17. Under 18 USC § 981, any property, real or personal, which constitutes or is

derived from proceeds traceable to a violation of 18 U.S.C. § 1956 is subject to civil forfeiture to the United States.

18. Under 18 USC § 982, any property, real or personal, involved in or traceable to a violation of 18 U.S.C. §§ 1956 is subject to criminal forfeiture.

19. Under 21 USC § 853(f), a protective order for the Subject Bank Accounts would not be sufficient to ensure their availability for criminal forfeiture. The Subject Bank Accounts are fungible, and a protective order would be insufficient to ensure that the funds are not withdrawn and removed from the jurisdiction of the court.

IV. PROBABLE CAUSE

20. According to records filed with the State of Georgia Secretary of State Corporations Division, Hi-Tech was incorporated by Jared Wheat on April 6, 1998. According to the annual filings of Hi-Tech filed with the State of Georgia since October 2007 through January 2017, 6015 Unity Drive, Suites A, B, D and F, Norcross, GA 30071 (LOCATION 1) is listed as the principal office address of record.

21. I have identified multiple physical locations associated with Hi-Tech, which includes (collectively "PHYSICAL LOCATIONS"):

- "LOCATION 1" is a business property located at 6015 Unity Drive, Suites A, B, D and F, Norcross, GA 30071.

- "LOCATION 2" is a business property located at 6020 Unity Drive, Suites D, E, F, G and H, Norcross, GA 30071. .
- "LOCATION 3" is a business property located at 6025 Unity Drive, Suite A, Norcross, GA 30071.
- "LOCATION 4" is a business property located at 5440 Oakbrook Parkway, Suites A and B, Norcross, GA 30093.
- "LOCATION 5" is a business property located at 500 Satellite Blvd., Suite B, Suwanee, GA 30024.
- "LOCATION 6" is a business property located at 1256 Oakbrook Drive, Suite A, Norcross, GA 30093.

22. Hi-Tech has an active food facility registration with the FDA, which was last updated by Hi-Tech on November 7, 2016. That registration is valid through December 31, 2018. The registration lists LOCATION 1 as the food facility address.

23. According to FDA records, Hi-Tech has multiple Facility FDA Establishment Identifier ("FEI) Numbers assigned to it. Facility FEIs are assigned by the FDA to track inspections. LOCATIONS 1, 4, 5 and 6 have Facility FEIs assigned.

24. According to FDA records, Hi-Tech's registered facilities in Georgia were last inspected by the FDA in October 2013. The inspected facilities included LOCATIONS 1, 2, 4 and 5. At the time of that inspection, LOCATION 1 (consisting of Suites B and D) served as Hi-Tech's administrative offices and manufacturing facility, respectively. LOCATION 2 (consisting of Suites F and G) served as an additional manufacturing facility. LOCATION 4 served as a warehouse for raw material storage, finished products, bulk dietary supplements, packaging material, and manufacturing machinery. LOCATION 5 served as a facility for blending powder products and raw materials. During the course of the inspection, FDA regulators observed manufacturing activities and reviewed and

collected various business records pertaining to Hi-Tech's manufacture and distribution of purported dietary supplements. Such records included batch records, importation of raw material documents, operating procedures, and shipping records.

25. Beginning in or around August 2011, I have been involved in several investigations involving products manufactured and distributed by Hi-Tech. Through such investigations, I have become familiar with the physical locations (PHYSICAL LOCATIONS) and websites operated by Hi-Tech, including www.hitechpharma.com. Such website is utilized to promote Hi-Tech's business operations and products it manufactures and distributes. Such website also serves as an online retail store in which a consumer can order purported dietary supplement products manufactured by Hi-Tech.

26. I have conducted a search of the www.hitechpharma.com domain name through a public domain registration database. The registrant of the hitechpharma.com domain name was listed as "Hi-Tech Pharmaceuticals, Inc." located at LOCATION 1.

27. In August 2016, I visited the website of www.hitechpharma.com. During the review of the website, I observed numerous Hi-Tech branded products being marketed for sale under the category of "Testosterone & Prohormone Supplements," including 1-AD, 1-Testosterone, Androdiol, Equibolin, and

Superdrol. Through training and experience, I am aware that "prohormone" supplements are marketed to promote muscle growth. I am further aware from other similar investigations that prohormone supplements often contain non-dietary ingredients or Schedule III controlled substances, namely anabolic steroids.

28. Previously, in September 2016, agents from FDA-OCI conducted undercover purchases of the aforementioned products from www.hitechpharma.com using undercover names and credit cards. Those products were subsequently received via UPS Ground delivery to FDA-OCI undercover addresses in Florida and Georgia. Each shipment listed the shipper as being located at LOCATION 6. Each shipment contained a printed invoice from Hi-Tech listing its address as LOCATION 1. The undercover credit card statements reflect Hi-Tech Pharmaceuticals as the merchant for the undercover purchases made in September 2016.

29. Following receipt of the undercover purchases, the products were submitted to FDA's Forensic Chemistry Center (FCC) for chemical analysis. The FDA-FCC reported that the following Hi-Tech products contained Schedule III anabolic steroids:

Product	**Schedule III Anabolic Steroids**	**Alternate Name of Steroids**
1-AD Lot # C736	boldione; and	androstadienedione and/or 1,4-androstadien-3,17-dione

	androstanedione	5α-androstan-3,17-dione
1-Testosterone Lot # C737	boldione; and androstanedione	androstadienedione and/or 1,4-androstadien-3,17-dione 5α-androstan-3,17-dione
Androdiol Lot # C750	4-androstenediol and/or 5-androstenediol	4-androsten-3β, 17β-diol 5-androsten-3β-ol-17-one
Equibolin Lot # C689	4-androstenediol and/or 5-androstenediol	4-androsten-3β, 17β-diol 5-androsten-3β-ol-17-one
Superdrol Lot # C770	androstanedione	5α-androstan-3,17-dione

30. The respective labeling for the 1-AD, 1-Testosterone, Androdiol, Equibolin, and Superdrol products received from the September 2016 undercover purchases failed to properly declare as ingredients the respective Schedule III anabolic steroids contained therein, as more fully detailed in the table above. Accordingly, this false or misleading labeling rendered those products misbranded under the FDCA. *See* 21 U.S.C. § 343(a)(1) (foods) and 352(a) (drugs).

31. On August 7, 2017, a cooperating source (CS)[1] sent an email to Chad

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1 The CS is considered an un-indicted co-conspirator in an unrelated investigation and pending criminal case in the Northern District of Georgia. The CS owned and operated a nutrition retail store and distributed a privately labeled brand of dietary supplements that he sold to end-user consumers. The investigation determined that the CS distributed products containing controlled substances, specifically anabolic steroids, which were manufactured by co-conspirators who

Jordan, Regional Sales Manager for Hi-Tech, requesting information on Hi-Tech's prohormones. In response, Jordan sent an email to the CS on August 8, 2017 from chadj@hitechpharma.com stating in part that "all are compliant and DHEA compounds that bypass the liver so they are not toxic. 34.95 is your price on all of the prohormones under the hi tech line. 1-testosterone is the one I move the most and then Anavar is my second best seller." Additionally, Jordan provided the CS with a dropbox link containing price sheets for Hi-Tech's products and its family of brands. The link also contained marketing material and labels for numerous products Hi-Tech distributes. On August 14, 2017, the CS emailed Jordan to inquire about payment options. In response, Jordan replied in part "really just have two options. We can do COD if you fill out the COD form. Or we can take a credit card for the order." On August 15, 2017, the CS emailed Jordan to place an order for five bottles each of the products listed in paragraph 22 above via COD payment.

32. On August 21, 2017, a UPS COD shipment was delivered to the CS in North

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have been indicted. The products containing controlled substances that were distributed by the CS were misbranded in that they did not disclose on the labeling that the products contained anabolic steroids. The CS agreed to voluntarily cooperate with law enforcement and has not been charged to date.

Carolina from Hi-Tech. Upon receipt of the COD shipment, the CS paid for the COD shipment utilizing a business check issued to Hi Tech Phama. According to a copy of the cancelled check provided to me by the CS, such check was deposited into Touchmark National Bank account number [redacted]0855 held in the name of Hi Tech Pharmaceuticals Inc on or about August 31, 2017. The shipment listed the shipper as located at LOCATION 6. I took custody of the parcel, which was sealed when I received it, and subsequently inventoried its contents. The shipment contained a printed invoice dated August 17, 2017, from Hi-Tech listing its address as LOCATION 1. The shipment also contained five sealed bottles each of 1-AD, Androdiol, Equibolin, and Superdrol bearing the same label information but with different lot numbers from the lot numbers listed on the previously purchased products received in September 2016. I am aware that such products are commonly manufactured in batches with a unique lot number assigned to each batch.

33. One bottle of each of the four products received from the undercover purchase in August 2017 was subsequently submitted to FDA-FCC for chemical analysis. FDA-FCC reported the following products contained Schedule III anabolic steroids, as more fully detailed below:

Product	**Schedule III Anabolic Steroids**	**Alternate Name of Steroids**
1-AD Lot # C921	4-androstenediol and/or	4-androsten-3β, 17β-diol 5-androsten-3β-ol-17-one

	5-androstenediol	
Androdiol Lot #C681	4-androstenediol and/or 5-androstenediol	4-androsten-3β, 17β-diol 5-androsten-3β-ol-17-one
Equibolin Lot # C841	4-androstenediol and/or 5-androstenediol	4-androsten-3β, 17β-diol 5-androsten-3β-ol-17-one
Superdrol Lot # C857	androstanedione; 4-androstenediol and/or 5-androstenediol; and Boldione	5α-androstan-3,17-dione 4-androsten-3β, 17β-diol 5-androsten-3β-ol-17-one androstadienedione and/or 1,4-androstadien-3,17-dione

34. The respective labeling for the 1-AD, Androdiol, Equibolin, and Superdrol products received from the August 2017 undercover purchase failed to properly declare as ingredients the respective Schedule III anabolic steroids contained therein, as more fully detailed in the table above. Accordingly, this false or misleading labeling rendered those products misbranded under the FDCA. *See* 21 U.S.C. § 343(a)(1) (foods) and 352(a) (drugs).

35. On September 14, 2017, I visited the website www.hitechpharma.com. The Hi-Tech website continued to offer for sale the products listed in paragraphs 30 and 34 above. Also, I reviewed internet archives for the website www.hitechpharma.com, and determined that the Hi-Tech website has offered

these products for sale since at least March 2016.

36. In August 2017, I received and reviewed lease agreements and other landlord records obtained from Plaza 85 SPE, LLC, the owner of Plaza 85 Business Park where LOCATIONS 1, 2 and 3 are located. Such records reflect that Hi-Tech entered into an industrial lease agreement for all three premises beginning on June 10, 2014. A June 2016 addendum to the lease agreement for LOCATIONS 1, 2 and 3 shows a lease expiration of May 30, 2020. Additional landlord records reflect the rent payments on the above-described premises being paid from funds derived from a Bank of America checking account in the name of "Diversified Biotech Inc dba Hi-Tech Pharmaceuticals" located at LOCATION 2.

37. In August 2017, I received and reviewed lease agreements and other landlord records obtained from MDH Partners, LLC, owner and landlord of LOCATION 4. Such records reflect that Hi-Tech entered into a lease agreement with the landlord effective November 10, 2011, for the premises at LOCATION 4 consisting of approximately 42,106 rentable square feet. On January 10, 2013, Hi-Tech executed an amendment to this lease agreement by expanding the leased premises to include Suite B consisting of approximately 14,106 additional rentable square feet. This lease agreement is valid through April 30, 2018. Additional records reflect the rent payments on the above described premises being paid from funds derived from a Bank of America checking account in the name of

"Diversified Biotech Inc dba Hi-Tech Pharmaceuticals" located at LOCATION 2.

38. In May 2017, I received and reviewed lease agreements and other landlord records obtained from Stream Realty Partners, third party property management service provider for LOCATION 6. Such records reflect that Hi-Tech entered into an industrial lease agreement with the landlord effective October 29, 2015, for the premises at LOCATION 6. On February 16, 2016, Hi-Tech executed an amendment to this lease agreement by expanding the leased premises to include Suite B-1 consisting of approximately 5,036 additional rentable square feet. This lease is valid through November 30, 2020. Additional records reflect the rent payments on the above described premises being paid from funds derived from a Bank of America checking account in the name of "Diversified Biotech Inc dba Hi-Tech Pharmaceuticals" located at LOCATION 2.

39. According to records obtained from UPS in June 2017, Shipping Account # [redacted] is listed in the name of "Hi-Tech Pharmaceutical" at the address of LOCATION 4. This account started in September 1997 and remains active with UPS. Records reflect in excess of 3,700 packages were picked up by UPS between January 2015 and May 15, 2017, listing Hi-Tech Pharmaceutical at LOCATION 4 as the consignee.

40. According to records obtained from UPS in June 2017, Shipping Account

#[redacted] is listed in the name of "Hitech Pharma Small Package" at the address of LOCATION 6. This account started in December 2015 and remains active with UPS. Records reflect in excess of 57,000 shipments were billed to this account by UPS between February 2016 and May 15, 2017. Such shipments include the three undercover purchases made in September 2016.

41. On August 22, 2017, I received information from UPS regarding COD remittances for UPS Account #[redacted]. Specifically, UPS stated that COD remittances for this account are sent via US mail to Hi-Tech Pharmaceutical at LOCATION 1.

V. BANK RECORDS

42. Per bank records received pursuant to a GJ Subpoena, Touchmark National Bank Account #[redacted]0855 was opened in May 2014. The account is titled in the name of Hi Tech Pharmaceuticals, Inc. located at 6015 B Unity Drive, Norcross, GA. I have reviewed the monthly transactions of this account for the period January 2016 through August 2017. Such transactions reflect regular deposits into the account from various merchant service providers, including Fifth Third Bankcard Systems and American Express. Based upon my training and experience, I know that deposits from merchant service providers such as Fifth Third Bankcard Systems and American Express are derived from a merchant accepting credit cards for sales transactions. As stated previously in this affidavit,

I know that Hi-Tech Pharmaceuticals, Inc. accepts credit card payments for purchases of purported dietary supplements Hi-Tech sells through its website, www.hitechpharma.com, including prohormones which have been tested and found to contain Schedule III Controlled Substances (anabolic steroids). I have also reviewed the checks and debit transactions posted to this account for the same period. Based upon such review, I have found the account has recurring check payments to Hi-Tech Pharmaceuticals, Inc., which are subsequently deposited into Bank of America Account # [redacted]1840 in the name of Diversified Biotech, Inc. DBA Hi-Tech Pharmaceuticals located at 6020 Unity Drive, Suite G, Norcross, GA. For the period January 2016 through June 2017, such checks totaled $7,520,000. The vast majority of such checks list "Transfer to BOA" in the memo section of the check.

43. Per bank records received pursuant to a GJ Subpoena, Bank of America Account # [redacted]1840 was opened in October 2014. The account is titled in the name of Diversified Biotech, Inc., DBA Hi-Tech Pharmaceuticals located at 6020 Unity Drive, Suite G, Norcross, GA. John Brandon Schopp is listed as President and sole signor on the account per the records received. I have reviewed the monthly transactions of this account for the period January 2016 through June 2017. Such transactions reflect the account receives deposits from various entities,

some of which I know to be engaged in the distribution of dietary supplements. In addition to such deposits, the account also reflects recurring deposits of checks drawn on Touchmark National Bank Account # [redacted]0855 totaling $7,520,000 for the period January 2016 through June 2017. I have also reviewed the checks and debit transactions posted to this account for the same period. Based upon such review, I have found recurring payments for operating expenses of Hi-Tech Pharmaceuticals, Inc., including rent/lease payments, payroll, contract labor, packaging materials and supplies, shipping charges, etc. consistent with a business engaged in the manufacture and distribution of dietary supplements.

44. On September 28, 2017, a Grand Jury seated in the Northern District of Georgia returned a Superseding Indictment, charging Jared Wheat, Brandon Schopp, and/or Hi-Tech Pharmaceuticals, Inc., with violations of 21 U.S.C. §§ 331(a), 333(a)(2), 841(a)(1), and 846 (conspiracy to distribute controlled substances) and with violations of 18 U.S.C. §§ 1343, 1349 (conspiracy to commit wire fraud), 1956 and 1957.

CONCLUSION

45. Based on the foregoing, I believe there is probable cause to believe that Hi-Tech is committing violations of federal law, including violations of: (a) Title 21, United States Code, Sections 331(a) and 333(a)(2) (introducing or delivering for introduction into interstate commerce misbranded foods and/or drugs); (b) Title 21,

United States Code, Sections 331(k) and 333(a)(2) (doing an act to a food and/or drug after shipment in interstate commerce and while held for sale that results in the food and/or drug being misbranded); (c) Title 21, United States Code, Section 841(a)(1) (manufacturing and distributing controlled substances); and (d) Title 18, United States Code, Section 1956 (money laundering). Furthermore, I have probable cause to believe that the funds maintained in the Subject Bank Accounts are subject to seizure and forfeiture.