UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. $1,810,490.34 SEIZED FROM TOUCHMARK NATIONAL BANK ACCOUNT NUMBER XXXXXX0855, and $1,225,827.11 SEIZED FROM BANK OF AMERICA ACCOUNT NUMBER XXXXXX1840, Defendants.	CIVIL ACTION NO. 1:17-CV-4442-CAP

ORDER

This action is before the court on Claimant Hi-Tech Pharmaceuticals, Inc.'s ("Hi-Tech") motion to reassign case [Doc. No. 8] and motion to dismiss for failure to state a claim [Doc. No. 7].[1]

I. Motion to Reassign

Hi-Tech moves for reassignment of this case to District Court Judge Amy Totenberg and Magistrate Judge Catherine M. Salinas because this case directly relates to a criminal case now pending before those judges. *See United States v. Jared Wheat*, et al., Criminal Action No. 1:17-CR-00229-AT-

[1] Claimant Diversified Biotech Inc. d/b/a Hi-Tech Pharmaceuticals has adopted Hi-Tech's motion to reassign and motion to dismiss [Doc. No. 29].

CMS. In support of the motion, Hi-Tech cites to this court's Internal Operating Procedures, which direct that "related cases shall be assigned to the same judge." Rule 905-2, Internal Operating Procedures, N.D. Ga.

The Internal Operating Procedure cited by Hi-Tech has never been interpreted by this court to apply across civil and criminal cases. The rule is applicable to the assignment of a civil case when it is related to another civil case. In assigning civil forfeiture actions, the clerk of this court does not consider the relatedness of criminal actions even when there is a pending criminal action containing forfeiture provisions involving the same property.

Accordingly, because the instant case was assigned through the regular procedures employed by the clerk of court that are applicable to civil cases, there is no basis for reassignment. Therefore, the motion to reassign case [Doc. No. 8] is DENIED.

II. Motion to Dismiss

This is a civil forfeiture action arising out of a criminal investigation of Hi-Tech, Diversified Biotech, Jared Wheat, John Brandon Schopp, and others pertaining to sale of false, mislabeled, and misbranded controlled substances. Hi-Tech, Diversified Biotech, Wheat, and Schopp have been indicted in this court in criminal action number 1:17-CR-0229-AT.

On November 6, 2017, the government filed its verified complaint for forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C), 21 U.S.C. § 881(a)(6), and 18 U.S.C. § 981(a)(1)(A). The property seized is currency from two bank accounts: $1,810,490.34 from a Touchmark National Bank account ending in 0855 in the name of Hi-Tech Pharmaceuticals, Inc., and $1,225,827.11 from Bank of America account ending in 1840 held in the name of Diversified Biotech Inc. d/b/a Hi-Tech Pharmaceuticals.

Hi-Tech moves to dismiss the complaint for failure to state a claim for relief [Doc. No. 7]. Specifically, Hi-Tech contends that the complaint does not allege sufficient facts as to crimes underlying the seizure of over $3 million in funds and makes no reasonable attempt to trace the funds seized to alleged crimes. As such, according to Hi-Tech, the government has failed to sufficiently set forth facts which create a reasonable belief that it will be able to show that the funds seized are forfeitable. The government filed a response in opposition to the motion to dismiss [Doc. No. 16], and Hi-Tech has filed a reply brief [Doc. No. 19].

A. Legal Standard

A claim will be dismissed under Federal Rule of Civil Procedure 12(b)(6) if 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).

In the instant civil forfeiture action, however, traditional pleading rules are 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 out requirements specific to civil forfeiture actions. Pursuant to the Supplemental Rules the complaint must, among other things, "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). 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).

The government is not required to prove its case at the pleading stage; it is merely required to establish the reasonable belief that the government can meet its burden at trial. *United States v. $90,000 in U.S. Funds*, No.

5:12–CV–169 (CAR), 2012 WL 5287888, at *2 (M.D.Ga. Oct. 23, 2012) ("At the trial of a civil forfeiture case, the Government must prove by a preponderance of the evidence that the property is subject to forfeiture. Thus, 'the complaint must at bottom allege facts sufficient to support a reasonable belief that the property is subject to forfeiture.' ") (internal citations omitted).

B. Analysis

In considering Hi-Tech's motion to dismiss, the court 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). As set forth above, the government is proceeding under three different forfeiture statutes. Hi-Tech contends that the government has failed to state a claim as to all three.

Pursuant to the first forfeiture statute relied upon by the government, the following property is subject to forfeiture:

> 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)(7) of this title), or a conspiracy to commit such offense.

18 U.S.C. § 981(a)(1)(C).

The second forfeiture statute relied upon by the government provides that the following property is subject to forfeiture:

> All 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.

21 U.S.C. § 881(a)(6).

The final forfeiture statute relied upon by the government provides that "[a]ny 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" is subject to forfeiture. 18 U.S.C. § 981(a)(1)(A).

The complaint alleges that the Defendant Property constitutes and is derived from proceeds traceable to specified unlawful activities including violations of 18 U.S.C. §§ 1341 (frauds & swindles), 1343 (wire fraud), 1349 (attempt & conspiracy), 1956 (money laundering), and 1957 (monetary transactions in property derived from unlawful activity) and 21 U.S.C. §§ 841(a)(1) (manufacture, distribute, dispense controlled substance), 846 (attempt & conspiracy), 854 (investment of illicit drug profits), and 856 (maintaining drug involved premises) [Doc. No. 1 at ¶ 2]. Additionally, the

complaint alleges that specific unlawful activities included mail fraud, introducing misbranded drugs into interstate commerce, manufacturing and distributing controlled substances, investment of illicit drug profits, money laundering, and conspiracies to commit all of these offenses [Doc. No. 1 at ¶ 9].

With respect to the unlawful activities identified by the government, the complaint makes the following factual allegations:

- Hi-Tech manufactured, stored, and distributed false, misbranded, and mislabeled controlled substances from its Business Premises.[2] Compl. at ¶ 28 [Doc. No. 1].
- Hi-Tech offered false, misbranded, and mislabeled controlled substances for sale on its web site at www.hitechpharma.com. *Id.* at ¶ 32.
- Customer orders were fulfilled by shipping orders via United Parcel Service ("UPS"). *Id.* at ¶ 34.
- Customers paid for Hi-Tech products via credit card and COD payments collected at time of delivery. *Id.* at ¶ 36

[2] The complaint defines the Business Premises as six different addresses where Hi-Tech and Diversified Biotech, Inc. conducted business [Doc. No. 1 at ¶ 25].

- Funds traceable to customer credit card payments and COD payments were deposited into the Touchmark Account. *Id.* at ¶¶ 37-38.
- In September 2016, undercover purchases were made from www.hitechpharma.com of Hi-Tech products including 1-AD, 1-Testosterone, Androdiol, Equibolin, and Superdrol. *Id.* at ¶¶ 41, 45.
- The merchandise, which contained Schedule III controlled substances was shipped via UPS from the Business Premises and paid for by credit card; the credit card statements indicate that Hi-Tech was the merchant originating the charges. *Id.* at ¶ ¶ 46, 48, and 51.
- The labeling of the 1-AD, 1-Testosterone, Androdiol, Equibolin, and Superdrol received as a result of the undercover purchases did not declare as ingredients the Schedule III controlled substance. *Id.* at at ¶ 52.
- In August 2017, Hi Tech's Regional Sales Manager responded to an inquiry using his Hi-Tech email account, chadj@hitechpharma.com, representing that all of Hi-Tech prohormones "are compliant and DHEA compounds that bypass the liver." *Id.* at ¶ 57.
- The email recipient sent an email to chadj@hitechpharma.com ordering five bottles each of 1-AD, Androdiol, Equibolin, and Superdrol. Id. at ¶ 60.

- Upon receipt of the order, the email recipient paid using a check made out to "Hi Tech Pharma," which was deposited into the Touchmark Account on August 31, 2017. *Id.* at ¶¶ 63, 64.
- The products received were found to contain Schedule III controlled substances, but their labels did not declare anabolic steroids as an ingredient. *Id.* at ¶¶ 66, 67.
- Financial and monetary transactions to launder Touchmark Account funds that were proceeds from Hi-Tech's manufacturing, marketing, and distributing false, mislabeled, and misbranded controlled substances occurred by issuing checks drawn on the Touchmark Account that were then deposited in the Bank of America Account, including $7,520,000 of deposits between January 2016 and June 2017. *Id.* ¶¶ 71-73.
- After funds were moved from the Touchmark Account, they were used to pay expenses related to the unlawful activities including the payment of rent for one or more of the Business Premises. *Id.* at ¶ 74, 75.

The court has considered these facts under the standard of Supplemental Rule G(2)(f): i.e., whether the complaint states sufficiently detailed facts to support a reasonable belief that the government will be able

to prove at trial that the Defendant Property is subject to forfeiture. The factual allegations set forth above are more than sufficient to uphold a reasonable belief that at trial, the government will be able to prove that at least some portion of the Defendant Property is subject to forfeiture.

In fact, Hi-Tech's motion seems to concede that the factual allegations are sufficient to survive a motion to dismiss challenge to at least some part of the Defendant Funds. The main issue raised by Hi-Tech is that the government seized all the funds in the two accounts rather than only those funds stemming from the illegal activity that the government could prove at the time of seizure. Hi-Tech spends the bulk of its brief arguing that the government cannot support a seizure of more than $3 million with two instances of undercover purchases.

In response to the motion to dismiss, the government relies on § 981(a)(1)(A), which provides that any property involved in a transaction or attempted transaction in violation of sections 1956 (money laundering), and 1957 (monetary transactions in property derived from unlawful activity) is forfeitable. The Eleventh Circuit has held that even funds derived from legitimate sources are forfeitable when those funds are used to facilitate an illegal scheme. *United States v. Puche*, 350 F.3d 1137, 1153 (11th Cir. 2003).

In *Puche*, what was important to the court was that the legitimate funds were used to conceal the illegitimate funds.

Apparently, it is the government's argument that the two bank accounts themselves or legitimate funds within them were used to promote the monetary transaction and money laundering schemes. The government does allege that money laundering transactions occurred when Hi-Tech regularly issued checks drawn on the Touchmark Account were deposited into the Bank of America Account. Compl. at ¶ 71-73 [Doc. No. 1]. But, the complaint makes no allegations regarding how the accounts themselves or non-tainted funds within the accounts were used to facilitate the illegal schemes. Rather, the complaint alleges that the tainted funds, i.e., the funds procured through the specified unlawful activity or in exchange for controlled substances, were used to pay various expenses. *Id.* at ¶¶ 74, 75.

Because the complaint fails make factual allegations sufficient to create a belief that the entire contents of the two bank accounts are forfeitable, the motion to dismiss is due to be granted. However, because the government has argued that its § 981(a)(1)(A) theory of forfeiture supports the seizure of all funds within the two accounts, the court will allow the government to file an amended verified complaint to cure the deficiencies identified above.

III. Conclusion

Hi-Tech's motion to reassign case [Doc. No. 8] is DENIED.

Hi-Tech's motion to dismiss [Doc. No. 7] is GRANTED, but the government is GRANTED LEAVE to file an amended verified complaint within twenty days of the date of this order.

In the event the government elects not to file an amended verified complaint, the dismissal shall become final after the expiration of the twenty-day period, and the clerk will then be directed to enter final judgment.[3]

In the event the government does file an amended verified complaint, the claimants are free to file a new Rule 12(b)(6) motion addressing the amended verified complaint within the time provided by the Federal Rules of Civil Procedure.

SO ORDERED this 28th day of February, 2018.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge

[3] *See Schuurman v. Motor Vessel Betty K V*, 798 F.2d 442, 445 (11th Cir. 1986) (stating that, "[i]n dismissing [a] complaint, the district court may . . . provide for a stated period within which the plaintiff may amend the complaint," and if plaintiff does not do so, "the dismissal order becomes final at the end of the stated period").