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

UNITED STATES OF AMERICA	
v.	CRIMINAL ACTION NO.
JARED WHEAT and HI-TECH PHARMACEUTICALS, INC.,	1:17-CR-0229-AT-CMS
Defendants.	

ORDER

Presently before the Court is the Motion for Return of Seized Property (DMAA) in which Defendant Hi-Tech Pharmaceuticals ("Hi-Tech") and Defendant Jared Wheat (collectively "Defendants") move pursuant to Federal Rule of Criminal Procedure 41(g) for an order requiring the return of 19 million dollars' worth of Hi-Tech's inventory that the Government seized more than eighteen months ago during the investigation and prosecution of this criminal case. [Doc. 173].

I. Background[1]

In 2012, the United States Food and Drug Administration ("FDA") began sending warning letters to companies that marketed dietary supplements containing

[1] These background facts are taken from pleadings and briefs in various cases and are included only to provide context for the present dispute between Defendants and the FDA. They are not intended to be construed as findings by the Court.

the food additive 1,3-Dimethylamylamine ("DMAA"), declaring such products to be "adulterated" and therefore unsafe.[2] As a result of the letters, many companies removed their DMAA-containing products from the stream of commerce. Hi-Tech, however, chose not to do so.

On October 24, 2013, FDA inspectors conducted an inspection of Hi-Tech facilities in Norcross, Georgia, during which they found substantial inventories of Hi-Tech products that were labeled as containing DMAA or its chemical equivalent, as well as bulk DMAA raw ingredients. On November 1, 2013, the FDA issued an administrative Detention Order against certain itemized DMAA-containing goods (the "2013 Seized Items") pursuant to its administrative detention authority under 21 U.S.C. § 334(h). According to Defendants, the value of the 2013 Seized Items was approximately $3 million. Defendants state that the agents left the detained products at Hi-Tech's premises, cordoned off with yellow tape. [Doc. 173 at 5–6].

---

[2] The FDA is the federal agency charged with protecting the health and safety of the American public by enforcing the Food Drug and Cosmetic Act ("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. The 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.

Within a few days of the issuance of the Detention Order, Hi-Tech filed a declaratory judgment action in federal court in Washington, D.C. styled Hi-Tech Pharmaceuticals, Inc. v. Hamburg, et al., No. 1:13-cv-1747-KBJ (D.D.C.) (the "Declaratory Judgment Action"). In that case, Hi-Tech challenged the FDA's determination that DMAA was an unsafe food additive and sought a declaratory judgment that it could continue to market and manufacture products containing DMAA. [Id. at Doc. 8-2]. Hi-Tech contended, among other things, that the FDA could regulate dietary supplements containing DMAA only through a formal rulemaking process and because that had not occurred, the FDA should be enjoined from taking any enforcement action against products containing DMAA.

Two days later, the Government initiated an *in rem* civil seizure action in federal court in the Northern District of Georgia, seeking forfeiture and condemnation of the 2013 Seized Items in the case styled United States v. Undetermined Quantities of Finished and In-Process Foods, et al., No. 1:13-cv-3675-WBH (N.D. Ga.) (the "Civil Seizure Action"). The Government also obtained a "Warrant for Arrest In Rem," pursuant to which the United States Marshals Service seized and detained the 2013 Seized Items. As soon as the seizure was completed, the Government terminated the administrative Detention Order. In July 2014, the Declaratory Judgment Action was transferred to the Northern District of Georgia where it was assigned to Senior United States District Judge Willis B. Hunt, Jr. and

styled Hi-Tech Pharmaceuticals, Inc. v. Hamburg, No. 1:14-cv-2479-WBH (N.D. Ga.). The Declaratory Judgment Action was then merged into the Civil Seizure Action.

On April 3, 2017, Judge Hunt granted summary judgment in the Government's favor in the Civil Seizure Action, concluding that the 2013 Seized Items were adulterated foods and ordering them condemned and forfeited to the United States. [Doc. 52-2 at 63–76]. Hi-Tech appealed Judge Hunt's ruling, and the appeal is still pending at the Eleventh Circuit Court of Appeals.

II. The Indictment, the Superseding Indictment, and the Initial Warrants

On June 28, 2017, a grand jury sitting in the Northern District of Georgia returned a criminal indictment against Hi-Tech, Mr. Wheat, and John Brandon Schopp. [Docs. 1–3]. The indictment was sealed, and no arrests were made at that time. Three months later, a grand jury returned a sealed eighteen-count superseding indictment alleging a variety of crimes relating to certain dietary supplements manufactured and sold by Hi-Tech. [Doc. 7]. Nine of the counts allege wire fraud and money-laundering offenses, while the remaining counts allege violations of the FDCA involving anabolic steroids and the substance lovastatin; DMAA is not mentioned in the superseding indictment. [Id.].

On September 28, 2017, the same day as the superseding indictment was returned, federal agents sought and obtained search warrants for six of Hi-Tech's

business locations (the "Initial Warrants"). [Docs. 51-1, 51-2]. The Initial Warrants focused on anabolic steroids, not DMAA. [Doc. 72-1 at 30–31]. On October 4, 2017, several things happened in this case: the superseding indictment was unsealed; Defendants were arrested; and federal agents executed the Initial Warrants. During the search of the six Hi-Tech locations, agents claim to have observed large quantities of DMAA-containing products and raw materials in plain view. [Doc. 52-2 at 11-12].

III. The DMAA Warrants and the Bond Orders

On October 4, 2017, upon discovering the DMAA, the agents took a different approach than the one they had employed in 2013. Rather than administratively detain the newly discovered DMAA-containing products, the agents instead elected to go the criminal route and apply for a federal search warrant authorizing them to search for and seize Hi-Tech's DMAA-containing products based on the agents' belief that Defendants were engaging in criminal conduct (*i.e.*, were violating the FDCA).

The affiant for the DMAA warrants was Gerald Dunham, a special agent with the FDA's Office of Criminal Investigations. [Doc. 52-2 at 10–12]. In his affidavit, Special Agent Dunham explained that the Government had prevailed on summary judgment in the Civil Seizure Action, and he attached a copy of Judge Hunt's order. [Id. at 11–12, 63–76]. Special Agent Dunham reasoned that because Judge Hunt

had concluded that DMAA is an unsafe food additive, all food containing DMAA is adulterated, and therefore, Hi-Tech is violating federal law "by continuing to purchase and receive DMAA as a raw ingredient, and then manufacturing, marketing, and distributing DMAA-containing [dietary supplements]." [Id. at 12–13]. He stated that there was probable cause to believe that Hi-Tech was committing two crimes: (1) introducing adulterated foods into interstate commerce (in violation of 21 U.S.C. §§ 331(a) and 333(a)); and (2) doing an act to a food after shipment in interstate commerce and while held for sale that results in the food being adulterated (in violation of 21 U.S.C. §§ 331(k) and 333(a)). [Id. at 13]. In his affidavit, Special Agent Dunham did not explain why the Government was shifting its approach and was not pursuing administrative detention of the products as it had done in 2013.

In the afternoon of October 4, 2017, while the execution of the Initial Warrants was still ongoing, United States Magistrate Judge Alan Baverman signed warrants authorizing the seizure of "evidence, fruits, and instrumentalities" of violations of the FDCA including, among other things, dietary supplements containing DMAA or its chemical equivalent (the "DMAA Warrants"). [Doc. 52-2 at 2, 4]. The agents then immediately executed the DMAA Warrants and seized massive amounts of Hi-Tech's inventory (the "2017 Seized Items"). According to Defendants, the 2017 Seized Items filled five tractor-trailers and have a retail value of approximately $19 million. [Doc. 173 at 2, 8; Doc. 214 at 9-10].

After being arrested, Defendants appeared before Judge Baverman for their initial appearances. Judge Baverman released them on conditions, with each agreeing, among other things, not to manufacture, distribute, or sell adulterated foods or misbranded drugs, including DMAA. [Doc. 19 (Hi-Tech); Doc. 22 at 2, 4 (Wheat); Doc. 26 at 2, 4 (Schopp)]. Specifically, Judge Baverman imposed a condition that the Government required, *i.e.*, that each of the defendants was:

> prohibited from, directly or indirectly through third parties, manufacturing, distributing or selling adulterated foods or misbranded drugs, including but not limited to products containing DMAA or its chemical equivalent. This includes but is not limited to: purchasing or receiving DMAA ingredients; and manufacturing, processing, packaging, marketing, or distributing food or dietary supplement products containing DMAA or its chemical equivalent.

[Doc. 19 at 1; Doc. 22-1 at 1; Doc. 26 at 4]. The following month, Defendants moved to modify the conditions of their release to remove the DMAA-related restrictions, but Judge Baverman denied the motion. [Docs. 45, 56, 62].

In his order, Judge Baverman ruled that Defendants are bound by Judge Hunt's conclusion that ***all*** DMAA-containing foods for human consumption—not just the 2013 Seized Items (the specific products at issue in the Civil Seizure Action)—are adulterated foods. [Doc. 62 at 10]. Judge Baverman noted that "Judge Hunt's conclusions did not seek to draw a distinction between the DMAA in his case and DMAA generally. Instead his findings and conclusions applied to DMAA generally." [Id.]. Judge Baverman continued:

> The introduction of adulterated food into interstate commerce is a crime.... I recognize that prohibiting Defendants from manufacturing, marketing, distributing, and selling DMAA-containing products might cause Hi-Tech to lay off many of its employees. However, since manufacturing, marketing, distributing, and selling DMAA-containing products by Hi-Tech would be in violation of federal law unless Judge Hunt's order is vacated or reversed, the unfortunate hardship that the employees will suffer is beyond my authority to militate....

[Doc. 62 at 9–10]. Finally, Judge Baverman rejected Defendants' argument that the Government was seeking relief in this criminal case that it should have sought in the Civil Seizure Action. He acknowledged that Judge Hunt's order did not expressly ban Defendants' manufacture, marketing, distribution, or sale of DMAA-containing products, but rather involved whether the DMAA *res* in that case was subject to seizure as adulterated food. [Id. at 8]. He nevertheless concluded that the fact that the Government had not sought or obtained injunctive relief was irrelevant to his decision. According to Judge Baverman, all that mattered was that "Judge Hunt's conclusion—that DMAA-containing foods for human consumption are adulterated foods—is binding on these Defendants unless and until reversed or revised by the Eleventh Circuit." [Id. at 10].

IV. The Pending Motion for Return of Property

In July 2018, nine months after the Government executed the DMAA Warrants and removed the 2017 Seized Items from Hi-Tech's premises, Defendants filed the instant motion. Defendants point out that despite the passage of many

months, the Government has not instituted a civil forfeiture proceeding as to those items, nor has the Government filed any criminal charges relating to DMAA. [Doc. 173 at 8]. Defendants argue that possession of DMAA is not a crime, and even if they cannot currently sell or manufacture DMAA-containing supplements, they still have a recognizable property interest in the 2017 Seized Items. [Id. at 13]. Defendants argue that these items are perishable and must be stored and contained in a particular manner to avoid spoilage, and they express concern that the Government may not have the knowledge, means, or motivation to adequately protect their property. [Id. at 3]. They remind the Court that they are presumed innocent and have not been charged with any crime relating to DMAA.

Defendants acknowledge that their ability to sell or take other action with respect to the 2017 Seized Items is limited at this time by Judge Baverman's bond condition, but they maintain that they should be the ones to store the items, not the Government. [Id. at 2–3]. Defendants state that if the Court were to return the 2017 Seized Items to them, they would store them at Hi-Tech's facilities and remain in full compliance with Judge Baverman's bond order. [Doc. 214 at 10-12]. Defendants state that such an arrangement would satisfy the Government's interest in the preservation of the property should the Eleventh Circuit uphold Judge Hunt's decision and would also allow Hi-Tech to ensure proper storage of the 2017 Seized Items and be in position to promptly return to market if the Eleventh Circuit rules in

their favor. Defendants point out that this is the arrangement that the Government agreed to regarding the 2013 Seized Items that Hi-Tech has faithfully honored for the past five years. [Id. at 13].

In its response, the Government acknowledges that it cannot indefinitely retain the 2017 Seized Items, but it points out that there are no set deadlines for filing a civil forfeiture action under the FDCA. [Doc. 212 at 7–8]. The Government contends that its retention of the DMAA is reasonable because it is awaiting the Eleventh Circuit's imminent ruling regarding DMAA. [Id. at 10]. According to the Government, "the Eleventh Circuit will provide specific guidance on the ultimate issue concerning the forfeiture of DMAA, [making it] appropriate to await the appellate decision." [Id. at 11]. The Government, however, does not explain specifically why it cannot (or does not want to) either file a civil forfeiture action now or bring criminal charges related to the DMAA now, nor does the Government explain why it needs "specific guidance."

V. Discussion

Defendants bring their motion pursuant to Federal Rule of Criminal Procedure 41(g), which provides:

> **(g) Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the

> court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

FED. R. CRIM. P. 41(g). The Advisory Committee Notes accompanying the 1989 amendments to what is now Rule 41(g) state:

> No standard is set forth in the rule to govern the determination of whether property should be returned to a person aggrieved either by an unlawful seizure of by deprivation of the property. The fourth amendment protects people from unreasonable seizures as well as unreasonable searches . . . , and reasonableness under all of the circumstances must be the test when a person seeks to obtain the return of property. If the United States has a need for the property in an investigation or prosecution, its retention of the property generally is reasonable. But, if the United States' legitimate interests can be satisfied even if the property is returned, continued retention of the property would become unreasonable.

FED. R. CRIM. P. 41(g), Advisory Committee Notes to 1989 Amendments of Rule 41(e).

In the context of a criminal case, a motion under Rule 41(g) is treated as a civil action in equity. See United States v. Howell, 425 F.3d 971, 974 (11th Cir. 2005). To invoke Rule 41(g) in this context, the movant must show that he has a possessory interest in the seized property and has "clean hands" with respect to that property. Id. Under this standard, a criminal defendant is "presumed to have the right to the return of his property once it is no longer needed as evidence." United States v. Dean, 100 F.3d 19, 20 (5th Cir. 1996) (citing United States v. Mills, 991 F.2d 609, 612 (9th Cir. 1993)). "If the government wishes to retain the property, it

must have and state a legitimate reason for doing so." United States v. Garcon, 406 F. App'x 366, 369 (11th Cir. 2010). One example of such a legitimate interest is where the Government can show that the property is needed as evidence in the case. See United States v. Price, No. 10–60243–CR–ZLOCH, 2011 WL 2651802, at *2 (S.D. Fla. July 7, 2011).[3] A Rule 41(g) motion is properly denied "if the defendant is not entitled to lawful possession of the seized property, the property is contraband or subject to forfeiture, or the government's need for the property as evidence continues." Garcon, 406 F. App'x at 369 (citing United States v. Pierre, 484 F.3d 75, 87 (1st Cir. 2007)).

---

[3] I have previously rejected the Government's argument that its seizure of Hi-Tech's products via criminal search warrants should not be treated as occurring in the context of this criminal case. [Doc. 122 at 3-4]. The Government halfheartedly makes that argument again here, urging me to apply a different legal standard. [Doc. 212 at 7 n.1]. I continue to view the Government's position with the utmost skepticism. The Government seized the DMAA well after Defendants had been indicted for, among other things, violating the FDCA. The basis for the DMAA Warrants was that the DMAA-containing products would be evidence of violations of the FDCA. The seizure at issue here occurred on the same day that Defendants were arrested and the same day that the agents executed a criminal search warrant for evidence of violations of the FDCA. By taking the position in its DMAA warrant application that Hi-Tech was acting criminally in connection with DMAA, by seizing Hi-Tech's property via a criminal search warrant, and then by mandating DMAA-related bond conditions, the Government made the tactical decision to inject DMAA into this criminal case and cannot now be heard to complain that the DMAA seizure should be viewed independently of this criminal prosecution.

Here, the Government does not contend that the 2017 Seized Items belong to anyone other than Defendants or that the items are necessary evidence in this criminal case. The Government also does not contend that mere possession of DMAA or DMAA-containing products is against the law. Nor does the Government argue that returning the property to Defendants would create a danger to the community.

Rather, the Government states only that it is waiting to see what the Eleventh Circuit is going to do with the pending appeal of the Civil Seizure Action before it takes any further action with respect to the 2017 Seized Items. I find this explanation unsatisfying, especially in light of the Government's statement that if it initiated a civil forfeiture action against the 2017 Seized Items, it would be "immediately entitled to summary judgment." [Doc. 212 at 12]. The Government leaves the Court wondering, if that is true, why has the Government not taken that step?[4]

The Government now says that the Eleventh Circuit opinion will provide "guidance." [Doc. 212 at 11]. But the Government has not explained why, if it needed guidance, the agents decided (1) to act outside the administrative procedure, (2) to tell Judge Baverman that Hi-Tech was likely committing federal crimes related

---

[4] Given the long, complicated relationship between the FDA and Defendants, I know better than to speculate about anyone's motives.

to DMAA, and then (3) to seize five truckloads full of Defendants' inventory without first obtaining that guidance. Perhaps the Government believes that its rationale is obvious, but it is not obvious to me.

Even the line of cases that the Government cites does not support further retention of the Hi-Tech's property. Those cases provide examples of when it may be reasonable for the Government to retain property before instituting civil forfeiture proceedings. For example, the Government's need to complete its investigation may be a valid justification for a significant delay in bringing a forfeiture action. See United States v. Approximately $1.67 Million, 513 F.3d 991, 1001 (9th Cir. 2008). Also, where the Government is waiting to see the outcome of an administrative proceeding that may resolve the issues, a delay may be considered reasonable. See United States v. $8,850 in United States Currency, 461 U.S. 555, 566 (1983) (noting that permitting the government to wait for a decision on an administrative forfeiture action is beneficial to the claimant, government, and court system). Courts have also found it reasonable to wait for the outcome of a defendant's criminal case before instituting civil forfeiture proceedings. See United States v. Ninety-Three Firearms, 330 F.3d 414, 425 (6th Cir. 2003). Here, however, none of those rationales are present. The Government has not claimed that it needs time to investigate any DMAA-related issues, there is no pending administrative proceeding, and there are no pending criminal charges related to 2017 Seized Items that need to be resolved.

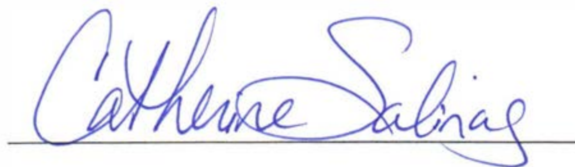
In short, the Government has not adequately explained its reasons for keeping Defendants' property in a state of limbo for eighteen months.

The Government does not dispute that the 2017 Seized Items are the property of Hi-Tech, are not illegal to possess, and have no evidentiary value in this criminal case. These facts, when coupled with the Government's failure to articulate a reasonable justification for continuing to detain Hi-Tech's property, compel a conclusion that the property must be returned to its rightful owner and that continued retention of the 2017 Seized Items would be unreasonable. See Price, 2011 WL 2651802, at *2.

VI. Conclusion

For the reasons stated, Defendants' Motion for Return of Seized Property (DMAA) [Doc. 173] is **GRANTED**. Defendants are cautioned that Judge Baverman's bond orders with the DMAA-related restrictions are still in effect, and they must proceed with extreme caution to ensure full compliance with those orders.

IT IS SO ORDERED this 3rd day of May, 2019.



CATHERINE M. SALINAS
United States Magistrate Judge