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-AT-CMS

DEFENDANTS JARED WHEAT AND HI-TECH PHARMACEUTICALS, INC.'S APPEAL AND OBJECTIONS TO THE DECEMBER 13, 2017 ORDER OF MAGISTRATE JUDGE DENYING THEIR MOTION TO AMEND CONDITIONS OF PRETRIAL RELEASE AND MEMORANDUM OF LAW IN SUPPORT

COME NOW Defendants Jared Wheat and Hi-Tech Pharmaceuticals, Inc. ("Hi-Tech"), by and through their undersigned counsel, pursuant to 18 U.S.C. §§ 3142(c)(3), 3145(a)(2) and LCrR 59(2)(b), NDGa, and move this Court for entry of an Order reversing the December 13, 2017 order entered by Magistrate Judge Alan J. Baverman, Doc. 62, which denied Mr. Wheat and Hi-Tech's Motion

to Amend Conditions of Pretrial Release (the "motion to amend"), Doc. 45, that prohibit Mr. Wheat and Hi-Tech from manufacturing or selling products containing DMAA. Doc. 22-1 (the "DMAA ban"). In support of this request, Defendants respectfully show this Court the following:

I. INTRODUCTION

The DMAA ban as a condition of bond is not rooted in the underlying purposes served by the Bail Reform Act and is effectively an injunction against Hi-Tech prohibiting manufacturing and selling DMAA containing products. Rather than protect the public, the condition of pretrial release was a product of governmental overreaching, designed to obtain relief that the Government has failed to seek in available and appropriate proceedings, and that the Government has not yet been able to secure through its previous civil action against Hi-Tech.

The use of the Bail Reform Act here is an overreaching that is manifestly intended to put Hi-Tech and Mr. Wheat out of business and provide the Government with an unfair and improper advantage in the instant criminal litigation. Such overreaching is wholly inconsistent with 18 U.S.C. § 3142(c), which requires that any conditions of release must be the "least restrictive" that are "reasonably necessary to . . . assure the safety of any other person or the

community." Such an analysis simply never occurred in this case when the DMAA ban was initially imposed as a condition of release.

Moreover, when Magistrate Judge Baverman ruled on Mr. Wheat and Hi-Tech's motion to amend, he again failed to require that the Government meet its burden under the Bail Reform Act to demonstrate that the DMAA ban was the least restrictive manner in which to ensure the safety of the community. Instead, the magistrate judge improperly relied on the doctrine of collateral estoppel and held that he was required to issue the DMAA ban based on the holding of another district court judge in a civil matter between the FDA and Hi-Tech. As explained below, that deference was not required by Judge Hunt's order, a fact which Magistrate Judge Baverman even acknowledged in his December 13, 2017 order.

Additionally, newly discovered evidence produced by the Government in unrelated litigation involving DMAA reveals that as far back as 2010, the FDA considered DMAA a legal dietary supplement and that it lacked any basis to conclude DMAA was harmful. This evidence, which counsel for Mr. Wheat and Hi-Tech only discovered following the hearing before Magistrate Judge Baverman, is an additional reason to reverse the December 13, 2017 order and vacate the condition of pretrial release relating to the DMAA ban.

Finally, as set out in Defendants' original motion to amend, the DMAA ban was sprung at the last moment, just before Defendants' initial appearance was about to begin. As a result, Defendants' agreement to the condition was obtained through coercion. The Government took that agreement and immediately presented a second search warrant to the magistrate judge for his approval and thereafter conducted a second series of seizures. The Government seized nearly $19 million of DMAA raw materials and DMAA containing products at Hi-Tech's facilities. Once Hi-Tech was able to assess the danger the DMAA ban and seizure posed to its business, the circumstances under which the original conditions of release were imposed had changed, and modification was both justifiable and necessary. The magistrate judge did not address the substance of these concerns in ruling on Defendants' motion to amend.

II. STATEMENT OF FACTS

For the sake of brevity and simplicity, Mr. Wheat and Hi-Tech respectfully refer the Court to the "Statement of Facts" section of their motion to amend. Doc. 45 at 6-27.[1] That section sets forth in detail: (1) the background of Hi-Tech's

[1] In addition to the facts and legal arguments set forth below, Mr. Wheat and Hi-Tech hereby refer to and adopt the entirety of the facts and arguments set forth in their Motion to Amend Conditions of Pretrial Release. Doc. 45. All defined terms used therein will retain the same meaning here.

dietary supplement business; (2) the history of the FDA's improper attempt to obtain a *de facto* ban of a substance known as DMAA from the dietary supplement market without proof that it posed a danger to the community;[2] (3) the FDA's crusade against Hi-Tech for its continued marketing of DMAA, which included the FDA's administrative detention of millions of dollars' worth of DMAA and DMAA containing products at Hi-Tech's facilities in November 2013; (4) an overview of Hi-Tech's litigation with the FDA before District Judge Willis B. Hunt, Jr., *United States v. Undetermined Quantities of all Articles of Finished and In-process Foods, et al.*, 1:13-cv-3675 (N.D. Ga.) (the "seizure action"), regarding the status of the DMAA the FDA seized in November 2013 under the Dietary Supplement Health and Education Act of 1994, 21 U.S.C. §§ 301 *et seq.* ("DSHEA); (5) the scientific misconduct of the FDA's experts that was discovered during that litigation; (6) Judge Hunt's novel ruling that held – even though the Government failed to meet its burden to show that DMAA was not naturally occurring in the geranium plant – that DMAA is adulterated under DSHEA because there was no evidence in the record that DMAA had ever been commercially extracted from geraniums; (7) the basis for Mr. Wheat and

[2] *See also* discussion *infra* at page 19-20, regarding newly discovered evidence produced in a matter unrelated to this case wherein the FDA's own scientific staff, as far back as 2010, stated that it considered DMAA a dietary ingredient under DSHEA and that the FDA lacked evidence to prove that DMAA was harmful.

Hi-Tech's appeal of Judge Hunt's order; (8) the incontrovertible fact that the superseding indictment in this case does not involve DMAA and does not even refer to DMAA in passing; and (9) the circumstances surrounding the arrest of Mr. Wheat and his agreement – under duress at his bail hearing – that Hi-Tech would cease marketing DMAA. Doc. 45 at 6-27.

A. Magistrate Judge Baverman's Order Denying Mr. Wheat and Hi-Tech's Motion to Amend Conditions of Pretrial Release.

Mr. Wheat and Hi-Tech filed their motion to amend on November 10, 2017. Doc. 45. In that motion, they argued that their agreement to the DMAA ban as a condition of pretrial release was a product of coercion at Defendants' initial appearance and an improper use of the criminal process to gain an advantage in an ongoing civil case in this District. *Id*. at 28-37. Alternatively, Mr. Wheat and Hi-Tech argued that changed conditions, as a result of the Government's multiple seizures and the endangerment of Hi-Tech's existence as a viable business, provided ample justification to amend the bond order pursuant to the magistrate judge's discretion under 18 U.S.C. §§ 3142(c)(3) and 3145(a)(2). Doc. 45 at 38-39.

The Government did not file an opposition to Defendants' motion to amend, nor did the magistrate judge require it to do so. A hearing regarding the issues raised in the motion was held on December 7, 2017, before Magistrate Judge Baverman. *See* Doc. 61. At that hearing, the Court heard oral argument from the

Government and counsel for Mr. Wheat, Hi-Tech, and Defendant John Brandon Schoop, who had joined in Hi-Tech and Mr. Wheat's motion, Doc. 56.

Magistrate Judge Baverman issued an order on December 13, 2017 denying the motion to amend. Doc. 62. Rather than address the substance of the arguments put forth by Mr. Wheat and Hi-Tech, Magistrate Judge Baverman utilized the doctrine of collateral estoppel as the sole basis for denying Defendants' motion to amend. Critically, Magistrate Judge Baverman did so even though he acknowledged that "issues resolved in an earlier civil action are not subject to preclusion in a later criminal action." Doc. 62 at 6-7 (citing *Standefer v. United States*, 447 U.S. 10, 25 (1980)).

Specifically, the magistrate judge held that Judge Hunt's ruling in the civil seizure action controlled resolution of the motion to amend and the status of DMAA under DSHEA generally. After setting forth the elements of collateral estoppel, Magistrate Judge Baverman went through each of the elements and held that Mr. Wheat and Hi-Tech were "bound by the rulings issued by Judge Hunt that DMAA-containing products for human consumption constitute adulterated food under the FDCA, unless and until said order is reversed by the Eleventh Circuit." Doc. 62 at 9. *See also id.* at 7-9. Building on this, the magistrate concluded that:

> [I]it flows that Defendants' manufacture, marketing, distribution, and sale of these materials constitutes a crime in violation of federal

> law. Since while on pretrial release Defendants may not commit another federal offense, the DMAA ban in the Hi-Tech order and Wheat's and Schopp's conditions of release are appropriate, least restrictive conditions to reasonably assure the safety of the community.

Doc. 62 at 10.

B. Newly Discovered Evidence Further Demonstrates that the FDA's Current Position Regarding DMAA Is Incorrect.

Subsequent to the filing of the motion to amend and the hearing on that motion before the magistrate judge, counsel for Mr. Wheat and Hi-Tech became aware of evidence demonstrating the Government's prior acknowledgement of DMAA's safety and legality. These documents, which were produced by the Government in an unrelated case captioned *USA v. USPLabs LLC, et al.*, No. 3:15-cr-4796 (N.D. Tx.) (the "USPLabs action"), reveal that, as far back as 2010, the FDA considered DMAA a dietary ingredient under DSHEA and that it did "not have any evidence to show a hazard" related to the use of DMAA. Doc. 252-1 at 12-14 in USPLabs action, attached hereto as EXHIBIT A (March 29, 2010 emails between Quyen Tien and James Lin). In 2011, the FDA again reiterated that it lacked evidence to conclude that DMAA is "harmful" or "adulterated". Doc. 319-24 in USPLabs action, attached hereto as EXHIBIT B (March 30, 2011 email from Robert J. Moore to Quyen Tien).

As explained below, this newly discovered evidence provides an additional basis for the Court to reverse Magistrate Judge Baverman's December 13, 2017 order and modify Defendants' conditions of pretrial release.

The questions this Court should consider are: (1) Why is DMAA not included as a part of this indictment, which includes counts containing charges based on misbranding and adulterated substances? (2) Why has the FDA failed to seek an injunction against the production and marketing of MDAA? (3) Why has the FDA not followed their own procedures to outlaw DMAA, especially in light of the fact that the consolidated case before Judge Hunt contained a count under the Administrative Procedures Act, alleging that the FDA failed to follow the procedure required by law? *See* 5 U.S.C. § 702.

The simple answer to these questions, which the magistrate judge failed to acknowledge when he concluded that the production and marketing of these materials "constitutes a crime in violation of federal law," Doc. 62 at 10, is that as of this date, DMAA is *not* a violation of any federal law. DMAA is not charged in this indictment because the Government cannot prove that it is illegal, which is precisely why their argument in support of the DMAA ban as a condition of bond fails when it is analyzed under the Bail Reform Act.

III. LEGAL STANDARD

Typically, any objection to a pretrial decision of a magistrate judge must establish that the decision was "clearly erroneous or contrary to law." LCrR 59(2)(b), NDGa. However, precedent is clear that a challenge to a magistrate judge's order setting the terms of pretrial release is subject to a *de novo* review. *United States v. King*, 849 F.2d 485, 489 (11th Cir. 1988); *United States v. Hurtado*, 779 F.2d 1467, 1480-81 (11th Cir. 1985); *United States v. Megahed*, 519 F. Supp. 2d 1236, 1241 (M.D. Fla. 2007) ("A district court reviews *de novo* a magistrate judge's pre-trial release order."). Thus, the district court must engage in an "independent consideration of all facts properly before it." *United States v. Gaviria*, 828 F.2d 667, 670 (11th Cir. 1987).

Here, the substantive standard that guides the Court's consideration is found in the Bail Reform Act, 18 U.S.C. § 3142. Pursuant to § 3142(c), any conditions of release must be the "least restrictive" that are "reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person or the community."

IV. ARGUMENT AND CITATION OF AUTHORITIES

Defendants respectfully submit that this Court should reverse Magistrate Judge Baverman's order denying Mr. Wheat and Hi-Tech's motion to amend.

First, as Judge Bavermen admitted, the application of collateral estoppel against a criminal defendant is improper. Second, Magistrate Judge Baverman failed to require that the Government demonstrate under the Bail Reform Act that the DMAA ban was the least restrictive means necessary to assure the safety of the community. Third, newly discovered evidence reveals that the FDA's position vis-à-vis DMAA is untenable and directly contradicts its prior position on the matter. Finally, in light of the Government's extraction of the agreement to the bond condition under duress, as well as the changed circumstances relating to the Government's seizure of nearly $19 million of Hi-Tech's DMAA containing products, this Court should revisit the conditions of pretrial release pursuant to its discretion under 18 U.S.C. § 3142(c)(3).

A. Magistrate Judge Baverman's Reliance on the Doctrine of Collateral Estoppel to Deny Mr. Wheat and Hi-Tech's Motion to Amend Was Improper and Should Be Reversed.

Magistrate Judge Baverman's order acknowledged that "issues resolved in an earlier civil action are not subject to preclusion in a later criminal action." Doc. 62 at 6-7. Indeed, binding precedent is unambiguous on this issue: "the government may not collaterally estop a criminal defendant from relitigating an issue decided against the defendant in a different court in a prior proceeding." *United States v. Harnage*, 976 F.2d 633, 636 (11th Cir. 1992). The *Harnage* Court

adopted this rule because it was "not convinced that allowing the government to bar a defendant from relitigating an unfavorable determination of facts in a prior proceeding would serve the original goal of collateral estoppel – judicial economy." *Id.* at 635. Nevertheless, Magistrate Judge Baverman held that "collateral estoppel mandates that Defendants' arguments [in their motion to amend] be rejected." Doc. 62 at 5. This holding is incorrect and should be reversed.

Although Magistrate Judge Baverman attempted to hedge his reliance on collateral estoppel by noting that it "provide[d] guidance for how Defendants' motion should be treated" because motions to amend conditions of pretrial release are not governed by "proof beyond a reasonable doubt but rather a reasonableness standard, that is, 18 U.S.C. § 3142's mandate that whatever conditions of release are imposed on a defendant be the least restrictive conditions to reasonably assure the safety of the community," Doc. 62 at 7, that does not cure his improper reliance on the doctrine of collateral estoppel. Simply put, logic dictates that a court cannot both acknowledge that collateral estoppel cannot be applied in a given instance, yet *solely* rely on that doctrine as the basis for a decision.

Because Magistrate Judge Baverman's improper reliance on collateral estoppel pervades his analysis in the December 13, 2017 order, it should be

rejected by this Court. For the reasons stated in the motion to amend, the DMAA condition of pretrial release, Doc. 22-1, should be amended and Mr. Wheat and Hi-Tech should not be precluded from continuing to market their DMAA containing products as a condition of pretrial release.

B. The Magistrate Judge Erred by Failing to Require the Government to Demonstrate Under the Bail Reform Act that the DMAA Ban Was the Least Restrictive Condition Reasonably Necessary to Assure the Safety of the Community.

Under § 3142(c), the main focus of the order on the motion to amend should have been whether Mr. Wheat and Hi-Tech's conditions on release were the "least restrictive" that are "reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community." This is a balancing test that is completely unrelated to the various legal and factual issues considered in the seizure action before Judge Hunt, and the burden should be on the Government to demonstrate the reasonable necessity of the condition.

Magistrate Judge Baverman failed to consider whether the DMAA ban was the least restrictive manner to protect the public and ensure Mr. Wheat's appearance at trial. First, as a result of the coerced agreement by Defendants to the condition of bond demanded by the Government, there was no consideration of whether the condition was appropriate, let alone necessary, under § 3142(c). When Defendants moved to amend this condition of bond, Doc 45, the magistrate judge

did not require the Government to file any response, but instead conducted a hearing at which the court heard oral argument. Doc. 61. At the hearing, the Government did not offer any evidence to justify the need for the condition of bond, or even respond to Defendants' contentions by arguing that the DMAA ban was the appropriate vehicle to ensure the safety of the community.

Thereafter, in ruling on Defendants' request, the magistrate judge failed to address the substance of Defendants' arguments relating to the Government's misuse of the criminal process to gain an advantage in a civil action, the Government's blatantly coercive tactics in the initial bond proceeding, and the changed circumstances that justified revisiting the conditions of pretrial release.

Instead, Magistrate Judge Baverman relied on the legal conclusion in a civil matter (with a pending appeal) to make a critical, bond-related determination in a pending criminal matter. Doc. 62 at 10 ("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."). This presumption of illegality based on the holding in the seizure action – which Mr. Wheat and Hi-Tech are currently appealing – is improper in this criminal action and resulted in Magistrate Judge Baverman's failing to perform the necessary analysis under the Bail Reform Act.

Moreover, the continued implementation of the DMAA ban as a condition of bond indicates that the magistrate judge may have had a fundamental misunderstanding of Judge Hunt's order. As explained in detail in the motion to amend, Judge Hunt did not ban the sale of DMAA by Hi-Tech or any other company. Rather, Judge Hunt's holding was limited to the *res* (*i.e.*, the DMAA detained by the FDA in 2013) that was the subject of the civil seizure action. Importantly, Judge Hunt did *not* issue an injunction banning the sale of DMAA, despite the Government's request to expand his order to ban Hi-Tech and all other companies from selling DMAA. *See* discussion at page 15 of Defendants' motion to amend, Doc. 45 at 15. Failing there, the Government then elected to use this unrelated criminal case to stop Hi-Tech and Mr. Wheat from marketing DMAA, even though the indictment does not involve DMAA in any way. *See id.* at 28-29.

In addition to misconstruing and misapplying Judge Hunt's order, the magistrate judge's analysis lacked an acknowledgment of the fact that Judge Hunt did *not* conclude that DMAA is unsafe. Although Judge Hunt did hold that Hi-Tech did not meet its burden to establish that DMAA is "Generally Recognized as Safe," which requires a scientific consensus for the court to apply that classification to an ingredient under the FDCA, is a far cry from a finding that

DMAA is unsafe or dangerous to the public for the purposes of establishing release conditions. Seizure action, Doc. 140 at 11-12.

Moreover, the Government has utterly failed to carry its burden to demonstrate that the DMAA ban is the least restrictive means required to ensure the safety of the community. Indeed, the superseding indictment does not even mention DMAA, much less bring any charges related to DMAA or DMAA's safety or lack thereof. Simply put, there was no record on which Magistrate Judge Baverman could conclude that DMAA poses a danger to the community and that the DMAA ban was a reasonably necessary restriction under the Bail Reform Act.

Magistrate Judge Baverman's two orders on this matter are all the more unsettling, especially regarding the December 13, 2017 order, because the only evidence in the record here supports a conclusion that DMAA is not a danger and the Government failed to show otherwise. *See* Doc. 45 at 7 & n.3. For example, a review by a panel convened by the U.S. Department of Defense to study whether the military should ban DMAA containing supplements from stores on its bases concluded that: "the existing evidence does not conclusively establish that DMAA-containing substances are causally associated with adverse medical events." John Lammie, Report of the Department of Defense 1,3 Dimethylamylamiine (DMAA) Safety Review Panel, June 3, 2013. A copy of this report may be found as Doc.

108-7 in the seizure action; the report may also be found at: http://www.webcitation.org/6cZi3FUka. Additionally, although the FDA has issued a warning based on its determination that DMAA is "potentially dangerous and did not qualify as a dietary substance," U.S. FDA, Stimulant Potentially Dangerous to Health, FDA Warns, April 11, 2013, https://www.fda.gov/ForConumers/ ConsumerUpdates/ucm34270.htm, the FDA has not obtained an injunction against any manufacturer (although it has obtained some consent decrees by its actions) or prosecuted any company or individual for its manufacture or distribution of DMAA. Doc. 45 at 7 & n.3.

Mr. Wheat and Hi-Tech also informed Magistrate Judge Baverman that Michael Lumpkin, PhD, DABT, a Senior Toxicologist at the Center for Toxicology and Environmental Health provided a detailed declaration regarding DMAA's safety in conjunction with the seizure action. Seizure action, Doc. 108-4. Therein, Dr. Lumpkin concluded: "The weight of the evidence from data found in the peer-reviewed, published scientific literature and the DoD DMAA safety panel assessment does not indicate that consumption of DMAA at labeled doses in dietary supplements, including those manufactured by Hi-Tech, will likely result in adverse cardiac or thermo-regulatory injuries." *Id.* at ¶ 83; *see also id.* at ¶ 100 (concluding "there is no evidence that consumption of DMAA at concentrations

found in Hi-Tech's dietary supplements and according to labeled doses would result in any adverse health effects").

In light of this evidence, especially when it is considered with the additional evidence discussed in the next subsection, it is apparent that the Government used the circumstances accompanying this criminal action in order to obtain the result it failed to attain in the action before Judge Hunt – a *de facto* injunction against Hi-Tech halting the production and sale of DMAA containing products. If the Government had the proof to establish that DMAA containing products are unsafe and a danger to the public, the Government could have sought injunctive relief at the time of the November 2013 seizure (or, at a minimum, could have provided that evidence to the magistrate for his bond determination). For some reason – arguably related to their confidence in their ability to establish a danger to the public – the Government has demonstrated a reluctance to seek the most logical relief if it truly believes that DMAA poses a danger: filing an action for injunctive relief to stop the manufacturing and sale of DMAA or, alternatively, by invoking its rule making procedure under the Administrative Procedures Act, 5 U.S.C. § 702, to ban DMAA. Instead, it has employed these criminal proceedings and the Bail Reform Act – presented in inherently coercive, and transparently orchestrated,

circumstances – to obtain the relief that it has failed to obtain, or even seek, in an appropriate proceeding.

Magistrate Judge Baverman did not require the Government to show that the condition of pretrial release was necessary to protect the public. Nor did he consider any of the evidence (of which the foregoing is merely a small snippet) regarding DMAA's safety. His failure to do so undercuts his resolution of the motion to amend. Considering the utter lack of evidence in the record that DMAA is dangerous, there is simply no basis to conclude that the DMAA ban is the least restrictive condition necessary to ensure the safety of the community. Indeed, if the Government is convinced that DMAA containing products are dangerous to the public – and if it has the evidence to show that – it should have taken decisive action to stop *all* production and marketing of *all* DMAA containing drugs, rather than relying on a coerced condition of bond in a criminal case brought pursuant to an indictment that does not even mention, let alone, charge any violation of federal law regarding the production and sale of DMAA containing products.

C. Recently Acquired Evidence Not Considered by Magistrate Judge Baverman Further Supports Mr. Wheat and Hi-Tech's Arguments that the Government Cannot Establish that DMAA Is a Danger.

The FDA's own scientists have previously acknowledged that DMAA is safe and should be considered a dietary ingredient under DSHEA. For example,

internal FDA emails establish that, as far back as 2010, the FDA considered DMAA a lawful dietary ingredient and that it lacked any evidence that it presented a "safety hazard." EXHIBIT A. That position was reiterated in 2011 when Dr. Robert J. Moore, an FDA supervisor in the Division of Dietary Supplements, stated:

> I don't know what basis we would use to declare [DMAA] adulterated. To my knowledge, *we have not determined that this substance is harmful. Nor has anyone submitted to us evidence that the substance is not a constituent of geranium oil*. While some dispute that this substance is a natural constituent of the oil, no such evidence has been provided to us. Accordingly, we do not see a basis ot [sic] conclude that the substance or a product containing it is adulterated because it is a poisonous or deleterious substance.

EXHIBIT B (emphasis added).

Counsel for Mr. Wheat and Hi-Tech became aware of these emails following their use in a case pending in the Northern District of Texas. These newly discovered documents are further evidence that the Government has failed to demonstrate that the DMAA ban is the least restrictive manner in which to secure Mr. Wheat's appearance in this matter going forward.

D. In Light of the Coercive Circumstances in Which the Government Extracted Defendants' Agreement to the Bond Condition and the Changed Circumstances, this Court Should Revise the Conditions of Pretrial Release.

As set out in Defendants' motion to amend, the circumstances under which the Government presented its demand for an agreement to the DMAA ban immediately before the beginning of Defendants' initial appearance were inherently coercive. Doc. 45 at 18-23. Mr. Wheat's personal circumstances, including his medical conditions and the complications regarding supervision of his daughter, *id*. at 20-22, coupled with the realization that failure to agree to the condition as demanded would likely result in his detention for another five days, *id*. at 22, made the circumstances uniquely coercive. As set out in Defendants' motion to amend, agreements extracted by prosecutors from defendants under duress are unenforceable, especially where a defendant was in custody, as Mr. Wheat was. *Id.* at 34-37. *See, e.g., Boyd v. Adams*, 513 F.2d 83, 85-88 (release-dismissal agreement invalidated due to coercive circumstances under which it was obtained).

Rather than analyze the circumstances in which the agreement to the condition of bond was obtained and their legal implications, Magistrate Judge Baverman simply concluded: "As for Wheat's claim that he agreed to the condition under duress, even assuming that fact for purposes of this Order, I am unable to

allow Wheat to commit a violation of federal law." Doc. 62 at 10. Defendants are not asking for permission to violate the law, nor is there any federal law that bans the production and sale of DMAA. Rather, they are asking for an appropriate determination of the conditions of pretrial release under § 3142(c), and a determination that is untainted by the existence of an "agreement" that was extracted by the Government's creation of a perfect storm of coercion.

Defendants also argued that the circumstances in which the initial bond was set, with the condition forbidding manufacture and sale of DMAA containing products, had changed significantly in light of the Government's massive seizure of Hi-Tech's inventory and the unanticipated – and unanticipatable – ramifications for Hi-Tech's business justified the exercise of the magistrate judge's authority to reconsider the conditions of bond under § 3142(c)(3). Doc. 45 at 38-39. Magistrate Baverman's only response to that concern was:

> 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.

Again, this ignores the context in which this issue arises, a determination of conditions of pretrial release, under which the statute commands that the court impose "the least restrictive … conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community …." § 3142(c)(1)(b).

V. CONCLUSION

The Bail Reform Act was not created to give the Government a hammer to gain an advantage in a civil case in which the court did not order that Hi-Tech – and others – cease production and marketing of DMAA containing products. Nor was the proceeding in which the agreement of Defendants to cease that activity was coerced with the real possibility of being denied pretrial release for at least five additional days a proceeding that this Court should implicitly approve by upholding the magistrate judge's order. This is especially true in light of the fact that the indictment in this case does not involve – or even mention – DMAA or DMAA containing products. If the Government can establish that there is, indeed, a need for such a condition to assure the safety of the community, then the condition can be required under § 3142(c). To require it in these circumstances, on this record, is not consistent with the procedures and purposes of the Bail Reform Act.

Defendants' October 4, 2017 agreement to the DMAA ban as a condition of bond was a product of inherently coercive circumstances – circumstances clearly anticipated and orchestrated by the Government – and an order entered in circumstances that rapidly changed after Mr. Wheat's release as the result of the Government's execution of its carefully planned offensive in the wake of the entry of the order containing the DMAA ban.

The Government's indictment in this case has nothing at all to do with DMAA or DMAA containing products. The Government has never contended in conjunction with Mr. Wheat's pretrial release, let alone proved, that the DMAA ban is necessary to assure Mr. Wheat's appearance or assure the safety of any person or the community. The DMAA ban as a condition of bond is not rooted in the underlying purposes served by the Bail Reform Act, and is effectively an injunction against Hi-Tech and Mr. Wheat from manufacturing and selling DMAA containing products. In essence, the Government has obtained injunctive relief without seeking it in an appropriate proceeding, and it has obtained that injunctive relief without offering the evidence to support it.

Instead, the instant bond order containing was the result of Governmental overreaching, an improper overreaching designed to obtain relief that the Government has not yet been obtained through its civil action or sought through

more appropriate and available proceedings. And it is an overreaching that is manifestly intended to put Hi-Tech and Mr. Wheat out of business, and thereby provide the Government with an unfair and improper advantage in the instant criminal litigation. That is not the purpose of the conditions that 18 U.S.C. § 3142 empowers the Court to require in order to ensure a defendant's appearance and the safety of other persons or the community.

WHEREFORE, Defendants respectfully pray that this Court issue an Order reversing Magistrate Judge Baverman's December 13 order and vacating its order of October 4, 2017, Doc. 22-1, and to remove the prohibition against the manufacture and sale of DMAA containing products. Alternatively, Defendants pray that this Court vacate the magistrate's October 4, 2017 order and hold an evidentiary hearing at which the Government will be offered an opportunity to establish that this condition of pretrial release is reasonably necessary to assure the safety of the community, and for such other and further relief as this Court may deem just and proper.

This 27th day of December 2017.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing "Defendant Jared Wheat and Hi-Tech Pharmaceuticals, Inc.'s Appeal and Objections to the December 13, 2017 Order of Magistrate Judge Denying Their Motion to Amend Conditions of Pretrial Release and Memorandum of Law in Support" into this District's ECF System, which will automatically forward a copy to counsel of record in this matter.

This 27th day of December 2017.

/s/ Arthur W. Leach
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