

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

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	1:13-CV-3675-WBH
	:	
QUANTITIES OF FINISHED AND	:	
IN-PROCESS FOODS, et al.,	:	
Defendants.	:	

ORDER

Hi-Tech Pharmaceuticals, Inc., (Hi-Tech) is a company that manufactures dietary supplements, including weight loss products containing 1, 3 Dimethylamylamine, more commonly known as DMAA. The Federal Food and Drug Administration, contending that DMAA is an unapproved food additive and that products containing DMAA are subject to seizure under federal law, seized a great deal of Hi-Tech’s product and initiated this in rem forfeiture action. In response, Hi-Tech and its CEO entered the forfeiture action as claimants and also filed a separate Administrative Procedure Act/Due Process action seeking various injunctive remedies that, generally, boil down to a demand that the Government¹ return Hi-Tech’s products. Hi-Tech contends that its DMAA products were not subject to seizure under

¹ Hereinafter, “Hi-Tech” refers to both Hi-Tech and Jared Wheat. “The Government” refers to the FDA, Margaret A. Hamburg, M.D., and any other federal entities or individuals involved in this case.

the law. Hi-Tech's suit was merged into the forfeiture action so that all of the parties' claims can be considered together.

Now pending before the Court are two motions filed by the Government, the titles of which sound substantive but, in reality, tend to concern the procedural manner in which this Court analyzes the parties' claims. In those motions, the Government seeks to have certain of Hi-Tech's affirmative defenses struck and all of Hi-Tech's claims from their suit against the Government dismissed.

In response to the Government's motion to have affirmative defenses struck, this Court is guided by the sentiment, voiced by a federal judge in New Mexico, that while "[m]otions to dismiss help resolve cases; motions to strike, in most cases, waste everyone's time." Lane v. Page, 272 F.R.D. 581, 586 (D.N.M. 2011). Indeed, affirmative defenses make their brief appearances in answers and are usually never heard from again, and their presence in the answer certainly has no binding effect on the opposing party until that argument is raised in (or in response to) a dispositive motion. Courts and commentators have also noted that motions to strike under Rule 12(f) are disfavored.

The district court possesses considerable discretion in disposing of a Rule 12(f) motion to strike redundant, impertinent, immaterial, or scandalous matter. However, because federal judges have made it clear, in numerous opinions they have rendered in many substantive contexts, that Rule 12(f) motions to strike on any of these grounds are not favored, often being considered purely cosmetic or "time wasters," there appears to be general judicial agreement, as reflected in the extensive case law on the subject, that they should be denied unless the challenged allegations

have no possible relation or logical connection to the subject matter of the controversy.

5C C. Wright & A. Miller, Fed. Prac. & Proc. Civ., § 1382 (3d. ed.2004) (footnotes omitted). Because granting the motion cannot have a substantive effect on the outcome of this action, the Government's motion to strike is **DENIED**.


The Government's motion to dismiss would likewise do little to clear up the issues presented in this case, mostly due to the fact that many of Hi-Tech's claims are superfluous given the forfeiture action. If the Government is entitled to seize Hi-Tech's products, the claims in Hi-Tech's complaint fail. If the Government is not so entitled, this Court will order much of the relief sought by Hi-Tech in its complaint and much of the rest of the relief Hi-Tech seeks would be implied by the judgment. Accordingly, this Court **DENIES** the Government's motion without prejudice. If this Court ultimately decides that the Government was not entitled to seize Hi-Tech's product, this Court will then determine whether any of Hi-Tech's claims are viable and would entitle Hi-Tech to additional relief.

The relevant question right now is the question of the forfeiture and whether the Government acted properly under Dietary Supplement Health and Education Act ("DSHEA"), and specifically 21 U.S.C. § 342(f)(1)(B). In their various pleadings, both sides have stated their position on this issue, and it is clear that certain evidentiary issues need to be developed in order for this Court to render a judgment

regarding the propriety of the Government's actions. Accordingly, the parties shall prepare a joint scheduling order that sets a timetable for further discovery, if needed, and the filing of a motion for summary judgment. In order to avoid requiring the parties to file several repetitive pleadings, the scheduling order will provide that the Government will file its motion for summary judgment first. If Hi-Tech desires to file a summary judgment motion, it should file it in combination with its response to the Government's motion. The Government can then file a reply/response and then Hi-Tech can file a reply.

To summarize, the Government's motion to strike, [Doc. 37], is **DENIED**. The Government's motion to dismiss, [Doc. 43], is **DENIED** without prejudice. Hi-Tech's motion to stay, [Doc. 46], is **GRANTED**. The parties are **DIRECTED** to confer and to present to this Court, within two weeks, a proposed scheduling order that provides a timetable for further discovery and the filing of the Government's motion for summary judgment and the subsequent pleadings discussed above.

IT IS SO ORDERED, this 21st day of April, 2015.



WILLIS B. HUNT, JR.
UNITED STATES DISTRICT JUDGE