

# Brooklyn Federal Judge Refuses to Lift Asset Freezes in Counterfeit HIV Drug Lawsuit

By Jane Wester  
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U.S. District Judge Ann Donnelly of the Eastern District of New York denied requests to lift or modify asset freezes against the defendants in a lawsuit regarding alleged counterfeit HIV drugs, instead ordering that the asset freezes be entered as preliminary injunctions.

Donnelly on Monday ruled that the plaintiff, Gilead Sciences, met its burden to show that defendant Scripts Wholesale “engaged in a pattern of fraudulent or evasive conduct so as to justify a preliminary injunction freezing assets to satisfy a potential equitable award.”

The suit involves an alleged scheme to sell counterfeit HIV drugs, involving both Gilead-branded bottles filled with non-Gilead drugs that did not treat HIV along with bottles with the correct medication that bore fake “pedigrees,” or records showing the chain of the medication’s sales or transfers back to its manufacturer.

Gilead’s attorneys Geoffrey Potter and Timothy Waters of Patterson Belknap Webb &

Tyler advocated for the continued asset freeze, arguing that \$5.5 million in frozen funds amount to “significantly less than Scripts’ counterfeiting profits.”

They estimated the profits to be higher than \$7.2 million.

Donnelly noted that Scripts “does not contest the scope of the current freeze” in terms of the amount of money involved.

Scripts’ legal team at Stern & Schurin argued that the freeze should be dropped or modified because Gilead’s counterfeiting claims against Scripts would likely fail as a matter of law, but Donnelly did not find in their favor.

“While an asset freeze is undoubtedly a hardship, this asset freeze is limited—it binds one savings account—and Scripts does not articulate how the continued injunctive relief



**Judge Donnelly**



**Gilead a biopharmaceutical company located in Foster City, California**

on this account would force it out of business,” Donnelly wrote. “Because Gilead is likely to succeed on the merits and to suffer irreparable harm absent preliminary relief, and the balance of the equities does not outweigh its interest in this relief, it is entitled to a preliminary injunction.”

The Scripts attorneys argued that Gilead’s counterfeiting claims against Scripts were based on “a novel and flawed theory of counterfeiting under the Lanham Act” related to Scripts’ alleged use of false pedigrees.

Donnelly disagreed with the argument about the novelty of Gilead’s claims.

“The allegations here are that the pedigrees contained made-up chains of sale intended to confuse consumers, conceal material differences that would likely be relevant to a consumer’s decision to purchase the drugs, and flout the trademark holder’s quality control

standards,” she wrote. “These are classic Lanham Act claims.”

Donnelly also rejected arguments from other defendants to modify an asset freeze against properties held by defendant Peter Khaim.

“[E]ven without deducting value from these assets due to possible mortgages or other liabilities, the \$12 million in real property brings the total value of Khaim’s restrained assets to \$30,250,000,” she wrote. “Because the counterfeit proceeds are estimated to exceed \$37 million, the relief defendant’s motion to modify the asset freeze is denied.”

Oleg Mestechkin, lead counsel for Peter Khaim, declined to comment. Stern & Schurin partner Richard Schurin, who represents Scripts, also declined to comment.

Benjamin Brafman of Brafman & Associates, who represents Scripts owner Steven Diamantstein in Diamantstein’s New Jersey criminal case and also appears as an attorney for Scripts in the Brooklyn civil case, said he respects Donnelly but disagrees with her ruling on the asset freezes.

In July, Diamantstein pleaded not guilty in the New Jersey case, which also relates to the alleged sale of misbranded and falsely labeled HIV medication. Brafman said he believes the case involves “an inaccurate statement of the law and a flawed understanding of the rules that should apply to a person in Mr. Diamantstein’s position.”