

NY Judge Won't Lift Asset Freezes In Gilead Counterfeit Suit

By **Hailey Konnath**

Law360 (July 31, 2023, 10:43 PM EDT) -- A New York federal judge on Monday refused to lift asset freezes Gilead Sciences obtained against Scripts Wholesale Inc. and an individual accused of conspiring to peddle counterfeit versions of Gilead HIV medication, ruling that Gilead has shown it's likely to win its case and that the freezes are justified.

U.S. District Judge Ann M. Donnelly denied motions from Scripts and Peter Khaim, holding that Gilead is likely to succeed on the merits and to suffer irreparable harm without preliminary relief.



Geoffrey Potter

In particular, the judge said Gilead has alleged that the defendants, including Scripts, sold bottles of Gilead-branded medicine with "spurious marks" — for example, made-up pedigrees and other manipulations to the labeling, sealing and bottle caps — which concealed the fact that the bottles were acquired from street-level buy back operations. Pedigrees are the records showing the chain of all sales or transfers of a drug.

"This is sufficient to state a claim that the alleged unauthorized use of the Gilead-branded bottles created a 'likelihood of confusion regarding' the source of the medications," Judge Donnelly said.

The judge added that Scripts is accused of being the "longest running counterfeiter of Gilead-branded medication in this case," and Gilead has met its burden to show that Scripts and its principal engaged in a pattern of "fraudulent or evasive conduct" to justify the asset freeze.

"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 on this account would force it out of business," Judge Donnelly said.

Judge Donnelly also rejected Scripts' argument that Gilead gave inconsistent interrogatory responses concerning the bottles seized from its warehouse. Scripts has only singled out a handful of entries among hundreds of records of seized counterfeits, the judge said.

"At this point in the litigation, this factual dispute does not render Gilead's evidence unreliable," she said. "Gilead has established likelihood of success by a preponderance of the evidence."

Gilead initially filed suit in July 2021, and has filed several amended complaints. The biotech company says a massive ring of small-time drug distributors and pharmacists was filling its branded HIV medication bottles with potentially dangerous drugs and then selling the counterfeit pills to patients.

Gilead's investigation found that more than 85,000 counterfeit bottles labeled as Gilead-branded medication have been sold to pharmacies over the past two years, altogether worth about \$250 million, according to a statement released in early 2022, when the case was unsealed.

Since then, Gilead has convinced Judge Donnelly to issue asset freeze orders against multiple defendants, including Scripts and Khaim. Gilead has alleged that Khaim is an "off-the-books principal" of one of the conspiring suppliers.

Khaim argued that the asset freeze should be limited to two properties purchased in 2021 and 2019. The assets currently frozen would exceed his amount of ill-gotten gains, he said.

But Judge Donnelly said Monday that Gilead has established that its equitable claim may be as big as \$37.7 million, the court doesn't yet know how much Khaim's assets are really worth.

"The defendant does not provide its own valuation of these properties except to say that the properties it concedes may be restrained can be valued at their market price — they are in the process of being sold — and that the assets may have increased in value since Khaim's acquisition," Judge Donnelly said. "Without additional submissions from the defendants, the court has no way to assess their claim that the value of the assets may be greater than \$12 million."

Judge Donnelly denied Khaim's request without prejudice, inviting him to show "through documentary proof" that particular assets aren't connected to the alleged counterfeiting.

Counsel for Scripts and Gilead declined to comment, and counsel for Khaim didn't immediately respond to a request for comment late Monday.

Gilead is represented by Geoffrey Potter and Timothy A. Waters of Patterson Belknap Webb & Tyler LLP.

Scripts is represented by Richard S. Schurin and Anthony Famularo of Stern & Schurin LLP.

Khaim is represented by Oleg A. Mestechkin and Wing K. Chiu of Mestechkin Law Group PC.

The case is Gilead Sciences Inc. et al. v. Safe Chain Solutions LLC et al., case number 1:21-cv-04106, in the U.S. District Court for the Eastern District of New York.

—Additional reporting by Dani Kass and Lauren Berg. Editing by Emily Kokoll.