UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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**GILEAD SCIENCES, INC.,** *et al.*,

Plaintiffs,

– against –

**SAFE CHAIN SOLUTIONS, LLC,** *et al.*,

Defendants.

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**MEMORANDUM DECISION AND ORDER**

21-CV-4106 (AMD) (RER)

**ANN M. DONNELLY**, United States District Judge:

During the course of this litigation, Gilead Sciences has obtained asset freeze orders against multiple defendants, including Peter Khaim and Scripts, in anticipation of a potential equitable award. Before the Court are Khaim's and Scripts' motions for modification or dissolution of the asset freezes against them. For the reasons below, the motions are denied, and the asset freezes are entered as preliminary injunctions.

## BACKGROUND

### I. The Lawsuit

The plaintiff develops, manufactures and sells HIV drugs, and owns registered trademarks and distinctive packaging associated with those drugs. (ECF No. 1056 (Sixth Amended Complaint) ¶¶ 14–17, 197–208.) In the normal course, Gilead sells its medications directly to "authorized" primary wholesalers. Primary wholesalers can sell drugs to licensed, independent wholesalers "if they are unable to sell inventory to retail pharmacies or other healthcare providers," for example, because of aging stock or not meeting quarterly sales quotas. (ECF No. 899 ¶ 33.) This downstream market of "unauthorized" but licensed buyers is known as the gray market. (ECF No. 1056 ¶¶ 260, 483.) Each bottle of medication is accompanied by a

pedigree—a record documenting the chain of all its sales or transfers going back to the manufacturer. The pedigrees document these transactions so that Gilead and its regulators can "secure [the] supply chain[.]" (ECF No. 1120 at 8.) Downstream purchasers of medications rely on pedigrees to confirm that they are buying authentic medications from licensed entities in compliance with federal law. (*Id.*)

This lawsuit arises out of an alleged HIV drug counterfeiting ring. The plaintiff alleges that the defendants sold Gilead-branded bottles repurposed with non-Gilead drugs, such as anti-psychotic medication, that do not treat HIV. (ECF No. 1056 ¶¶ 209–19.) They also allege that the defendants sold thousands of Gilead-branded bottles with the correct Gilead medication but accompanied by fake "pedigrees." (*Id.* ¶¶ 226–33.) The plaintiff raises claims under the Lanham Act, New York General Business Law and common law, and seeks monetary and equitable remedies including an accounting and disgorgement of ill-gotten profits from the manufacture, sale and distribution of the counterfeit medication. (ECF No. 1056 ¶ 12.)

According to the plaintiff, the counterfeiting ring consisted of various groups of co-conspirators including, as relevant here, kingpins, collectors, suppliers, distributors, and pharmacies. (ECF No. 945-1.) The collector defendants obtained most of the Gilead-branded bottles via a "street-level buyback operation." (ECF No. 1056 ¶ 537.) Collector defendants purchased both empty and full bottles of HIV medication from homeless or drug-addicted patients willing to sell their empty or full bottles of medications for cash. (*Id.* ¶ 222.) The collector defendants "cleaned" the bottles to remove patient labeling, which often left sticky residue on the repurposed bottles. (*Id.* ¶ 541; *see* ECF No. 607 at 81–86.) Sometimes, the collector defendants replaced missing or broken caps with counterfeit caps. (ECF No. 607 at 17,

78.) The collector defendants created counterfeit pedigrees which appeared to represent a chain of sale from authorized distributors. (*Id*. at 7.)

The plaintiff alleges that an elusive group of kingpin defendants controlled a group of supplier defendants—shell companies posing as wholesale suppliers. (ECF No. 1056 ¶ 5.) The collectors sold the counterfeit bottles to supplier defendants, who sold counterfeits "until [they] started to garner unwanted attention, at which point [the supplier defendants] would shut down and disappear[,]" and new companies would take their places. (*Id*. ¶ 6.) The supplier defendants sold the counterfeits to "distributor defendants," which were established businesses licensed and registered with the FDA, and had existing business relationships with pharmacies, who sold the counterfeits to retail pharmacies. (*Id*. ¶¶ 7, 483.) "Leader defendants" recruited the distributor defendants and connected them with the ever-changing landscape of suppliers. (*Id*. ¶ 8.)

Scripts Wholesale Inc. ("Scripts"), one of the distributor defendants, is alleged to have transacted in large volumes of Gilead-branded medications from a variety of supplier defendants. (*Id*. ¶¶ 337, 343, 350, 356, 484.) The plaintiff also alleges that defendant Steven Diamantstein, Scripts' owner, actively financed and orchestrated the supply of counterfeits to Scripts after he was recruited by one of the leader defendants. (*Id*. ¶¶ 345–49, 362, 486–98.)

From 2017 to 2018, the earliest known sales in the entire counterfeiting scheme, Scripts purchased the counterfeits from supplier defendant Mainspring Distribution LLC.[1] (ECF No. 607 at 60.) From August 1 to October 31, 2018, Scripts advanced almost $5 million to Mainspring as prepayment for the supply, (*see* ECF No. 457-3[2] ¶¶ 7–15), money that, according

[1] The plaintiff alleges that Scripts purchased the counterfeiting medications from Lieb Pharmacy, a retail pharmacy "located downstairs from Scripts," and "owned by [the CEO's] father." (ECF No. 607 at 60.) Lieb obtained these drugs from Mainspring. The plaintiff alleges that after Mainspring closed, Scripts bought the drugs directly from certain collector defendants. (*Id*. at 81.)

[2] *Scripts Wholesale, Inc. v. Mainspring Distribution LLC et al.*, 1:18-cv-6612, ECF No.1 (Complaint)).

to the plaintiff, Scripts intended to use to finance the street-level-buy-back operations. (ECF No. 1120 at 10.) However, in November 2018, Mainspring's principal was arrested, Mainspring ceased operations, and Scripts never received shipments in exchange for that payment. (ECF No. 457-3 ¶¶ 13–18.)

After Mainspring's principal was indicted for selling fake HIV medication, Scripts continued to sell the Gilead-branded product it sourced from Mainspring. (ECF No. 457-8.) Scripts then turned to other sources of Gilead-branded medication, including defendant Gentek LLC and Abacus Distributors. In January 2021, the FDA's Office of Criminal Investigation informed Scripts that it had purchased a counterfeit bottle of another brand's HIV treatment medication from defendant Gentek and sold it to defendant Ascan Pharmacy. (ECF No. 421-2.) Shortly thereafter, the FDA notified Scripts that defendant Abacus was also under investigation. (ECF No. 421-3.) Two days later, Scripts sold all its remaining stock of Gilead-branded medication from Abacus—370 bottles—to defendant Total Remedy, a retail pharmacy. When Gilead notified Scripts in June 2021 that Scripts had sold Gilead-branded bottles containing the wrong pills and fraudulent pedigrees, Scripts responded that it "had no reason to believe that the documents were falsified and that the [Gilead] products had been altered." (ECF No. 1120 at 12.)

Gilead alleges that in June and July 2021, Diamantstein began working directly with the collector defendants. Gilead cites text messages purporting to show that Diamantstein communicated his preferences for the forged pedigrees, including text messages between Abramov and Gelbinovich showing that Diamantstein instructed Gelbinovich how to make the

false chains of sale so that it would look like Scripts purchased the repurposed bottles from an "authorized distributor." (ECF No. 1120 at 13–14; ECF No. 608-133.)

Gilead alleges that every bottle of medication bearing Gilead trademarks that Scripts has sold from February 2017 to October 2021—over 54,000 bottles—has a fake pedigree. (ECF No. 1120 at 17.) Gilead also alleges that it has seized bottles with counterfeit caps, and bottles with damaged labels or sticky residue from Scripts' warehouse. (*Id*. at 9.) Gilead alleges that Scripts received over $137 million for these sales, $7.2 million of which are profits. (*Id*. at 21; ECF No. 1056 ¶ 487.)

The plaintiff also alleges that Peter Khaim, an "off-the-books principal" of supplier defendant Boulevard 9229 LLC ("Boulevard"), conspired to supply counterfeit drugs to distributor defendants. (ECF No. 1056 ¶¶ 25, 192, 261, 292.) The complaint alleges that proceeds from the counterfeit sales went to bank accounts operated by a shell company, MFK Management LLC ("MFK"), an asset holder defendant. (*Id*. ¶¶ 98, 180, 303, 506.) In opposing Khaim's motion, the plaintiff says that Khaim "controlled" supplier defendant Valuecare Pharmacy, through which he sold medicines to individual pharmacies. (ECF No. 1119 at 2.) The plaintiff alleges that Valuecare is connected to Boulevard, is "at least in part controlled" by Khaim, and that "Khaim conducted Valuecare's business under the alias 'Alex Kim,' using cell phones that Khaim also used to conduct business on behalf of [s]upplier [d]efendant Boulevard." (ECF No. 1056 ¶ 368.) Valuecare's nominal owner, defendant Bakhtiyar Nabiev, is the father-

in-law of defendant Zafar Abdullaev, the paper owner of Boulevard whom Khaim hired for that role. (*Id*.)

## II. Procedural History

### a. Scripts Wholesale

On October 16, 2021, the Honorable Rachel Kovner entered two temporary restraining orders after an *ex parte* hearing: an asset freeze order restraining all of Scripts' assets (ECF No. 166), and a prohibition on Scripts' purchase or sale of Gilead-branded products (ECF No. 168). The asset freeze order permitted Scripts to "file a motion to lift this asset freeze Order." (ECF No. 166 ¶ 7). On October 20, 2021, Scripts stipulated to extending the prohibition of its sale of Gilead-branded products until a preliminary injunction hearing. As part of that agreement, Gilead and Scripts agreed to "release all funds from fourteen of the fifteen disclosed frozen accounts, totaling approximately $2.4 million, for the Scripts Defendants' immediate use, while maintaining the freeze on the Scripts Savings account, ending in 2120[.]" (ECF No. 181 (the "October Agreement") at 2.) The October Agreement also included a provision reserving each parties' rights "to further move to amend the Asset Freeze Order." (*Id.* ¶4.)

On December 1, 2021, the parties agreed to release "an additional specific account frozen pursuant to the Asset Freeze Order[.]" (ECF No. 319 (the "December Agreement") at 1.) The Savings Account remained frozen. (*Id*. ¶ 1.d.) Both the October and December agreements provide as follows: "Except to the extent inconsistent with this Order, the provisions of the Court's Asset Freeze Order shall remain in effect." (ECF No. 181 ¶ 3.e; *see also* ECF No. 319 ¶ 1.e (further noting that the asset freeze order was "modified" by the October Agreement).) Neither the October nor the December Agreement set an expiration date for the asset freeze.

On January 20, 2022, Scripts moved to vacate or amend the asset freeze order. (ECF No. 391.) At oral argument on the motion, the parties agreed to mediate their dispute, and the Court

denied Scripts' motion to vacate without prejudice to renew upon the conclusion of mediation. Scripts renewed the motion to vacate on April 17, 2023. (ECF No. 1005.) Gilead represents that almost $5.5 million is currently frozen in the subject Savings Account; Scripts does not contest the scope of the current freeze. (ECF No. 1120 at 21.)

**b. Peter Khaim**

On August 20, 2021, Judge Kovner issued an asset freeze order against Khaim, freezing "all assets held by, for, or on [his] account" as well as "the balance of any account for which any of them has signature authority."[3] (ECF No. 47 ¶5.) This order froze an estimated $350,000 in assets held in various bank accounts. (Relief Def. Submission at 1.)

On April 14, 2022, the Court granted Gilead's *ex parte* motion for a temporary restraining order ("TRO") against a group of relief defendants connected to Khaim. (ECF No. 512.) This group did not contest the asset freeze, and after the deadline to oppose the TRO passed, it converted to a preliminary injunction on April 22, 2022. (ECF Nos. 512, 535.) This order restrained the conveyance of three real properties that were being held on Khaim's behalf. (ECF No. 535.) Khaim purchased those properties in 2020 and 2021 for a total of $17.9 million. (Relief Def. Submission at 3.)

On April 19, 2023, Gilead moved *ex parte* for a TRO against a second group of relief defendants related to Khaim. This group includes Khaim's wife and brother-in-law, as well as limited liability companies that purchased and own real estate assets on Khaim's behalf.[4] The

[3] Khaim did not oppose the asset freeze order. Rather, he refused to comply with the provisions of an accompanying seizure order requiring him to produce documents "on the basis of the Fifth Amendment privilege." (ECF No. 63-1 ¶ 8.) After a hearing, the Court denied Gilead's motion to hold Khaim in contempt. (Minute Entry and Order, September 30, 2021.)

[4] The relief defendants are Oksana Poltilova, Mark Poltilov, 214 Jamaica LLC, A&P Rockaway LLC, B&O Estates LLC, 91 Park LLC, 91 Rego LLC, and 93 Everton LLC.

plaintiff seeks to restrain seven real properties, which Gilead alleges Khaim purchased for a total of $12 million. (ECF No. 1017 at 14–24.) As with its previous motions, the plaintiff asked the Court to freeze these assets pursuant to its equitable powers under Federal Rule of Civil Procedure 65 and the Lanham Act. Gilead estimated Khaim's ill-gotten gains to be $22 million, based upon the proceeds that MFK received from Safe Chain, a distributor defendant, for the sale of 14,899 bottles of Gilead-branded medication. (ECF No. 1017 at 9.) In the alternative, Gilead argued that the Court could restrain the assets under state attachment law, pursuant to CPLR § 6201, or incorporate these properties into the prior order freezing all assets "on behalf of" Khaim.

The Court held an *ex parte* hearing on the plaintiff's motion and granted its request to amend the complaint to name the relevant relief defendants and enter the TRO on April 25, 2023. (ECF Nos. 1029, 1030.) The relief defendants timely opposed the TRO on May 9, 2023, via an email submission. The Court held a preliminary injunction hearing and asked for supplemental briefing on the accounting of Khaim's profits.

The relief defendants consent to a freeze of two of the seven properties, which they propose add $4.04 million to the $18.25 million already frozen. (Relief Def. Submission at 3.) The defendants base these calculations on the price at which relevant LLCs purchased these two properties in 2020 and 2021. (*Id*.) They argue that any additional restraints would result in a freeze which "exceeds even a liberal estimation of Khaim's supposedly ill-gotten gains"—the $22 million the plaintiff says can be linked to sales of Gilead-branded medications. (Relief Def. Submission at 3; May 23, 2023 Preliminary Injunction Hearing "Hrg. Tr." at 1–7.) [5] The relief

[5] The defendants also argued that attachment under state law was inappropriate. As discussed below, it is not necessary for the Court to reach the state attachment law issues, because it finds that the preliminary injunction is proper under the Lanham Act.

defendants argue that the amount subject to the freeze should be limited to $22 million because Gilead has not connected these additional proceeds to the counterfeited medications. (Relief Def. Submission at 2.)

The plaintiff responds that the $22 million figure was a conservative estimate of the ill-gotten gains and submitted additional records: a summary of financial records showing that MFK Management received over $34 million from Safe Chain, and $1.2 million from ProVen Pharmaceuticals. (ECF No. 1090.) They also submit financial records showing that Khaim received millions of dollars from pharmacies through Valuecare. (*Id*.)

**LEGAL STANDARD**

The Lanham Act entitles a plaintiff who establishes a violation of its rights in connection with a registered trademark to recover a defendant's profits. 15 U.S.C. § 1117(a); *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 131 (2d Cir. 2014) (A trademark infringer "is required in equity to account for and yield up his gains to the true owner, and profits are then allowed as an equitable measure of compensation." (internal quotation marks and emphasis omitted) (citing *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916))). Accordingly, "the Court unquestionably has authority to freeze assets to preserve an equitable accounting of profits." *Klipsch Grp., Inc. v. Big Box Store Ltd.*, No. 12 CIV. 6283, 2012 WL 5265727, at *4 (S.D.N.Y. Oct. 24, 2012); *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 131 (2d Cir. 2014); *see also Coley v. Vannguard Urb. Improvement Ass'n, Inc.*, No. 12-CV-5565, 2016 WL 7217641, at *2 (E.D.N.Y. Dec. 13, 2016). The "purpose of freezing assets is to preserve security for [the] plaintiff's future recovery on an accounting of the counterfeiter's profits." *N. Face Apparel Corp. v. TC Fashions, Inc.*, 2006 WL 838993, at *3 (internal quotation marks omitted). "[T]he party seeking an injunction must show that the 'injunction acts in aid of the recovery sought in

equity,'—in other words, that the preliminary injunction is reasonably necessary to preserve the status quo with respect to particular assets so that the court can grant the movant ultimate relief." *Yong Xiong He v. China New Star Rest., Inc.*, No. 19-CV-5907, 2020 WL 6202423, at *4 n.5 (E.D.N.Y. Oct. 22, 2020).

Under Rule 65(b), a TRO issued without notice to the adverse party expires within 14 days "unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension." Fed. R. Civ. P. 65(b)(2). A TRO extended beyond the time limit permitted by Rule 65(b)(2) "is treated as [a] preliminary injunction." *Seijas v. Republic of Argentina*, 352 F. App'x 519, 520–21 (2d Cir. 2009). "The purpose of a TRO is to preserve the status quo until a preliminary injunction hearing can be held." § 30:30. 5 McCarthy on Trademarks and Unfair Competition § 30:30 (5th ed.).

After a party obtains a TRO, "the adverse party may appear and move to dissolve or modify the order." Fed. R. Civ. P. 65(b)(4). "The burden is on the party seeking the restraint to show that it is justified." *Gardner-Alfred v. Fed. Rsrv. Bank of New York*, No. 22-CV-1585, 2022 WL 748249, at *1 (S.D.N.Y. Mar. 11, 2022). To justify a preliminary injunction, a movant must demonstrate by a preponderance of the evidence "(1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and (3) that the public's interest weighs in favor of granting an injunction." *Spanski Enterprises, Inc. v. Telewizja Polska S.A.*, 832 F. App'x 723, 724 (2d Cir. 2020); *Citigroup Inc. v. AT&T Servs., Inc.*, No. 16-CV-4333, 2016 WL 4362206, at *3 (S.D.N.Y. Aug. 11, 2016).

A party seeking to lift an asset freeze order that has already been entered as a preliminary injunction has the burden of "present[ing] documentary proof that particular assets are not the

proceeds of counterfeiting activities." *Ideavillage Prod. Corp. v. Bling Boutique Store*, No. 16-CV-9039, 2017 WL 1435748, at *6 (S.D.N.Y. Apr. 21, 2017) (citing *N. Face Apparel Corp. v. TC Fashions, Inc.*, No. 05-CV-9083, 2006 WL 838993, at *3 (S.D.N.Y. Mar. 30, 2006)).

## DISCUSSION

### I. Scripts Wholesale

#### a. Burden of Proof

The parties disagree on whether the current asset freeze order is a TRO which the parties have agreed to extend indefinitely, or a preliminary injunction. Scripts argues that the freeze is a TRO, and that the plaintiff has the burden to prove why the order should remain in effect over its objections. (ECF No. 1006 at 3.) Gilead argues that Scripts agreed to surrender its right to challenge the asset freeze order *de novo* when it stipulated to the October Agreement and must now show why the order should be vacated or modified. (ECF No. 1120 at 6.)

Gilead cites *In re Crawford*, in which two defendants convicted of criminal contempt for violating a TRO's terms argued that the TRO automatically expired under Rule 65(b) and could not support a criminal contempt conviction. In upholding the conviction, the Second Circuit found that a TRO does not expire, even when it exceeds Rule 65(b)'s time limit, as long as the "parties had notice of the district court's order and had the opportunity to present their opposition to it." 329 F.3d 131, 137–38 (2d Cir. 2003). The court observed that "the appellants could have appealed the extension of the TRO. They could have asked the district court to issue an order vacating the TRO. What they could not do, however, is disobey the Order without consequences." *Id*. at 139. Notably, the Court did not find that the TRO was converted into a preliminary injunction upon the inaction of the parties; it concluded only that "a binding order existed as to the appellants." *Id*. at 138.

While a TRO does not simply expire because of the parties' failure to act, Gilead does not cite any authority for the proposition that a party may not preserve its objection to entry of a preliminary injunction when stipulating to extend the TRO. The record is clear that Scripts agreed to extend the asset freeze without surrendering its rights to challenge the freeze on the merits. This Court entered the TRO *ex parte* as an initial matter, and the parties stipulated to an extension four days later; 41 days after that, they stipulated to another modification. The December Agreement was in place for 51 days before Scripts moved to vacate or amend the asset freeze. The Court did not rule on that motion because the parties agreed to mediate their dispute. Nothing in this record suggests that Scripts agreed that the asset freeze should be converted into a preliminary injunction, or that it otherwise waived its right to oppose the TRO *de novo*. Indeed, in each stipulated agreement, Scripts reserved its rights to challenge the asset freeze. Agreements like these are efficient; they permit parties to negotiate a resolution amenable to both sides during the pendency of litigation, without court intervention. Although the TRO has been in place for over eighteen months, Scripts should not be penalized for trying to resolve this dispute with Gilead. Thus, Gilead bears the burden of making the requisite showing for entry of a preliminary injunction. *See Spin Master v. Aciper*, No. 19-CV-6949, 2020 WL 6482878, at *4 (S.D.N.Y. Nov. 4, 2020).[6] However, as discussed below, Gilead has satisfied that burden.

[6] The plaintiff's claim that "[t]his Court has in fact already held that, in this procedural posture, the defendant moving to amend the Asset Freeze Order bears the burden of proof," is not accurate. (ECF No. at 6 (citing Dkt No. 256).) The plaintiff and Safe Chain stipulated to modify the asset freeze and enter a preliminary injunction restraining sale of Gilead-branded products. (ECF No. 28 at 2.) Later, Safe Chain filed an emergency motion to lift the restraint on two credit card processing accounts on the grounds that the assets in the accounts are unrelated to the counterfeit sales and exceed the amount necessary to preserve an equitable award, and that their restraint would force Safe Chain out of business. (ECF No. 104 at 6-7.) After a hearing, the Court granted Safe Chain's motion, but required that Safe

**b. Preliminary Injunction**

*i. Likelihood of Success*

To justify a preliminary injunction, a movant must demonstrate "a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial." *Cablevision Sys. Corp. v. Verizon New York Inc.*, 119 F. Supp. 3d 39, 49 (E.D.N.Y. 2015).

As a threshold matter, Scripts argues that the Drug Supply Chain Security Act ("DSCSA") pre-empts Gilead's Lanham Act claims regarding the suspect pedigrees because that statute gives the FDA the "exclusive authority to decide claims involving suspect pedigrees." (ECF No. 1006 at 4.) Gilead alleges that every bottle of the 54,000 Scripts sold has a counterfeit pedigree.[7] Scripts concedes that nothing in the DSCSA or the case law says that the FDA's authority under the DSCSA precludes litigants from asserting claims under other federal statutes. Instead, they say that the plaintiff has no private right of action because the DSCSA prohibits state regulations that are "are inconsistent with, less stringent than, directly related to, or covered by [its] standards and requirements." 21 U.S.C. § 360eee-4. The DSCSA pre-empts state law so that there is a uniform national policy for the pharmaceutical distribution supply chain; it does not logically follow that it also precludes private causes of action under other federal statutes. *See POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 114 (2014) (in light of the FDCA's express pre-emption provision regarding state food and beverage laws, the absence of a provision expressly precluding suits arising under other federal laws "is 'powerful evidence that Congress

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Chain place additional funds into escrow in order to preserve Gilead's equitable claim. (ECF Nos. 121, 259.)

[7] Gilead also claims that hundreds of these bottles either had no outserts, which are instructions that accompany each bottle with federally mandated disclosures, or had fakes ones. (ECF No. 1056 ¶ 542.) Scripts argues that the Court cannot consider this claim because it is an "unasserted copyright claim." (ECF No. 1133 at 8.) The Court does not reach this issue because the plaintiff has established a likelihood of success on the claims premised on the counterfeit pedigrees.

did not intend FDA oversight to be the exclusive means of ensuring' proper food and beverage labeling" (quoting *Wyeth v. Levine,* 555 U.S. 555, 575 (2009)).)

"The FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with the medical device provisions . . . ." *Buckman Co. v. Plaintiffs' Legal Comm*., 531 U.S. 341, 349 n.4 (2001) (quoting 21 U.S.C. § 337(a)) ("all such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States.")) The DCSA contains no such provision. Nevertheless, even if the Court were to find that Congress meant the FDA to have exclusive enforcement authority under the DCSCA, this would not itself operate to bar Gilead's Lanham Act claims. Although private litigants may not enforce the FDCA's provisions, the Supreme Court has held "the FDCA and the Lanham Act complement each other in the federal regulation of misleading labels" and that the FDCA does not preclude a private party from bringing Lanham Act claims related to labels subject to the FDCA's regulatory scheme. *POM Wonderful LLC*, 573 U.S. at 120–21. *Amarin Pharma, Inc. v. Int'l Trade Comm'n* is an exception to this rule. 923 F.3d 959 (Fed. Cir. 2019). The plaintiff in that case premised its Lanham Act false advertising claims on the defendant's mislabeling of products as dietary supplements, apparently in violation of the FDCA. *Id*. at 967. The FDA, which had not yet "taken the position that the articles at issue do, indeed, violate the FDCA," urged the International Trade Commission to dismiss the complaint as an exercise of comity to the FDA. *Id*. at 962. The Trade Commission dismissed the complaint and the plaintiff appealed. *Id*. at 962. In affirming the dismissal, the Federal Circuit distinguished *POM Wonderful*, because the false advertising claims in *POM Wonderful* "did not require proving a violation of the FDCA itself." *Id*. at 969.

Resolution of Gilead's Lanham Act claims does not require this Court to decide how parties may comply with DSCSA's regulatory scheme of pedigrees, which Scripts represents allows wholesale distributors like itself to comply by "either provid[ing] prior pedigrees received or create[ing] a new single pedigree document." (ECF No. 1006 at 8.) 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. These are classic Lanham Act claims. Litigation over the alleged fabrication of the chains of sale does not, as Scripts suggests, "neutraliz[e] the choice" that the DSCA provides it and other industry actors. Nor has the FDA intervened to ask the Court to dismiss the pedigree-related claims.

In the alternative, Scripts argues that the suspect pedigrees are not counterfeit because they were attached to genuine Gilead medications, and characterizes the bottles of medication as "gray market goods" that Congress did not intend to be covered by the Lanham Act. (ECF No. 1006 at 11 (citing Senate-House Joint Explanatory Statement on Trademark Counterfeiting Legislation, 130 Cong. Rec. H12076, at H12078 (Oct. 10, 1984)). When Congress enacted the Lanham Act, it stated that "gray market goods," which it defined as "trademarked goods legitimately manufactured and sold overseas and then imported into the United States outside the trademark owner's desired distribution channels," are not counterfeits. 130 Cong. Rec. H12076, at H12079 (Oct. 10, 1984). Congress added that "the sponsors do not consider such goods to bear counterfeit marks for purposes of this legislation, since the marks on these goods are placed there with the consent of the trademark owner or of a person affiliated with the trademark owner." *Id*. The Second Circuit has "applied the legal standards from gray market goods cases to claims involving trademarked domestic goods sold by unauthorized retailers," *Coty Inc. v.*

*Cosmopolitan Cosms. Inc.*, 432 F. Supp. 3d 345, 351 (S.D.N.Y. 2020), and "has observed that as a general rule, trademark law does not reach" the sale of genuine goods bearing a true mark even though the sale is not authorized by the mark owner." *TechnoMarine SA v. Jacob Time, Inc.*, 905 F. Supp. 2d 482, 488 (S.D.N.Y. 2012) (internal quotations citations omitted). However, goods manufactured by the trademark holder and then sold on the gray market may be 'counterfeit' if "a difference in products bearing the same name confuses consumers and impinges on the trademark holder's goodwill." *Coty Inc.*, 432 F. Supp. at 350.

Gilead does not appear to dispute the legality of the "gray market" in which its drugs are acquired from authorized distributors and resold by licensed but "unauthorized" downstream wholesalers. Rather, Gilead alleges that the pedigrees render the bottles materially different from genuine bottles of Gilead medication, deceiving customers and "subvert[ing its] quality control efforts." (ECF No. 1056 ¶ 701, 708, 716, 723.) "A claim for trademark infringement arises when a person uses a registered mark in commerce in connection with the sale of a good without the consent of the registrant and in a manner likely to cause confusion about the source of the goods." *Coty Inc.*, 432 F. Supp. 3d at 349. The plaintiff need "only to raise a serious question of likelihood of confusion." *Am. Cyanamid Co. v. Campagna Per Le Farmacie in Italia, S.P.A.*, 847 F.2d 53, 55 (2d Cir. 1988) (internal quotation marks and citations omitted). "Courts require no more than a slight difference which consumers would likely deem relevant when considering a purchase of the product." *Id*. at 351 (internal citations and alterations omitted). The Second Circuit has also recognized that goods may violate the Lanham Act if they do not conform to the trademark holder's quality control standards. *Monsanto Co. v. Haskel Trading, Inc.*, 13 F. Supp. 2d 349, 355 (E.D.N.Y. 1998) (quoting *Warner–Lambert Co. v. Northside Development Corp.,* 86 F.3d 3, 6 (2d Cir.1996).

The defendants sold bottles of Gilead-branded medicine with "spurious marks"—made-up pedigrees and other manipulations to the labeling, sealing, and bottle caps—that concealed the fact that the bottles were acquired from street-level buy back operations. 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. The pedigrees serve an important quality control function because they allow the plaintiff "to track the manufacture and packing of the product" and "are designed to expedite recalls in the event of any problems with the health, safety" or integrity of its products. *Monsanto*, 13 F. Supp. 2d at 357. Gilead has also plausibly alleged a material difference between the repurposed bottles and its genuine product based on the packaging: sticky residue, broken seals and made-up pedigrees.[8] *See Coty Inc.*, 432 F. Supp. 3d at 353 (plaintiff plausibly alleged a material difference as to products in which "production codes [had] been obscured, stickered, or otherwise mutilated" in order "to conceal the identity of the seller who is diverting the products outside of authorized distribution channels" from consumers).

Scripts also argues that because the pedigrees are not "used in commerce," they are not "trademarks" and thus cannot violate the Lanham Act. (ECF No. 1006 at 15–17 (citing 15 U.S.C. § 1127.) Section 1127 authorizes federal registration for trademarks that are actually used in the ordinary course of trade. *VersaTop Support Sys., LLC v. Georgia Expo, Inc.*, 921 F.3d 1364, 1369 (Fed. Cir. 2019). Multiple courts have held that this definition applies only trademark registration, and does not bear on trademark infringement; and indeed, that "an infringing use may be 'use of any type.'" *VersaTop Support Sys., LLC*, 921 F.3d at 1370; *see*

[8] Scripts argues that the Court may not consider whether Gilead is likely to succeed on a material differences theory, because in its *ex parte* application, it argued only that the counterfeits caused a likelihood of confusion. This argument is not persuasive. The Court evaluates the propriety of a preliminary injunction based on the evidence currently before it.

*also New Balance Athletics, Inc. v. USA New Bunren Int'l Co. Ltd. LLC*, 424 F. Supp. 3d 334, 345 (D. Del. 2019); *BTG Patent Holdings, LLC v. Bag2Go, GmbH*, 193 F. Supp. 3d 1310, 1322 (S.D. Fla. 2016) (stating that the definition of "use in commerce" in § 1127 "applies only in the trademark qualification context and not in the trademark infringement context"); *see also Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 131–40 (2d Cir. 2009) (in dicta, analysis of the statutory text and historical evolution of the Lanham Act supports § 1127 application to trademark qualifications and not infringement).

Finally, Scripts claims that Gilead gave inconsistent interrogatory responses concerning the Gilead-branded bottles seized from Scripts' warehouse that contained the wrong medication, and that this is likely the result of the plaintiff confusing the bottles it seized from various defendants. (ECF No. 1133 at 10.) Scripts argues that the inconsistencies render Gilead's "facts" regarding the counterfeit bottles to be unreliable. (*Id.*) The Court has reviewed the relevant documents, and Scripts appears to take issue with a handful of entries among hundreds of records of seized counterfeits. (ECF No. 1134.) At this point in the litigation, this factual dispute does not render Gilead's evidence unreliable. *See 725 Eatery Corp. v. City of New York*, 408 F. Supp. 3d 424, 455 (S.D.N.Y. 2019) ("As the Supreme Court has observed, 'the decision of whether to award preliminary injunctive relief is often based on 'procedures that are less formal and evidence that is less complete than in a trial on the merits.'" (quoting *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010)).). Gilead has established likelihood of success by a preponderance of the evidence. *AFA Dispensing Grp. B.V. v. Anheuser-Busch, Inc.*, 740 F. Supp. 2d 465, 471 (S.D.N.Y. 2010). "The Court's findings of fact and conclusions of law in this proceeding do not preclude reexamination of the merits at a subsequent trial or other stage of the

litigation." *Citigroup Inc*, 2016 WL 4362206, at *3 (citing *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998)).

*ii. Irreparable Harm*

"To satisfy the irreparable harm requirement, [the p]laintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (cleaned up).

Gilead points to Scripts' fraudulent conduct as alleged in the complaint—the "longest-running counterfeiter of Gilead-branded medication in this case"—as prima facie evidence that Scripts is likely to dissipate any funds, which would frustrate the enforcement of an equitable award. This conduct includes Diamantstein's role in facilitating the manufacture of fake pedigrees, as well as Scripts' knowing sale of counterfeit medications even after the FBI and the FDA Office of Criminal Investigation told Scripts it was selling counterfeit bottles of non-Gilead HIV medication that it had sourced from Gentek. (ECF No. 1120 at 23 (citing ECF No. 153-2).) Although Scripts disputes that Diamantstein had a hand in the collection process that created the street-level black market for the Gilead-branded medications (ECF No. 1133 at 9), it does not give convincing alternative explanations for the text messages between Diamantstein defendants Abramov and Gelbinovich. None of this controverts the extensive evidence documenting Scripts' knowing participation in the counterfeiting ring,

Gilead has met its burden to show that Scripts and its principal have engaged in a pattern of fraudulent or evasive conduct so as to justify a preliminary injunction freezing assets to satisfy a potential equitable award. *See Dong v. Miller*, No. 16-CV-5836, 2018 WL 1445573, at *10

(E.D.N.Y. Mar. 23, 2018) (irreparable harm justified asset freeze where the "[d]efendants have engaged in a long-running fraud").

*iii. Public Interest*

Finally, Gilead "must demonstrate that the balance of equities tips in its favor and that "an injunction is in the public interest." *New York v. United States Dep't of Homeland Sec*., 408 F. Supp. 3d 334, 351 (S.D.N.Y. 2019), *aff'd as modified*, 969 F.3d 42 (2d Cir. 2020). "[T]here is hardly a conceivable public interest in enabling [the d]efendants to evade their creditors." *Dong*, 2018 WL 1445573, at *13. 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. 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. Because Scripts does not contest the scope of the preliminary injunction, the terms of the asset freeze are unchanged.

## II. Peter Khaim

In their opposition to the TRO, the relief defendants do not dispute irreparable harm, likelihood of success on the merits, or public interest. Because the relief defendants do not contest that the plaintiff has met its burden of proof for injunctive relief, the TRO is converted into a preliminary injunction. The relief defendants' opposition to the asset freeze, therefore, is construed as a motion to modify the preliminary injunction.

### a. Authority for the Freeze

The plaintiff seeks an asset freeze at federal law, and under state attachment law. The current TRO is executed pursuant to federal law, not state law. As discussed above, the plaintiff

in a trademark infringement action under the Lanham Act may recover a defendant's profits. Federal Rule of Civil Procedure 64(a) provides that "every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies."

CPLR 6201(3) requires a plaintiff to prove two elements: "(1) that defendant either is about to or has assigned, disposed of, encumbered, or secreted property, or removed it from the state; and (2) that defendant has acted or will act with the intent to defraud her creditors or to frustrate the enforcement of a judgment that might be rendered in plaintiff's favor." *Allstate Ins. Co. v. Rozenberg*, No. 09-CV-565, 2009 WL 9081080, at *5 (E.D.N.Y. Jan. 26, 2009) (quoting *Encore Credit Corp. v. LaMattina*, No. CV-05-5442, 2006 WL 148909, at *3 (E.D.N.Y. Jan. 18, 2006)). The plaintiff has only established that two of the seven properties—the Dartmouth Street and the Fleet Street—are "about to" be disposed of; they are listed for sale. *See Allstate Ins. Co. v. Rozenberg*, No. 09-CV-565, 2009 WL 9081080, at *5 (E.D.N.Y. Jan. 26, 2009). As discussed below, both of these properties are assets freezable under the Lanham Act, so state attachment law does not provide a supplemental remedy here. Because the Lanham Act clearly provides for the remedy of restraining assets, the Court declines to order further equitable relief under CPLR § 6201. *See Balenciaga Am., Inc. v. Dollinger*, No.10-CV-2912, 2010 WL 3952850, at *8 (S.D.N.Y. Oct. 8, 2010) (denying challenge to asset freeze based upon state attachment law and Rule 64 when the Lanham Act provided the Court's authority for the freeze).

**b. The Court May Restrain Assets to Preserve an Equitable Accounting of Profits**

The relief defendants do not oppose the restraint on two of the properties—the Jamaica Avenue Property, purchased in 2021, and the Everton Street Property, purchased in 2019. Rather, the relief defendants argue that the asset freeze should be limited to these two properties

because (1) the currently frozen assets would exceed the amount of Khaim's ill-gotten gains and (2) the assets were not assigned to the relief defendants with fraudulent intent, as required by state law, because they were acquired before the alleged counterfeiting scheme commenced. Because the Court declines to issue an asset freeze pursuant to state law, it construes the latter argument as a challenge to the asset freeze under federal law on the basis that these assets are not sufficiently linked to the counterfeiting proceeds.

When a party moves to modify an asset freeze order, a court "may exempt any particular assets from the freeze on the ground that they [are] not linked to the profits of allegedly illegal activity." However, the burden remains "on the party seeking relief to present documentary proof that particular assets are not the proceeds of counterfeiting activities." *Klipsch*, 2012 WL 5265727, at *8 (internal citation and alterations omitted) (citing *N. Face Apparel Corp. v. TC Fashions, Inc.*, 2006 WL 838993, at *3 (S.D.N.Y. Mar. 30, 2006)); *see also Ideavillage Prod. Corp. v. Bling Boutique Store*, No. 16-CV-9039, 2017 WL 1435748, at *6 (S.D.N.Y. Apr. 21, 2017) ("To lift the Asset Freeze Order, the burden is on Moving Defendants to present documentary proof that particular assets are not the proceeds of counterfeiting activities." (internal quotation marks omitted)). An asset freeze may extend to those assets "commingled" with illegal profits. *SEC v. Byers*, No. 08-CV-7104, 2009 WL 33434, at *3 (S.D.N.Y. Jan. 7, 2009); *see also FTC v. Leanspa, LLC*, No. 11-CV-1715, 2013 WL 12140480, at *5–7 (D. Conn. Jan. 29, 2013), *aff'd sub nom. FTC v. Strano*, 528 F. App'x 47 (2d Cir. 2013).

The relief defendants argue that "even if [they] purchased their properties on Khaim's behalf, and using Khaim's money, they did so before the inception of the counterfeiting scheme alleged in this action." (Relief Def. Submission at 6.) Khaim or his associates acquired the five

properties—located at Radnor Road, Rockaway Avenue, Dartmouth Street, Fleet Street, and 63rd Drive—between 2013 and April 2019.

Gilead does not claim that Khaim was involved in the counterfeiting scheme before 2019. Rather, it argues that funds from the illicit scheme were used to make mortgage payments on the Radnor Road and Dartmouth Street properties, to make tax payments on the Fleet Street property and improve the Dartmouth Street and 63rd Drive properties during and after Khaim's alleged conduct. This is sufficient to render these assets "inextricably intertwined with [Khaim's] allegedly fraudulent business dealings" to be frozen as "ill-gotten" assets. *S.E.C. v. Byers*, No. 08-CV-7104, 2009 WL 33434, at *3 (S.D.N.Y. Jan. 7, 2009) (freezing real property when some mortgage payments were made from account into which defendant deposited funds traceable to securities fraud; reasoning "the defendant should not benefit from the fact that he commingled his illegal profits with other assets").

That leaves the Rockaway Avenue property, acquired in June 2015. Gilead does not link this property to the counterfeiting scheme; it seeks to freeze it solely to "preserve security" for any future recovery. *N. Face Apparel Corp.*, 2006 WL 838993, at *3. Gilead claims that Khaim uses A&P Rockaway LLC, which owns the restrained asset, as "his personal piggy bank." (ECF No. 1017 at 19–20.) It is the burden of the party seeking to modify the preliminary injunction to "present documentary proof that particular assets are not the proceeds of counterfeiting activities." *Ideavillage Prod. Corp.* 2017 WL 1435748, at *6. The relief defendants have not submitted any evidence that the Rockaway Avenue property is not commingled with Khaim's ill-gotten gains. The relief defendants may renew their motion as to this property with documentary proof that this restrained asset has not been maintained or improved with proceeds from the scheme. Accordingly, the property is subject to being frozen pending a determination that their

value is "equal to the amount of funds derived" from the counterfeiting scheme. *Fed. Trade Comm'n v. Leanspa, LLC*, No. 11-CV-1715, 2013 WL 12140480, at *8 (D. Conn. Jan. 29, 2013), *aff'd sub nom. F.T.C. v. Strano*, 528 F. App'x 47 (2d Cir. 2013). As discussed below, I find that they are.

**c. The Amount of the Freeze**

*i. Accounting of Profits*

Under the Lanham Act, an asset freeze "must be limited to an amount sufficient to preserve the equitable claim and may not be used to 'preserve funds that may later be used to satisfy an award of statutory damages.'" *Spin Master v. Aciper*, No. 19-CV-6949, 2020 WL 6482878, at *3 (S.D.N.Y. Nov. 4, 2020) (quoting *Klipsch Grp., Inc. v. Big Box Store Ltd.*, No. 12-CV-6283, 2012 WL 5265727, at *5 (S.D.N.Y. Oct. 24, 2012)). A plaintiff seeking an accounting of profits is "required to prove defendant's sales only. [] And then the burden shifts to the defendants to 'prove all elements of cost or deduction.'" *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 133 (2d Cir. 2014) (quoting 15 U.S.C. § 1117(a)); *accord S.E.C. v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996) ("The amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation; any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty." (internal citations and quotations omitted)).

The parties dispute the parameters of the available equitable relief. The relief defendants claim that the plaintiff has established only that $22 million is linked to the sale of Gilead-branded medications, so only that amount is "freezable" under the Lanham Act. (Hrg. Tr. at 4:5-7.) The plaintiff asks this Court to set the upper limit of funds that can be restrained under the Lanham Act at $38 million.

In its *ex parte* motion, the plaintiff represented that Safe Chain paid $22 million into a Metro City Bank checking account held by MFK Management LLC d/b/a 9229 Boulevard LLC, for which Khaim was the sole signatory during 2021. (ECF No. 1017 at 15; ECF No. 102-1 (MFK bank records for account ending in x3339).) Gilead linked this $22 million to the sale of 14,899 bottles of Gilead-branded medication. (ECF No. 469-3.) In its opposition to the relief defendants' motion to modify the asset freeze, Gilead modifies its estimate and adds deposits from Safe Chain into MFK accounts at Chase and Santander banks. (ECF No. 1090-2.) The plaintiff alleges that deposits into these additional bank accounts gave MFK Management a total of $34.7 million from Safe Chain between May 2020 and March 2021.[9]

The relief defendants argue that Gilead has not linked these additional amounts to Gilead-branded medications. The plaintiff responds that there is no other explanation for Safe Chain's payments to MFK because the "relief defendants have submitted no evidence that MFK has any purpose but to collect payments for Khaim's sale of counterfeit Gilead medicines, or that Safe Chain had any relationship with MFK but to pay for counterfeit Gilead medicines." (ECF No. 1119 at 2.)

The relief defendants have not sustained their burden to refute the inference that the payments from Safe Chain were from sales of Gilead-branded medications. Certainly, Gilead's evidence regarding the additional $12 million in the Chase and Santander accounts is circumstantial. But "[w]here the defendants fail to produce evidence to refute plaintiffs' evidence of defendants' sales of counterfeit products, the court must rely on less certain methods of proof." *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 973 (2d Cir. 1985)

[9] Gilead submitted only a summary table, not the underlying bank records from Chase and Santander. However, the relief defendants do not object to the form of the summary of records, or cite case law requiring production of the underlying bank records.

(affirming district court's estimation of damages based on testimony where the defendant "refused to produce any records"). The relief defendants have not explained why Safe Chain dealt with MFK or Boulevard, except to obtain Gilead-branded medications. Nor do they explain why the Court should accept that the Safe Chain payments into the Metro City Bank account were for Gilead-branded medications, but reject that premise for the payments into the Chase and Santander accounts.

The remaining sums that Gilead offers as counterfeit proceeds are different in kind, based on discovery from other defendants. The plaintiff estimates that MFK received an additional $1.2 million from ProVen Pharmaceuticals, another distributor defendant, based on pedigrees of counterfeit medication that show the transfer of bottles from Boulevard to ProVen. As documented by the pedigrees, the plaintiff multiplied the number of bottles Boulevard sold to ProVen in September and October 2020 with the "wholesale acquisition cost"—the price at which Gilead sells its product—which would amount to almost $1.4 million. (ECF No. 1119 at 2.) The plaintiff claims that this accounts for the $1.2 million that ProVen paid into the Chase bank account belonging to MFK between September and November 2020. (ECF No. 1090-3; ECF No. 1056 ¶ 506.) Although circumstantial, these calculations suffice to raise the inference that these funds were received in exchange for sales of Gilead-branded medications.

The plaintiff also argues that sums received by Valuecare Pharmacy should be considered a part of the total pool of Khaim's ill-gotten gains. (ECF No. 1090 at 5.) The defendants do not contest that Khaim controlled Valuecare, or that Valuecare's sales should be considered Khaim's ill-gotten gains. (Hrg. Tr. at 5:1-13.) The plaintiff attaches a summary of bank records that purports to show that Ascan Pharmacy, a pharmacy defendant, among other non-party pharmacies, paid Valuecare $2,899,857 between April and July 2021. (ECF No. 1090-5.) The

plaintiff contends this number corresponds with invoices of ValueCare sales to Ascan pharmacy detailing orders including Gilead-branded medicines between March and November of 2021 that amount to $2,822,225 in sales. (ECF No. 1119-4.) The defendants do not offer any evidence that these invoices list non-Gilead or authentic medications, or that transactions do not correspond with the invoices.

In addition to Gilead-branded medications—Biktarvy, Descovy, Genvoya and Atripla—the invoices list other medications that do not appear to be Gilead-branded or at issue in this action. But the amounts listed for the Gilead medications account for the vast majority of the sales on the invoices: $2,436,150 of the $2,822,225. This is sufficient to meet the plaintiff's burden to show a "reasonable approximation" of counterfeiting proceeds.

Finally, the plaintiff submits a summary of financial records that purports to show that Valuecare received over $500,000 from other pharmacies who are not named defendants. (ECF No. 1090-4.) However, the plaintiff does not have evidence, such as invoices, that link these payments to sales of Gilead-branded medication. Accordingly, the plaintiff has not met its burden of proof with respect to the $515,117 from of Valuecare proceeds from alleged "pharmacy-to-pharmacy" sales. Altogether, the plaintiff has established that its equitable claim may be as large as $37.7 million.[10]

*ii. Value of the Assets*

Gilead argues that while Khaim may have paid a total $12 million for the properties, the Court cannot know how much these assets are worth because the defendants have not shown the value of these assets. (ECF No. 1090 at 6.) It argues that "a years-old purchase price is on its

[10] This amount includes $34 million in sales to Safe Chain, $1.2 million in sales to ProVen and $2.5 in sales to Ascan Pharmacy.

face insufficient evidence to establish the current value of a parcel of real estate," in part because it is unknown whether mortgages encumber the properties, and how fees or taxes would reduce the amount available to satisfy a judgment. (*Id*. at 6–7.) 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. (Relief Def. Submission, at 3; ECF No. 1122 at 2.) 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. As for the plaintiff's arguments, even 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. Because the counterfeit proceeds are estimated to exceed $37 million, the relief defendant's motion to modify the asset freeze is denied.

## CONCLUSION

Scripts' motion to vacate the asset freeze is denied. The relief defendants' motion to modify the asset freeze is denied without prejudice to renewal, if they can show, "through documentary proof, that particular assets are not proceeds of counterfeiting activities so as to warrant exemption" of those assets as consistent with this order. *Balenciaga Am., Inc. v. Dollinger*, No. 10-CV-2912, 2010 WL 3952850, at *8 (S.D.N.Y. Oct. 8, 2010) (quoting *N. Face Apparel*, 2006 WL 838993 at *3). The asset freeze orders against Scripts and the relief defendants are entered as preliminary injunctions.

**SO ORDERED.**

s/Ann M. Donnelly

ANN M. DONNELLY
United States District Judge

Dated: Brooklyn, New York
July 28, 2023