

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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THE PEOPLE OF THE STATE OF NEW YORK,
by ERIC T. SCHNEIDERMAN, Attorney General of
the State of New York,

Petitioner,

-against-

GIGGLESWORLD CORPORATION d/b/a
GIGGLES and TIMOTHY M. SERINO,

Respondents.
-----X

**ORDER TO SHOW CAUSE
WITH A TEMPORARY
RESTRAINING ORDER**

Index No.
Hon.

Upon reading and filing the annexed Verified Petition, verified on July 10, 2012; and the Affirmation of G. Nicholas Garin, Assistant Attorney General, affirmed to on July 10, 2012; and the Affidavits of Senior Investigator Chad Shelmidine, sworn to on June 26, 2012, and Maja Lundborg-Gray, MD, FAAEM, FACEP, sworn to on July 5, 2012, and the exhibits annexed thereto, and

Upon the motion of ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, attorney for the Petitioner, it is

ORDERED that the Respondents in the above-entitled proceeding show cause at a Term of this Court, to be held at the Dutchess County Courthouse, located at 10 Market Street, Poughkeepsie, New York 12601, on the ___ day of July, 2012, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, why an order should not be made, pursuant to Executive Law § 63(12) and General Business Law, Article 22-A, granting an order and judgment:

- a. permanently enjoining Respondents and their agents, trustees, servants, employees, successors, heirs and assigns, or any other person under their direction

and control, whether acting individually or in concert with others, or through any corporate or other entity or device through which they may now or hereafter act or conduct business ("Respondents"), from offering for sale and/or selling mislabeled drugs in violation of Ag. and Mkts. Law § 194;

- b. permanently enjoining Respondents from offering for sale and/or selling misbranded drugs in violation of Educ. Law §§ 6802 and 6815;
- c. permanently enjoining Respondents from misleadingly offering for sale and/or selling products as designer drugs or other street drug alternatives, including encouraging ingestion of products that are labeled or specifically designated "not for human consumption;"
- d. permanently enjoining Respondents from offering for sale and selling nitrous oxide to the public in violation of Public Health Law § 3380;
- e. permanently enjoining Respondents from engaging in the fraudulent, deceptive and illegal practices alleged in the petition in violation of GBL § 349;
- f. requiring Respondents to comply with any and all state, local or federal labeling requirements;
- g. requiring Respondents to prepare an accounting of all commodities they sold, or offered for sale, from January 1, 2012 to July 10, 2012 including the (i) name of the product, (ii) the manufacturer and/or distributor of the product, (iii) a description of the product, (iv) the retail price of the product, and (v) the number units of the product sold;
- h. pursuant to GBL § 350-d, imposing a civil penalty of \$5,000 for each deceptive act committed by Respondents;
- i. pursuant to CPLR § 8303(a)(6), granting costs to the State of New York of \$2,000; and
- j. for such other and further relief as the court deems just and proper.

IT APPEARING that a cause of action for temporary injunctive relief exists under Executive Law § 63(12), General Business Law § 349, and CPLR Sections 6301 and 6313, and that Respondents have engaged in repeated and persistent illegal, fraudulent and deceptive acts and practices which have caused and will continue to cause immediate and irreparable injury to

members of the public unless Respondents are restrained before a hearing can be held, it is

ORDERED that pending the hearing and determination of this proceeding, and to protect the public health, Respondents, their agents, employees, successors, and assigns, and any other person under their direction and control, whether acting individually or in concert with others, or through any corporate or other entity or device, are hereby temporarily restrained, pursuant to CPLR Sections 6301 and 6313 from offering for sale or selling mislabeled and/or misbranded drugs, from misleadingly offering for sale and/or selling products as designer drugs or other street drug alternatives, including but not limited to products that are labeled "not for human consumption" or any similar terms, and from selling nitrous oxide to the public;

SUFFICIENT CAUSE appearing to me therefore,

LET service of one copy of this order and supporting papers on Respondents on or before the ____ day of July, 2012 be deemed due and sufficient service hereof.

Pursuant to C.P.L.R. § 403(b), answering papers, if any, are required to be served at least two days before the return date of this special proceeding. If, however, this Order to Show Cause is served at least twelve days before the return date, answering papers, if any, are required to be served at least seven days before the return date.

Dated: Syracuse, New York
July __, 2012

E N T E R

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

PEOPLE OF THE STATE OF NEW YORK, by
ERIC T. SCHNEIDERMAN, Attorney General of the
State of New York,

Petitioner,

-against-

GIGGLESWORLD CORPORATION d/b/a
GIGGLES and TIMOTHY M. SERINO,

Respondents.

**VERIFIED
PETITION**

The People of the State of New York, by their attorney, Eric T. Schneiderman, Attorney General of the State of New York, allege as follows:

PRELIMINARY STATEMENT

1. Petitioner brings this summary proceeding pursuant to New York Executive Law § 63(12), and New York General Business Law (“GBL”) § 349 to enjoin Respondents, GigglesWorld Corporation and Timothy M. Serino doing business as Giggles, from engaging in deceptive, fraudulent and illegal practices in connection with their business (commonly known as a “head shop”). Respondents sell so-called “designer drugs,” which are synthetic versions of illegal drugs, as well as other street drug alternatives, which are products that are marketed with claims that the effect of their use mimics controlled substances. Designer drugs and other street drug alternatives [hereafter “designer drugs”] are marketed to avoid the provisions of existing drug laws; they are intended to stimulate, sedate or cause hallucinations or euphoria when ingested or inhaled. Petitioner also seeks civil penalties and costs, as authorized by statute, to be paid to the State of New York.

2. The sale of designer drugs has contributed to a public health crisis in New York State and across the nation. These products are sold by head shops for their psychoactive effects akin to those obtained from illegal drug use. Many of the products are packaged with innocuous names and bright graphics to give the misleading impression that their use is harmless. Others are packaged and named to mimic illegal drugs or legal prescription drugs. The products target people who wish to engage in recreational legal drug use and/or who do not want to risk a positive drug test. Many products are insufficiently labeled, mislabeled, and/or misbranded, lacking identification of ingredients, adequate directions for use, adequate warning labels, and/or manufacturer information. In addition, some products that bear labels stating "not fit for human consumption" are deceptively misrepresented by head shops to consumers as drugs with psychoactive properties.

3. Misrepresenting products as safe for human consumption and selling products that are insufficiently labeled or mislabeled is inherently misleading and dangerous. Consumers cannot make informed decisions about the safety of the products they are purchasing without knowing the contents of the products and how they are intended to be used. Some of these products may cause serious health effects such as agitation, tachycardia (rapid heartbeat), hallucinations, seizures, extreme paranoia, panic, vomiting, mood swings, intense cravings to redose, suicidal or homicidal thoughts, or even death. Consumers who experience dire health consequences as a result of ingesting one of these products are at further risk. Without being able to disclose to emergency personnel and health care providers the chemicals they have ingested, the users of these products may not receive appropriate medical treatment.

4. New York State has enacted a comprehensive statutory scheme with respect to the labeling of commodities and drugs. For example, the New York State Agriculture and Markets

Law (hereinafter "Ag.& Mkts. Law") § 194 regulates labeling of commodities, including non-prescription drugs. The New York State Education Law (hereinafter "Educ. Law") § 6802 proscribes misbranding of all drugs. Crucial to protecting the health of all New Yorkers is enforcement of the state's laws prohibiting mislabeling of commodities and misbranding of drugs.

5. In addition, the New York State Public Health Law (hereinafter "Pub. Health Law") § 3380 proscribes the retail sale of nitrous oxide to the public. Respondents offer for sale and sell nitrous oxide canisters to the public.

PARTIES AND JURISDICTION

6. Petitioner is the People of the State of New York, by their attorney, Eric T. Schneiderman, Attorney General of the State of New York

7. Respondent, Timothy M. Serino ("Serino") is a resident of Dutchess County. Serino is the sole shareholder and officer of Respondent, GigglesWorld Corporation ("GigglesWorld"), a domestic corporation incorporated on or about November 9, 1999 which does business as Giggles. Giggles is located at 3969 Albany Post Road, Hyde Park, New York.

8. Petitioner brings this proceeding pursuant to New York Executive Law § 63(12) which authorizes the Attorney General to seek injunctive relief, restitution, damages and costs when any person or entity has engaged in repeated fraudulent or illegal acts or has otherwise engaged in persistent fraud or illegality in the conduct of its business, and pursuant to GBL Article 22-A, which authorizes the Attorney General to seek injunctive relief, restitution and civil penalties against any person or business entity that has engaged in deceptive business practices.

9. Petitioner has timely served Respondents with pre-litigation notices pursuant to GBL § 349(c).

FACTS

10. Respondents own and operate a "head shop" that specializes in the retail sale of drug paraphernalia for the consumption of cannabis and other controlled substances, as well as the sale of designer drugs. Designer drugs are marketed as innocuous products but are designed to stimulate, sedate or cause hallucinations or euphoria when ingested or inhaled. Many of these products are harmful to consumers.

11. The Office of the New York State Attorney General Eric T. Schneiderman ("OAG") conducted an undercover investigation that revealed extensive evidence that Giggles offers for sale and sells mislabeled and misbranded designer drugs and nitrous oxide to the public. The Food and Drug Administration ("FDA") also considers any product that is promoted as a street drug alternative to be an unapproved new drug and misbranded drug in violation of sections 505 and 502 of the Federal Food, Drug, and Cosmetic Act. 21 U.S.C. §§ 321(p)(1) and 352(f)(1).

12. Giggles offers for sale and sells these products in such a manner as to either explicitly or implicitly misrepresent the products as designer drugs.

13. As detailed below, Giggles offers for sale and sells the following designer drugs: kratom and salvia. Giggles also offers for sale and sells canisters of nitrous oxide, despite its lack of an exemption by the Commissioner of the State Health Department to sell such products. Indeed, New York State Law does not allow exemptions for the retail sale of nitrous oxide to the public.

14. On May 16, 2012, at approximately 12:20 p.m., Chad Shelmidine, a Senior Investigator employed by the OAG ("Inv. Shelmidine"), went to Giggles, located at 3969 Albany Post Road, Hyde Park, New York.

15. Giggles offers for sale and sells "kratom," a type of designer drug or street drug alternative. It is sold in a package under "Giggles Maeng Da Kratom" that specifies it contains 10 grams and states, "Not for human consumption."

16. According to the United States Department of Justice Department of Drug Enforcement, kratom is a tropical tree native to Southeast Asia. Like psychostimulant drugs, consumption of kratom leaves (or extract) produces both stimulant effects in low doses, and sedative effects in high doses and can lead to addiction. Several cases of psychosis resulting from use of kratom have been reported, where individuals addicted to kratom exhibited psychotic symptoms, including hallucinations, delusion, and confusion. Withdrawal effects include symptoms of hostility, aggression, mood swings, runny nose, achy muscles and bones, and jerky movement of the limbs. There is no legitimate medical use for kratom in the United States.

17. Giggles also sells salvia under the name "Purple Sticky Brand." On the package it states that it is in instant powder form and, "We provide the highest grade extracts and smokeables from around the world."

18. According to the U.S. Department of Justice Drug Enforcement Administration, salvia divinorum is an herb in the mint family native to certain areas of the Sierra Mazateca region of Oaxaca Mexico. Salvia divinorum products are "abused for their ability to evoke hallucinogenic effects, which, in general, are similar to those of other scheduled hallucinogenic substances." Salvinorin-A is believed to be the active ingredient responsible for the

hallucinogenic effects. Neither salvia divinorum nor Salvinorin-A, have any approved medical uses in the United States. Side effects include losing coordination, dizziness and slurred speech.

19. Giggles also offers for sale and sells Best Whip cream chargers, containing nitrous oxide. Nitrous oxide is also known by the slang term "laughing gas." When it is inhaled, nitrous oxide has analgesic and euphoric effects on the user. Nitrous chargers can be used to make whip cream, but are frequently misused by people to get high.

20. Giggles also offers for sale and sells "crackers," devices used to 'crack' the seal on the nitrous oxide chargers and balloons. After piercing the seal, the cracker allows the gas to escape in a controlled fashion. A balloon is attached to the cracker to capture the gas and allow it to absorb enough heat to be inhaled safely. It is then inhaled by the user to get high.

21. According to the packaging, the box contained 24 10 cubic centimeter chargers, each charger containing pure nitrous oxide (N₂O). The label included instructions that the chargers are specially made for making whipped cream in Cream Whippers and were not for use for any other purpose and cautioned "do not inhale." The label misleadingly states that nitrous oxide canisters may not be sold to persons under the age of 18; in New York State such canisters may not be sold for any reason to persons under the age 21 and can not be sold at retail. There was no address or contact information for the manufacturer or distributor.

22. Giggles offers for sale and sells whipped cream chargers that state on their packaging that they are not to be inhaled. Giggles sells these nitrous oxide chargers with accoutrements (crackers and balloons); these accoutrements can only be used for one purpose -- the inhalation of the nitrous oxide.

**FIRST CAUSE OF ACTION
VIOLATION OF EXECUTIVE LAW 63(12)
REPEATED ILLEGALITY
VIOLATION OF AG. & MKTS. LAW § 194
(FALSE LABELING)**

23. New York State Ag. & Mkts. § 194 proscribes false labels on commodities sold, offered or exposed for sale, or any false description respecting the number, quantity weight or measure of such commodity.

24. The definition of a commodity as set forth in Ag. & Mkts § 191 includes, *inter alia*, non-prescription drugs. New York State law defines a drug as an “article[] (other than food) intended to affect the structure or any function of the body of man or animals.” NYS Education Law § 6802.

25. Title 1 of the New York State Codes, Rules and Regulations (NYCRR) defines a label as “any written, printed, or graphic matter affixed to, applied to, attached to, blown into, formed, molded into, embossed on, or appearing upon or adjacent to a consumer commodity or a package containing any consumer commodity, for purposes of branding, indentifying, or giving any information with respect to the commodity or to the contents of the package.” A label must include the product’s identity (common or usual name, description, generic term), the name and address of the manufacturer, packer or distributor, and the weight or quantity of the product.

26. The following products sold by respondents are intended to affect the function of the human body: Giggles Maeng Da Kratom, Purple Sticky Brand salvia, and nitrous oxide. They are thus, classifiable as non-prescription drugs and are commodities under New York State Ag. & Mkts. § 191(4).

27. The above labels do not satisfy the requirements for commodity labeling pursuant to the Ag. and Mkts. Law. The labels on each of these products fails to identify the name and address of the manufacturer, packer or distributor.

28. By selling, offering and exposing commodities for sale that do not satisfy New York State law regarding product labeling and by selling, offering and exposing falsely described commodities, Respondents have repeatedly and persistently violated the New York State Ag. & Mkts Law.

**SECOND CAUSE OF ACTION
VIOLATION OF EXECUTIVE LAW § 63(12)
REPEATED ILLEGALITY
VIOLATION OF NYS EDUCATION LAW § 6815
(MISBRANDING OF DRUGS)**

29. Misbranding of drugs is proscribed by the New York State Education Law.

30. Pursuant to the New York State Educ. Law § 6802, a drug is defined, in part, as “[a]rticles (other than food) intended to affect the structure or any function of the body of man or animals.”

31. The following products sold by Respondents are drugs pursuant New York State Educ. Law § 6802 since they constitute articles (other than food) intended to affect the structure or any function of the body of man or animals Giggles Maeng Da Kratom, Purple Sticky Brand salvia and nitrous oxide.

32. A drug is deemed to be misbranded pursuant to Educ. Law § 6815(2)(a)-(i) if:

- a. its labeling is false or misleading in any particular or, if in package form, it fails to bear a label containing the name of and place of business of the manufacturer, packer or distributor and an accurate statement of the quantity of the of the contents in terms of weight, measure or numerical count;

- b. required information is not prominently and conspicuously placed on the label in such terms to render it to be likely read and understood by ordinary individuals under customary conditions and purchase of use;
- c. its label fails to bear adequate directions for use;
- d. it lacks adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users;
- e. it as an imitation of another drug, or offered for sale under the name of another drug; or bears a copy, counterfeit, or colorable imitation of the trademark, label, container or identifying name or design of another drug; or
- f. it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended or suggested in the labeling thereof.

33. In considering whether a drug is misbranded because it is misleading, the court must consider (i) the representations made or suggested by the manufacturer, but also (ii) in view of those representations, the failure of the manufacturer to disclose material facts with respect to the consequences which may result from the customary or usual use of the drug. Educ. Law § 6802(13).

34. Giggles Maeng Da Kratom is misbranded for the following reasons.

- a. It fails to bear a label containing the name of and place of business of the manufacturer, packer or distributor.
- b. The label does not identify potential health effects from customary and usual use of this drug, which may include anything from sedation or stimulant effects to psychosis, hallucinations, delusion and confusion.

35. Purple Sticky Brand salvia is misbranded for the following reasons:

- a. The label fails to disclose the name of and place of business of the manufacturer, packer or distributor.
- b. The label fails to state the ingredients, directions for use, or potential health effects that may result from customary and usual use of this drug.

36. Best Whip Chargers is misbranded for the following reasons:

- a. The label fails to disclose an address for the manufacturer or distributor.
- b. Though the package contains the warning “Do not inhale! Misuse can be physically harmful and dangerous to your health,” the warning appears on the side of the box with other information regarding contents and can be easily overlooked. In addition, the warning fails to disclose that nitrous oxide can cause not only health problems, but also accidents and death.
- c. The label also states that Nitrous Oxide chargers may not be sold to persons under 18. This statement is false and misleading; in New York State, whip cream chargers can not be sold at retail without an exemption, and under no circumstances may a whip cream charger be sold to a person under age 21.

37. Educ. Law §§ 6811(9) and (11) make it a misdemeanor to sell, or receive in commerce, a misbranded drug. The labels of the kratom, salvia and nitrous oxide are misbranded.

**THIRD CAUSE OF ACTION
VIOLATION OF EXECUTIVE LAW § 63(12)
REPEATED ILLEGALITY
VIOLATION OF NYS PUBLIC HEALTH LAW § 3380
(ILLEGAL SALE OF NITROUS OXIDE)**

38. New York State Pub. Health Law § 3380 proscribes selling nitrous oxide to the public for the purpose of intoxication.

39. Pub. Health Law § 3380(5)(b) prohibits any person from selling any canister or other container of nitrous oxide unless granted an exemption by the Commissioner of the State Health Department.

40. Pursuant to Pub. Health Law § 3380(5)(f), there can be no exemptions for the retail sale of nitrous oxide.

41. Notwithstanding, to the extent that Pub. Health Law § 3380(5)(f) allows a seller to apply for an exemption to sell nitrous oxide to the public at retail, Respondents are not eligible

for such an exemption since they sell drug-related paraphernalia and other items used for the inhalation of nitrous oxide in their retail store. Pub. Health Law § 3380(5)(f)(v).

42. Respondents sell cases of nitrous oxide chargers at retail to the public for the purpose of causing a condition of intoxication, inebriation, excitement, stupefaction, or dulling of the brain or nervous system.

43. By offering for sale, and/or selling nitrous oxide without an exemption and for the purpose of causing a condition of intoxication, inebriation, excitement, stupefaction, or dulling of the brain or nervous system, Respondents repeatedly and persistently violated the New York Public Health Law.

**FOURTH CAUSE OF ACTION
PURSUANT TO EXECUTIVE LAW 63(12)
FRAUD AND ILLEGALITY
VIOLATIONS OF GBL § 349
(DECEPTIVE ACTS AND PRACTICES)**

44. GBL § 349 declares unlawful any deceptive acts or practices in the conduct of any business, trade or commerce in this state.

45. Respondents have engaged in deceptive acts and practices including the following: (1) offering for sale and selling mislabeled and/or misbranded products for consumer use; (2) offering for sale and selling mislabeled and/or misbranded products making it impossible for customers to make an informed decision as to the intended use of the products, and the safety and health-related risks associated with the products; (3) deceptively marketing and promoting illegal products as legal, such as the nitrous oxide products; (4) repeatedly encouraging consumers to ingest or smoke products that they sell without disclosure of product ingredients, manufacturer information, dietary information, and/or other warnings; and (5) encouraging and

promoting the use of products that are specifically labeled "not for human consumption" for ingestion and/or inhalation by consumers.

46. As set forth above, Respondents offered for sale mislabeled and misbranded drugs.

47. By offering for sale and/or selling mislabeled and misbranded drugs, Respondents have repeatedly and persistently violated GBL § 349.

**FIFTH CAUSE OF ACTION
PURSUANT TO EXECUTIVE LAW § 63(12):
FRAUD**

44. Executive Law § 63(12) defines "fraud" or "fraudulent" to include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense or unconscionable contractual provisions.

45. By offering for sale, and/or selling mislabeled and misbranded drugs, respondents have repeatedly and persistently engaged in fraud in violation of Executive Law, § 63(12).

WHEREFORE, the People of the State of New York, pursuant to the powers vested by New York State Executive Law § 63(12), respectfully request judgment as follows:

- a. permanently enjoining Respondents and their agents, trustees, servants, employees, successors, heirs and assigns, or any other person under their direction and control, whether acting individually or in concert with others, or through any corporate or other entity or device through which they may now or hereafter act or conduct business ("Respondents"), from offering for sale and/or selling mislabeled drugs in violation of Ag. and Mkts. Law § 194;
- b. permanently enjoining Respondents from offering for sale and/or selling misbranded drugs in violation of Educ. Law §§ 6802 and 6815;
- c. permanently enjoining Respondents from misleadingly offering for sale and/or selling products as designer drugs or other street drug alternatives, including

encouraging ingestion of products that are labeled or specifically designated "not for human consumption;"

- d. permanently enjoining Respondents from offering for sale and selling nitrous oxide to the public in violation of Public Health Law § 3380;
- e. permanently enjoining Respondents from engaging in the fraudulent, deceptive and illegal practices alleged in the petition in violation of GBL § 349;
- f. requiring Respondents to comply with any and all state, local or federal labeling requirements;
- g. requiring Respondents to prepare an accounting of all commodities they sold, or offered for sale, from January 1, 2012 to July 10, 2012 including the (i) name of the product, (ii) the manufacturer and/or distributor of the product, (iii) a description of the product, (iv) the retail price of the product, and (v) the number units of the product sold.
- h. pursuant to GBL § 350-d, imposing a civil penalty of \$5,000 for each deceptive act committed by Respondents;
- i. pursuant to CPLR § 8303(a)(6), granting costs to the State of New York of \$2,000; and
- j. for such other and further relief as the court deems just and proper.

Dated: Poughkeepsie, New York
July 10, 2012

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Petitioner



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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

PEOPLE OF THE STATE OF NEW YORK, by
ERIC T. SCHNEIDERMAN, Attorney General of the
State of New York,

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-against-

AFFIRMATION

GIGGLESWORLD CORPORATION d/b/a
GIGGLES and TIMOTHY M. SERINO,

Respondents.

G. Nicholas Garin, an attorney duly admitted to practice law in the State of New York, affirms the following under the penalties of perjury:

1. I am an Assistant Attorney General in the office of Eric T. Schneiderman, Attorney General of the State of New York (OAG), assigned to the Poughkeepsie Regional Office. I am fully familiar with the facts and circumstance of this proceeding, which are based on investigative materials contained in the files of the Attorney General's office.

2. I submit this Affirmation in support of Petitioner's application for an Order and Judgment permanently enjoining Respondents from engaging in deceptive, fraudulent and illegal business practices, requiring that Respondents produce an accounting of mislabeled and misbranded products sold and awarding and penalties and costs to the State of New York

3. Unless otherwise indicated, I make this affirmation upon information and belief, based upon my investigation, a review of documents and other evidence on file with the Department of Law.

INTRODUCTION

4. This case is brought in response to the proliferation of “designer drugs” that are being marketed and offered for sale to New York consumers. Designer drugs, referred to as “street drug alternatives” by the federal Food and Drug Administration (“FDA”), generally have one or more of the following characteristics. They typically are: (i) “manufactured, marketed, or distributed as alternatives to illicit street drugs;” (ii) “intended to be used for recreational purposes to effect psychological states (e.g. to get high, to promote euphoria, or to induce hallucinations,” and/or iii) claim to have effects on the user that “mimic the effects of controlled substances.” See Exhibit I, pp 3-4, annexed hereto (FDA Guidance for Industry Street Drug Alternatives)

5. It is indisputable that the growth in the market for designer drugs and other street drug alternatives poses a danger to the American population. See Affidavit of Maja Lundborg-Gray, M.D., FAAEM, FACEP, sworn to on July 5, 2012, (“Lundborg-Gray Aff.”), Exhibit II, ¶3, and Exhibit 2 thereto. Users of these products can experience severe health effects, some resulting in long-term disability or even death. See Lundborg-Gray Aff., ¶5, Exhibit II, annexed hereto. The Food and Drug Administration (FDA) also considers any product that is promoted as a street drug alternative to be an unapproved new drug and a misbranded drug in violation of sections 505 and 502 of the Federal Food, Drug, and Cosmetic Act. See Exhibit I, p. 4, annexed hereto.

6. Selling products for human consumption that are insufficiently labeled or mislabeled is inherently dangerous. Consumers cannot make informed decisions about the safety of the products they purchase. And, without knowing what drugs or substances people have ingested, medical personnel are hindered in their ability to provide immediate and appropriate medical care. See Lundborg-Gray Aff., ¶¶2-3, Exhibit II hereto.

7. To combat the problem of designer drugs, law enforcement authorities have been acting to include designer drugs within the list of prohibited controlled substances. For example, in 2011 the United States Drug Enforcement Administration (“DEA”) used its emergency scheduling authority to temporarily ban three synthetic stimulants, Mephedrone, 3,4-methylenedioxypropylamphetamine (MDPV) and Methylone, chemicals that serve as the active ingredient in the substance popularly known as “bath salts.” See Exhibit I, p. 5 (“DEA Moves to Emergency Control Synthetic Stimulants; Agency Will Study Whether To Permanently Control Three Substances,” September 7, 2011).

8. In March of 2011 and June of 2012, the DEA also implemented emergency bans on numerous formulas of synthetic cannabinoids, also known as “fake pot” products. See Exhibit I, p. 7, (“Chemicals Used in ‘Spice’ and ‘K2’ Type Products Now Under Federal Control and Regulation DEA Will Study Whether To Permanently Control Five Substances,” March 1, 2011. See also Exhibit I, p. 9 (“Congress Agrees to Add 26 Synthetic Drugs to Controlled Substances Act,” June 19, 2012).

9. As of this date, both houses of the federal legislature have passed “H.R. 1254: Synthetic Drug Control Act of 2011,” which would permanently classify 26

additional synthetic chemicals (including “bath salts” and synthetic marijuana analogues) as prohibited substances. See Exhibit I, pp. 11-13 (H.R. 1254: “Synthetic Drug Control Act of 2011, 112th Congress, 2011–2012. Text as of Dec 8, 2011). The bill is awaiting the President’s signature.

10. The New York legislature has also taken action to ban these substances. In 2011, the Public Health Law was amended to prohibit the sale of bath salts containing certain chemicals - - 4-Methylmethcathinone, also known as Mephedrone and Methylenedioxypropylvalerone, also known as MDPV - - which are known to have hallucinogenic effects. Public Health Law § 3306.

11. Earlier this year, State Health Commissioner Nirav Shah issued an order of summary action banning the sale of synthetic marijuana products in New York State. These substances, generally referred to as “synthetic marijuana,” consist of plant material coated by chemicals that mimic THC, the active ingredient in marijuana. These products are being sold as a “legal alternative” to marijuana in head shops, convenience stores, smoke shops, and tobacco stores with brand names such as “Spice,” “K2,” “Mr. Nice Guy,” and “Galaxy Gold.” The order states that “synthetic cannabinoids have been linked to severe adverse reactions, including death and acute renal failure, and commonly cause: tachycardia (increased heart rate); paranoid behavior, agitation and irritability; nausea and vomiting; confusion; drowsiness; headache; hypertension; electrolyte abnormalities; seizures; and syncope (loss of consciousness).” The Commissioner's order called for sales and distribution of these products to cease immediately. See Exhibit I, pp 15-22, annexed hereto

12. Nonetheless, the problem of designer drugs persists, because manufacturers have been misbranding products to disguise their intended use. In addition, manufacturers rapidly change the synthetic formulation of prohibited compounds without disclosing content, allowing them to circumvent lists of controlled substances. As one early “designer drug” chemist explained:

When a new type of active compound is discovered in pharmaceutical-chemical research, whether by isolation from a plant drug or from animal organs, or through synthetic production as in the case of LSD, then the chemist attempts, through alterations in its molecular structure, to produce new compounds with similar, perhaps improved activity, or with other valuable active properties. We call this process a chemical modification of this type of active substance. Of the approximately 20,000 new substances that are produced annually in the pharmaceutical-chemical research laboratories of the world, the overwhelming majority are modification products of proportionally few types of active compounds.

See Albert Hofmann, LSD: My Problem Child, p. 12 (1980), cited in Kau, Flashback to the Federal Analog Act of 1986, 156 U. Pa. L. Rev. 1078, 1084 (2008) See Exhibit I, pp. 23-47, annexed hereto.

13. In response to this growing problem, the Attorney General commenced a statewide investigation focusing on deceptive and illegal labeling of designer drugs (“the Investigation”). As part of this Investigation, undercover investigators visited head shops in twelve counties and made purchases of these products. The Investigation revealed that there is widespread sale of designer drugs and street drug alternatives at these establishments, which are deceptively marketed as innocuous products such as “incense,” “glass cleaner,” “bath salts,” “potpourri,” “sachets,” “dietary supplements,” or other common household products. Furthermore, nitrous oxide, a deadly “party” gas which is

illegal to sell at retail to the public in New York State was being offered for sale at nearly every location that was investigated.

14. The Attorney General's Investigation revealed that (i) the labeling of these designer drugs is insufficient, often omitting manufacturer information, product content, and/or safety and health risks associated with product use, (ii) the labeling on these designer drugs falsely describes their intended uses, (iii) head shops sell products that are labeled "not for human consumption," with accoutrement that can only be used for one purpose - human consumption, (iv) head shops promote and encourage the ingestion or inhalation of products that are labeled "not fit for human consumption," and (iv) head shops are selling nitrous oxide in violation of New York State Law.

FACTS

15. Since at least 2000, Respondents have owned and operated "Giggles," a retail outlet that is commonly known as "head shop." Webster's dictionary defines a head shop as "a shop specializing in articles (such as pipes and roach clips) of interest to drug users." As set forth below, Giggles offers for sale and sells designer drugs, drug paraphernalia used for consumption of cannabis and other recreational drugs, as well as accoutrements such as pipes, "crackers" and balloons. See Affidavit of Senior Investigator Chad Shelmidine (hereinafter "Shelmidine Aff."), sworn to June 26, 2012, annexed hereto as Exhibit III, ¶¶ 8 - 34 and Exhibits A - F; see also, certified copy of certificate of incorporation of GigglesWorld Corporation filed with the Clerk of Dutchess County annexed hereto as Exhibit IV.

16. On May 16, 2012, Inv. Shelmidine visited Giggles posing as a consumer interested in purchasing merchandise.

17. Investigator Shelmidine purchased three products: 1) Maeng Da Kratom, 2) Purple Sticky Brand (salvia), 3) nitrous oxide. See Shelmidine Affidavit, ¶¶ 8 - 16 and 27 - 28.

18. These products constitute drugs because they are “articles [other than food] intended to affect the structure or any function of the body of man or animals.” New York Education Law § 6802.

VIOLATION OF AGRICULTURE AND MARKETS LAW § 194

19. Agriculture and Markets Law (“Ag. & Mkts.”) § 194 proscribes false labels on commodities sold, offered or exposed for sale, or any false description respecting the number, quantity, weight, or measure. Commodities include non-prescription drugs. Ag. & Mkts. Law § 191(1)(b)(4).

20. Respondents repeatedly sell mislabeled commodities in violation of Ag. and Mkts. Law § 194. The following products are mislabeled because they fail to include the name and/or address of the manufacturer, packer or distributor:

- a. Maeng Da Kratom. See Shelmidine Aff., at ¶ 13, Exh. B
- b. Purple Sticky Brand (salvia). See Shelmidine Aff., at ¶ 10, Exh. A
- c. Best Whip Nitrous Chargers. See Shelmidine Aff., at ¶ 28, Exh. E

21. In addition, the labels on the Maeng Da Kratom and Purple Sticky Brand fail to provide any information about the product’s identity (common or usual name, description, generic term) and consequently constitutes an additional infraction of the Ag. & Mkts. labeling requirements.

VIOLATION OF EDUCATION LAW § 6815

22. Education Law (“Educ. Law”) § 6815 proscribes misbranding of drugs. A drug is misbranded if the label contains false or misleading information about the

product, fails to contain manufacturer information, fails to conspicuously place required information so that it is easily readable by ordinary individuals under customary conditions and purchase of use, fails to bear adequate directions for use, lacks adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, lacks warnings against unsafe dosage or methods of use, imitates another drug or the trademark, label, container or identifying name or design of another drug, or if the product is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended or suggested in the labeling. Educ. Law § 6815(2)(a)-(i)

23. Respondents have repeatedly sold misbranded drugs in violation of Educ. Law § 6815.

24. Purple Sticky Brand is misbranded because it fails to bear a label containing the name of and place of business of the manufacturer, packer or distributor. See Shelmidine Aff, ¶ 10 and Exhibit A. It is also misbranded because the label fails to identify potential health effects that may result from customary and usual use of this drug.

25. Maeng Da Kratom is misbranded because the label fails to disclose the name of and place of business of the manufacturer, packer or distributor. See Shelmidine Aff, ¶ 13 and Exhibit B. In addition, the label and directions for use are misleading. Though the label states that the product is “not for human consumption” this drug is customarily and usually smoked by the user to produce an intoxicating effect. Indeed, Respondents’ clerk informed Inv. Shelmidine that he could use a “dry piece” (pipe) with the kratom, and sold him a pipe with the purchase. See Shelmidine Aff, ¶¶ 16 - 23 , and

Exhibit C. Finally, the label fails to identify the identity of the product and any potential health effects that may result from customary and usual use of this drug. See Shelmidine Aff, Exhibit B.

26. Purple Sticky Brand (salvia) is misbranded because the label fails to disclose the name of and place of business of the manufacturer, packer or distributor. Shelmidine Aff, ¶ 10, and Exhibit A, annexed thereto. In addition, the label fails to state the ingredients, directions for use, or potential health effects that may result from customary and usual use of this drug. Id.

27. BestWhip24 nitrous oxide chargers are misbranded because, other than the brand name “BestWhip Inc.,” the label fails to disclose an address for the manufacturer, distributor or packer. Shelmidine Aff.Exhibit E, annexed thereto. Furthermore, the although the package contains the warning “Do not inhale! Misuse can be physically harmful and dangerous to your health,” the warning appears on the side of the box with other information regarding contents. Thus, the warning “misuse can be physically harmful and dangerous to your health” is not prominently and conspicuously placed and can be easily overlooked. Furthermore, the warning fails to clearly and conspicuously disclose that nitrous oxide can cause not only health problems, but also accidents and death. See Dr. Lundborg-Gray Aff., ¶ 15 and Exhibit G. Finally, the label also states that nitrous oxide chargers may not be sold to persons under 18, when in New York State, whip cream chargers can not be sold at retail without an exemption, and under no circumstances may a whip cream charger be sold to a person under age 21.

VIOLATION OF PUBLIC HEALTH LAW § 3380

28. Respondents have sold nitrous oxide to the public in violation of Public Health Law § 3380.

29. Respondents have nitrous oxide chargers, “crackers” and balloons on display at their establishment. See Shelmidine Aff., ¶¶ 24 and 25 . Inv. Shelmidine purchased a box containing twenty-four BestWhip chargers and advised Respondents' clerk that he also needed a “cracker” and a balloon. A cracker is used to break the charger and a balloon is used to capture the gas in order to inhale the drug. See Shelmidine Aff., ¶ 30. Inv. Shelmidine purchased a cracker and a balloon with the BestWhip chargers. Respondents therefore had knowledge of Inv. Shelmidine’s intended use of the product, and proceeded to provide him the nitrous oxide and delivery devices.

DECEPTIVE ACTS AND PRACTICES

30. Respondents repeatedly offer for sale and sell products for consumer use that are, in fact, misbranded and mislabeled drugs. The products are marketed in misleading packaging that fails to disclose required information, including manufacturer and distributor information, product ingredients, and/or potential health risk with customary use. See Shelmidine Aff., ¶¶ 10 - 34 and exhibits attached thereto.

31. Respondents repeatedly offer for sale and sell products for human consumption even though the labeling contradicts that use. See Shelmidine Aff., ¶ 13 and 17.

32. Respondents deceptively market and sell an illegal product as legal, e.g. the retail sale of nitrous oxide to the public. See Shelmidine Aff., ¶ 27.

NEED FOR TEMPORARY RESTRAINING ORDER

33. The evidence submitted by the Attorney General, including the Affidavit of Senior Investigator Chad Shelmidine dated June 26, 2012, with Exhibits and the Affidavit of Dr. Maja Lundborg-Gray, dated July 5, 2012, with exhibits, clearly demonstrates that Respondents are fraudulently and illegally selling misbranded and mislabeled designer drugs and that these drugs present serious harm to the public.

34. Without a temporary restraining order prohibiting Respondents from selling misbranded and mislabeled drugs, there is a great likelihood that Respondents will, in fact, continue to sell these products and that these sales will result in irreparable injury to individuals who consume these products.

35. Petitioner has notified Respondents of its intent to seek this relief pursuant to Section 202.7(f) of the Uniform Rules of the Trial Courts.

36. There has been no previous application for the relief requested herein.

CONCLUSION

37. Respondents continue to engage in deceptive, fraudulent and illegal acts set forth in this affirmation and petition and unless enjoined, will continue to engage in those acts. The Attorney General is bringing this action to force compliance with State labeling and consumer protection laws. Transparency in the labeling and sale of these dangerous products will permit the appropriate regulating authorities to deal with the products for what they truly are: Drugs. With that transparency can be real debates as to the products' safety, risks, quality control, and until such time, these dangerous products must be removed from the shelves.

WHEREFORE, it is respectfully requested that the relief requested in Petitioner's Verified Petition be granted, together civil penalties and costs as set forth by statute, and with such other and further relief as this Court deems just and proper.

Dated: Poughkeepsie, New York
July 10, 2012


G. NICHOLAS GARIN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
THE PEOPLE OF THE STATE OF NEW YORK,
by ERIC T. SCHNEIDERMAN, Attorney General of
the State of New York,

Petitioner,

Index No.:

-against-

GIGGLESWORLD CORPORATION d/b/a GIGGLES
and TIMOTHY M. SERINO,

RespondentS.
-----X

**ATTORNEY GENERAL'S MEMORANDUM OF LAW
IN SUPPORT OF THE VERIFIED PETITION FOR
INJUNCTIVE RELIEF, PENALTIES AND COSTS**

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Attorney General of the State of
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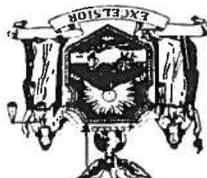
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POUGHKEEPSIE REGIONAL OFFICE
DIVISION OF REGIONAL AFFAIRS

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
THE PEOPLE OF THE STATE OF NEW YORK,
by ERIC T. SCHNEIDERMAN, Attorney General of
the State of New York,

Petitioner,

Index No.:

-against-

GIGGLESWORLD CORPORATION d/b/a GIGGLES
and TIMOTHY M. SERINO,

Respondents.

-----X

PRELIMINARY STATEMENT

Petitioner brings this summary proceeding pursuant to New York Executive Law § 63(12), and New York General Business Law (“GBL”) § 349 to enjoin Respondents, GigglesWorld Corporation and Timothy M. Serino, doing business as Giggles (hereinafter referred to as “Respondents”), from engaging in deceptive, fraudulent and illegal practices in connection with their business, Giggles. Respondents sell so-called “designer drugs,” which are synthetic versions of illegal drugs, as well as other street drug alternatives (referred to collectively as "designer drugs"). Designer drugs are manufactured, marketed and distributed as alternative to illegal street drugs. Designer drugs are intended to stimulate, sedate or cause hallucinations or euphoria when ingested or inhaled and are often marketed with claims that use mimics the effect of controlled substances. Petitioner also seeks civil penalties and costs, as authorized by statute, to be paid to the State of New York.

The sale of designer drugs has contributed to a public health crisis in New York State and across the nation. These products are typically packaged with innocuous names and bright

graphics, and target people who are experimenting with legal highs, or who want to get high without risking positive drug tests. Many products are misbranded or mislabeled, lacking identification of ingredients, directions for use and/or manufacturer information.

Selling designer drugs that are misbranded or mislabeled is inherently misleading and dangerous. Without knowing the contents of the products and how they are intended to be used, consumers are left in the dark about what they are purchasing and whether the products are safe to ingest. Some of these products may cause serious health effects such as agitation, tachycardia (rapid heartbeat), hallucinations, seizures, extreme paranoia, panic, vomiting, mood swings, intense cravings to redose, suicidal or homicidal thoughts, or even death. Consumers who experience dire health consequences as a result of ingesting one of these products will be at further risk. Without being able to disclose to emergency personnel and health care providers the chemicals they have ingested, the users of these products may not receive appropriate medical treatment.

New York State has enacted a comprehensive statutory scheme with respect to the labeling of commodities and drugs. For example, the New York State Agriculture and Markets Law (hereinafter "Ag. & Mkts. Law") § 194 regulates labeling of commodities, including non-prescription drugs. The New York State Education Law (hereinafter "Educ. Law") § 6802 proscribes misbranding of all drugs. In addition, the New York State Public Health Law (hereinafter "Pub. Health Law") § 3380 proscribes the retail sale of nitrous oxide to the public. Respondent offers for sale and sells nitrous oxide canisters to the public. Crucial to protecting the health of all New Yorkers is enforcement of the state's laws prohibiting mislabeling of commodities and misbranding of drugs and the sale of nitrous oxide.

STATEMENT OF FACTS

A. Background

This case is brought in response to the proliferation of designer drugs that are being marketed and offered for sale to New York consumers. In general, designer drugs (referred to as "street drug alternatives" by the Federal Food and Drug Administration ("FDA")) are (i) "manufactured, marketed, or distributed as alternatives to illicit street drugs;" (ii) claim to have effects on the user that "mimic the effects of controlled substances," and (iii) "are intended to be used for recreational purposes to effect psychological states (e.g. to get high, to promote euphoria, or to induce hallucinations." See Affirmation of Assistant Attorney General G. Nicholas Garin dated July 10, 2012 (hereafter "Garin Affirm." at ¶ 12 and Exhibit I, p. 3, annexed thereto (FDA Guidance of Industry, Street Drug Alternatives). The FDA considers any product that is promoted as a street drug alternative to be an unapproved new drug and misbranded drug in violation of sections 505 and 502 of the Federal Food, Drug and Cosmetic Act. 21 U.S.C. §§ 321(p)(1) and 352(f)(1). See Garin Affirm. ¶ 12 and Exhibit I, annexed thereto p. 3.

To combat the problem of designer drugs, law enforcement authorities have been acting to include designer drugs within the list of prohibited controlled substances. For example, in 2011 the United States Drug Enforcement Administration ("DEA") used its emergency scheduling authority to temporarily ban three synthetic stimulants, Mephedrone, 3,4-methylenedioxypyrovalerone (MDPV) and Methyline, chemicals that serve as the active ingredient in the substance popularly known as "bath salts." In March of 2011 and June of 2012, the DEA also implemented emergency bans on numerous formulas of synthetic cannabanoids,

also known as “fake pot” products. As of this date, both houses of the federal legislature have passed “H.R. 1254: Synthetic Drug Control Act of 2011,” which would permanently classify 26 additional synthetic chemicals (including “bath salts” and synthetic marijuana analogues) as prohibited substances. See Garin Affirm. at ¶¶ 7 and 8, and Exhibit I, pp. 5 and 9, annexed thereto.

The New York legislature has also taken action to ban these substances. In 2011, the Pub. Health Law was amended¹ to prohibit the sale of bath salts containing certain chemicals - - 4-Methylmethcathinone, also known as Mephedrone and Methylenedioxypropylone, also known as MDPV - - which are known to have hallucinogenic effects.

Earlier this year, State Health Commissioner Nirav Shah issued an order of summary action banning the sale of synthetic marijuana products in New York State. These substances, generally referred to as “synthetic marijuana,” consist of plant material coated by chemicals that mimic THC, the active ingredient in marijuana. These products are being sold as a “legal alternative” to marijuana in convenience stores, smoke shops, and tobacco stores with brand names such as “Spice,” “K2,” “Mr. Nice Guy,” and “Galaxy Gold.” The order states that “synthetic cannabinoids have been linked to severe adverse reactions, including death and acute renal failure, and commonly cause: tachycardia (increased heart rate); paranoid behavior, agitation and irritability; nausea and vomiting; confusion; drowsiness; headache; hypertension; electrolyte abnormalities; seizures; and syncope (loss of consciousness).” The Commissioner's order called for sales and distribution of these products to cease immediately. See Garin Affirm. at ¶ 11 and Exhibit I, pp. 14-22, annexed thereto.

¹ Public Health Law § 3306.

Nonetheless, the problem of designer drugs persists, as manufacturers rapidly change the synthetic formulation of prohibited compounds, allowing them to operate in a “grey area” of legality until regulators and legislatures can either ban the new substances or prove them to be an “analogue” under the Federal Analogue Act. As one early “designer drug” chemist explained:

When a new type of active compound is discovered in pharmaceutical-chemical research, whether by isolation from a plant drug or from animal organs, or through synthetic production as in the case of LSD, then the chemist attempts, through alterations in its molecular structure, to produce new compounds with similar, perhaps improved activity, or with other valuable active properties. We call this process a chemical modification of this type of active substance. Of the approximately 20,000 new substances that are produced annually in the pharmaceutical-chemical research laboratories of the world, the overwhelming majority are modification products of proportionally few types of active compounds.

Garin Affirm. ¶ 12, and Exhibit I, pp. 23 - 47, annexed thereto.

In response to this growing problem, the Attorney General commenced a statewide investigation earlier this year focused on the retail sale of designer drugs at head shops across New York State (the “Investigation”). See Garin Affirm, ¶ 13. The Investigation revealed that numerous head shops in New York State are selling designer drugs by deceptively marketing them as innocuous products such as “incense,” “glass cleaner,” “bath salts,” “potpourri,” “sachets,” “dietary supplements,” or other common household products. Furthermore, nitrous oxide, a deadly “party” gas which is illegal to sell to the public without special dispensation, was being offered for sale at nearly every location that was investigated.

The Attorney General’s investigation has revealed that the labeling of these products is insufficient, often omitting the true contents of the products and falsely describing their intended use.

B. Products Purchased From Respondents' Store Located at 3969 Albany Post Road, Hyde Park, New York.

On May 16, 2012, Senior Investigator Chad Shelmidine (hereinafter Inv. Shelmidine) visited Respondents' store located at 3969 Albany Post Road, Hyde Park, New York. Inv. Shelmidine was undercover, posing as a consumer. See Affidavit of Inv. Shelmidine, sworn to on June 26, 2012 (hereinafter "Shelmidine Aff."), ¶ 4.

Inv. Shelmidine purchased "Purple Sticky Brand" (salvia) from Respondents' store. See Shelmidine Aff. ¶ 9. According to the U.S. Department of Justice Drug Enforcement Administration ("DEA"), salvia divinorum is an herb in the mint family native to certain areas of Mexico. Salvia divinorum products are "abused for their ability to evoke hallucinogenic effects, which, in general, are similar to those of other scheduled hallucinogenic substances." See Affidavit of Maja Lundborg-Gray, M.D., FAAEM, FACEP, attached as Exhibit II to Garin Affirm. ("Lundborg-Gray Aff."), ¶ 9. There is no manufacturer or distributor information on the label. The label also fails to state the ingredients, directions for use, or potential health effects that may result from customary use of this drug. Respondents' clerk indicated that the salvia could be used with a "dry piece" rather than a "bubbler." A dry piece is a standard smoking pipe that does not use water. Shelmidine Aff. ¶¶ 17 - 19.

Inv. Shelmidine purchased a package of "Maeng Da Kratom" from Respondents' store. The label states "Only the highest quality," and "Not for human consumption." The package did not list any ingredients, directions for use, or the address or telephone number for the manufacturer. Shelmidine Aff. ¶ 13. According to the DEA, kratom is a tropical tree native to Southeast Asia. Like psychostimulant drugs, consumption of kratom leaves or extracts produce both stimulant effects in low doses and sedative effects in high doses and can lead to addiction.

Several cases of psychosis resulting from use of kratom have been reported, where individuals addicted to kratom exhibited psychotic symptoms, including hallucinations, delusion, and confusion. Withdrawal effects include symptoms of hostility, aggression, mood swings, runny nose, achy muscles and bones, and jerky movement of limbs. There is no legitimate medical use for kratom in the United States. Lundborg-Gray Aff. ¶ 10. Respondents' clerk also advised Inv. Shelmidine that the kratom could be smoked in a dry piece.

Inv. Shelmidine also purchased a box of nitrous oxide chargers at Respondents' store. Shelmidine Aff. ¶ 28. The box of "BestWhip 24" nitrous oxide chargers Inv. Shelmidine purchased stated each canister contained 10 cubic centimeters of pure nitrous oxide. See Exhibit E to Shelmidine Aff. At the same time Respondents' clerk sold Inv. Shelmidine the nitrous oxide chargers, she sold him a balloon and a cracker. Shelmidine Aff. ¶¶ 25, and 29 - 33.

Nitrous oxide can be used to make whip cream and is sold for that purpose as "cream chargers." Cream chargers, however, are frequently misused by people to get high by inhaling the gas. For this purpose, the user purchases cream chargers, a cracker to open the cream charger and a balloon into which the nitrous oxide is discharged and then inhaled by the user. Shelmidine Aff. ¶ 30.

According to the nitrous Oxide Alert Bulletin issued by the Massachusetts Department of Health, "the painkilling and numbing qualities of nitrous oxide begin to take effect when the gas is at concentrations of 10 percent. At higher concentrations, approaching 50%, a sense of well-being or euphoria is experienced. A person experiencing the effects of nitrous oxide may have slurred speech, have difficulty in maintaining his or her balance or walking, be slow to respond to questions, be immune to any stimulus such as pain, loud noise, and speech, lapse into

unconsciousness (at higher concentrations)." Lundborg-Gray Aff. ¶ 15 and Exhibit G, annexed thereto.

ARGUMENT

POINT I

RESPONDENTS' ACTIVITIES CONSTITUTE REPEATED AND PERSISTENT FRAUD AND ILLEGALITY IN VIOLATION OF EXECUTIVE LAW § 63(12)

A. Introduction .

Executive Law § 63(12) empowers the Attorney General to bring a special proceeding for permanent injunctive relief whenever any person or business engages in persistent or repeated "fraud or illegality." "Repeated" is defined as conduct which affects more than one person. It is not necessary to establish a large percentage of violations under § 63(12). State v. Princess Prestige, 42 N.Y.2d 104 (1977). The Attorney General is only required to show that "any number of separate and distinct fraudulent or illegal acts which affect more than one individual." Abrams v. 21st Cent. Leisure Spa Int'l Ltd., 153 Misc.2d 938, 944 (Sup. Ct. N.Y. Co. 1991). The existence of some satisfied customers is no defense. State v. Midland Equities, 117 Misc.2d 203, 207 (Sup. Ct. N.Y. Co. 1982).

B. Respondents Have Engaged in Repeated and Persistent Illegal Conduct

Respondents have engaged in repeated and persistent illegality in violation of Executive Law § 63(12). A violation of state, federal or local law constitutes illegality within the meaning of Executive Law § 63(12) and is actionable thereunder when persistent or repeated. State v. Princess Prestige, 42 N.Y.2d at 105; State v. Empyre Inground Pools, Inc., 227 A.D.2d 731, 732-

733 (3d Dep't 1996); State v. E.F.G. Baby Products Co., 40 A.D.2d 364, 366 (3d Dep't 1973); State v. Anderson, 137 A.D.2d 259, 265 (4th Dept 1988); State v. Scottish American Ass'n, 52 A.D.2d 528 (1st Dept 1976), appeal dismissed, 39 N.Y.2d 1057 (1976).

1. Respondents Have Engaged in Repeated Illegality in Violation of Executive Law § 63(12) by Violating Agriculture and Markets Law § 194 (False Labels).

Respondents have repeatedly and persistently sold commodities that are falsely labeled in violation of the New York Agriculture and Markets Law ("Ag & Mkts"). Ag. & Mkts. Law §194 proscribes false labels on commodities sold, offered or exposed for sale, or any false description.

No individual, ... [or] corporation [...] shall put upon any commodity sold, offered or exposed for sale or upon any container, package, ticket or label used in relation to such commodity [...] any false description or false indication of or respecting the number, quantity weight or measure of such commodity or any part thereof; or sell or offer or expose for sale any commodity which is falsely described or indicated in any of the manners or in any of the particulars as specified in this article or rules and regulations promulgated hereunder [...]

Consumer commodities are defined in Ag.& Mkts. Law § 191 to include non-prescription drugs. New York State law defines a drugs as "articles (other than food) intended to affect the structure or any function of the body of man or animals." Educ. Law § 6802². Kratom, Salvia and Nitrous Oxide are drugs since they affect the structure, or any function of the body by stimulating, sedating or causing hallucinations or euphoria when ingested or inhaled. Lundborg-Gray Aff., ¶¶ 9, 10 and 15, and Exhibits B, C and G, annexed thereto). Since Kratom, Salvia and

² The New York definition is consistent with the federal definition of a "drug." See 21 U.S.C.A. § 321(g)(1)(c).

Nitrous Oxide are consumer commodities, each is subject to the labeling requirements of Ag. & Mkts. Law §194 and the regulations thereto.

A label is “any written, printed, or graphic matter affixed to, applied to, attached to, blown into, formed, molded into, embossed on, or appearing upon or adjacent to a consumer commodity or a package containing any consumer commodity, for purposes of branding, indentifying, or giving any information with respect to the commodity or to the contents of the package.”³ 1 N.Y.C.R.R. 221.2(e).

N.Y.C.R.R. Title 1 sets forth the basic labeling requirements for commodities.

1. Each package must include a “declaration of identity” which shall identify the commodity in the package by its common or usual name, description, generic term, or the like. 1 N.Y.C.R.R. 221.3
2. Any packaged commodity, kept, offered or exposed for sale, or sold shall include a “declaration of responsibility,” and specify conspicuously on the label of the package, the name and address of the manufacturer, packer or distributor. The name shall be the actual corporate name, or when not incorporated, the name under which the business is conducted. The address shall include street address, city, state and ZIP code [...] 1 N.Y.C.R.R. 221.4(a)
3. Each package must include a “declaration of quantity,” including the weight or quantity of the product. 1 N.Y.C.R.R. 221.5.

Purple Sticky Brand Salvia packaging had no ingredients and no name or address of any manufacturer, packer or distributor. Therefore, it is a mislabeled under 1 N.Y.C.R.R. §§ 221.3 and 221.4.

The Giggles Maeng Da Kratom package had no ingredients and no name or address of any manufacturer, packer or distributor. Though labeled not for human consumption,

³ A consumer package or “package of consumer commodity” is a “commodity in package form that is customarily produced or distributed for sale through retail sale agencies or instrumentalities for consumption by individuals, or use by individuals for the purposes of personal care or in the performance of services ordinarily rendered in or about the household or in connection with personal possessions.” 1 N.Y.C.R.R. 221.2(b).

Respondent's clerk stated it could be used with a pipe without a bubbler. Therefore, it is mislabeled under 1 N.Y.C.R.R. §§ 221.3 and 221.4.

The Cream Chargers are packed in a box containing 24 chargers, each with 10 cubic centimeters of pure nitrous oxide. The brand is identified as BestWhip Inc. See Affidavit, ¶ 27, and Exhibit E, annexed thereto (photographs of product). Other than indicating the brand, BestWhip, Inc. there is no address indicated for the manufacturer or distributor. Therefore, the Whip Cream Charger is mislabeled under 1 N.Y.C.R.R. 221.4.

2. Respondents Have Engaged in Repeated Illegality in Violation of Executive Law § 63 (12) by Violating Education Law § 6815 (Misbranding of Drugs)

Respondents have repeatedly and persistently sold drugs in packaging that is misbranded in violation of the New York Education Law. As set forth in Point I(B)(2), Kratom, Salvia and Nitrous Oxide are drugs for purposes of Educ. Law § 6802 since they affect the structure, or any function of the body, by stimulating, sedating, or causing hallucinations or euphoria when ingested or inhaled. As such, the packaging must comply with the requirements of the Educ. Law.

A drug is misbranded if: (1) its labeling is false or misleading; (2) its package does not contain the name and place of business of the manufacturer, packer, or distributor and accurate quantity of the contents; (3) its labeling does not include adequate directions for use and adequate warnings against use in those pathological conditions where its use may be dangerous to health; (4) it is dangerous to health when used in the dosage suggested in the labeling. Educ. Law § 6815(2)(a), (b), (f), (i)

In addition, when determining whether a drug is misbranded because the labeling is misleading, there should be taken into account (among other things) not only representations

made or suggested by statement, word, design or device, but also the extent to which the labeling fails to reveal material facts about the consequences from the prescribed or customary use of the drug or device. Educ. Law § 6802(13). Here, the products are misbranded in different respects insofar as the deficiencies of their packages violate different sections of the Educ. Law, including §§ 6815(2)(a), (b), (f), (i).

The Kratom, Salvia and Whip Cream Chargers are misbranded because they fail to bear a label containing the name of and place of business of the manufacturer, packer or distributor. Educ. Law § 6815(2)(b). In addition, the label on the Kratom is misleading because it bears the warning “not for human consumption” when the product is customarily smoked to produce an intoxicating effect. Indeed, Respondents' clerk said that a non-bubbler pipe would work fine with it. Shelmidine Aff. ¶ 22. Since the product label fails to reveal any facts about potential health consequences associated with its customary use, the label is misleading, and the product is misbranded pursuant to Educ. Law § 6802(13). According to the DEA, long-term users of kratom have experienced anorexia, weight loss, insomnia, skin darkening, dry mouth, frequent urination and constipation. Low doses may cause increased alertness, physical energy, talkativeness, and sociable behavior while high doses may cause sedative effects. In addition, kratom consumption can lead to addiction. When individuals addicts to kratom, their psychotic symptoms may include hallucinations, delusion, and confusion. Withdrawal effects include symptoms of hostility, aggression, mood swings, runny nose, achy muscles and bones, and jerky movement of the limbs. Lundborg-Gray Affidavit, ¶ 10, and Exhibit C annexed thereto. By failing to include warnings of its potential dangerous health effects, the label of Giggles Maeng Da Kratom is misleading and is thus misbranded pursuant to the Educ. Law § 6815.

The Purple Sticky Brand salvia label is misleading because it fails to reveal any facts about potential health consequences associated with its customary use, the label is misleading, and the product is misbranded pursuant to Educ. Law § 6802(13). According to the DEA, salvia divinorum products evoke hallucinogenic effects similar to other scheduled hallucinogenic substances. Salvinorin-A is believed to be the active ingredient responsible for these effects. Neither salvia divinorum nor Salvinorin-A have any approved medical uses in the United States. Side effects include losing coordination, dizziness and slurred speech. See Dr. Lundborg-Gray Aff. at ¶ 9, and Exhibit B, annexed thereto.

The nitrous oxide product whip cream charger package purchased by Inv. Shelmidine identifies the brand as BestWhip, Inc., but does not include an address for the company or any distributor. Shelmidine Aff. ¶ 28 and Exhibit E, annexed thereto. Thus, the product is misbranded pursuant to Educ. Law § 6815(2)(b). The package includes direction of use and warnings including a statement that cream whipper and chargers should be used only in accordance with instruction and not for any other purpose. Consumers are instructed “Do not inhale! Misuse can be physically harmful and dangerous to your health.” The label also states that Nitrous Oxide chargers may not be sold to persons under 18. Despite of these warnings, the packaging is still misleading. First, these warnings appear on the side of the box and the warning “misuse can be physically harmful and dangerous to your health” can be easily overlooked. Second, the warning is over-generalized and thus not sufficient. Nitrous oxide can cause not only health problems, but also accidents and death. Breathing the pure gas can produce asphyxiation and cause suffocation. Exposure to concentrations of nitrous oxide in excess of 10% can compromise a person’s ability to think and act safely and has been a factor in deaths

related to accidents and car crashes. Long term exposure, even at very low level, may result in infertility or a vitamin B12 deficiency, which causes anemia and nerve degeneration, producing painful sensations in limbs, unsteady gait, loss of balance, irritability, and intellectual deterioration. Dr. Lundborg Gray Affidavit, ¶ 15 and Exhibit G, annexed thereto. Finally, the label states that nitrous oxide cartridges may not be sold to anyone under age 18. This statement is false and misleading; in New York State, whip cream chargers can not be sold at retail without an exemption, and under no circumstances may a whip cream charger be sold to a person under age 21. Therefore, the BestWhip cream charger purchased by Inv. Shelmidine is misbranded because its package does not provide manufacturer, packer or distributor information and its labeling is misleading.

3. Respondents Have Engaged in Repeated Illegality in Violation of Exec. Law § 63(12) by Illegally Selling Nitrous Oxide in Violation of Pub. Health Law § 3380.

Pub. Health Law § 3380 specifically proscribes selling nitrous oxide to the public for the purpose of intoxication. The inhalation of nitrous oxide for purposes of inebriation, intoxication, excitement, stupefaction or euphoria is a dangerous practice among youths, which has led to death and injury. Sponsor Memo, Bill Jacket, L 1982, ch. 771 (Senator Goodhue). The purpose of this legislation was to ban the retail sale of nitrous oxide to prevent young people from purchasing it for “recreational use.” Sponsor Memo, Bill Jacket, L 1989, ch. 677 (Senator Masiello)

Pub. Health Law § 3380(2) states that: “No person shall, for the purpose of causing a condition of intoxication, inebriation, excitement, stupefaction, or the dulling of his brain or nervous system, intentionally smell or inhale the fumes from any hazardous inhalants or from

any glue containing a solvent having the property of releasing toxic vapors or fumes; provided, that nothing in this section shall be interpreted as applying to the inhalation of any anesthesia or inhalant for medical or dental purposes.”

This section of the Pub. Health Law also sets forth the prohibition against selling nitrous oxide:

No person shall sell, or offer to sell, to any other person any tube or other container of any hazardous inhalants or glue containing a solvent having the property of releasing toxic vapors or fumes: (a) if he has knowledge that the product sold, or offered for sale, will be used for the purpose set forth in subdivision two of this section. [...]” Further, “[n]o person shall sell any canister or other container of nitrous oxide unless granted an exemption pursuant to this subdivision.

Moreover, canisters or other containers of nitrous oxide can not be sold to a person under the age of twenty-one years under any circumstances. Pub. Health Law § 3380(4), 5(b).

The Pub. Health Law directs the Commissioner of the State Department of Health to promulgate regulations to exempt specific products which must use nitrous oxide as a propellant, “provided such regulations shall prohibit the sale of such products at retail to the public.” Pub. Health Law § 3380(5)(d). Further, the statute states that sellers cannot sell canisters containing nitrous oxide without dispensation from the State Department of Health Commissioner. Pub. Health Law § 3380(5)(b). In order to get such dispensation, the Commissioner must find no evidence of substantial misuse of the product and the seller must “take steps” to “prevent their sale of the product to any person, firm or corporation who or which sell drug-related paraphernalia as such term is defined by subdivision two of section eight hundred fifty of the general business law.” Pub. Health Law § 3380(5)(f)-(v).

Respondents violated Pub. Health Law § 3380 on several grounds. First, Respondents offer for sale and sell cases of nitrous oxide chargers at retail to the public in violation of Pub. Health Law § 3380. Shelmidine Aff. ¶ 28. Second, Respondents' clerk sold the nitrous oxide to Inv. Shelmidine knowing that he would utilize the product for inhalation because she sold him a "cracker" and balloon as well (both devices used to open the canister and inhale the gas), thereby constituting a separate violation of Pub. Health Law § 3380. Shelmidine Affidavit ¶¶ 29 -- 35. Lastly, Pub. Health Law § 3380(5)(a) provides that no person may sell nitrous oxide unless granted an exemption by the Commissioner of the State Health Department. Pub. Health Law § 3380(5)(d) provides:

The commissioner is directed to promulgate regulations to exempt specific products which must use nitrous oxide, or a mixture of nitrous oxide with other gases, as a propellant from the provisions of this chapter provided such regulations shall prohibit the sale of such products at retail to the public.

Since Respondents sell nitrous oxide "at retail to the public," by definition they cannot have an exemption granted by the Commissioner of the State Health Department. To the extent that Pub. Health Law § 3380(5)(f) allows a seller to apply for an exemption to sell nitrous oxide to the public at retail, Respondents are not eligible for such an exemption since they sell drug-related paraphernalia and other items used for the inhalation of nitrous oxide in their retail store. Pub. Health Law § 3380(5)(f)(v).

For the reasons stated above, Respondents have clearly engaged in the illegal sale of nitrous oxide in violation of Pub. Health Law § 3380, and repeated illegality in violation of Exec. Law § 63(12).

4. Respondents Have Engaged in Repeated Illegality in Violation of Exec. Law § 63(12) by Violating General Business Law, Article 22-A.

As set forth in Point I(C), infra, Respondents repeatedly and persistently violated GBL, Article 22-A and, thus, engaged in repeated and persistent illegality in violation of Exec. Law § 63(12).

C. Respondents Have Engaged in Repeated and Persistent Fraud in Violation of Exec. Law § 63(12) and Deceptive Practices in Violation of GBL § 349.

Exec. Law § 63(12) defines the words “fraud” or “fraudulent” to include “any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions.” Courts have consistently applied an extremely broad view of what constitutes fraudulent and deceptive conduct in proceedings brought by the Attorney General under Exec. Law § 63(12). See, e.g., Lefkowitz v. Bull Investment Group, 46 A.D.2d 25, 28 (3d Dept. 1974), aff’d, 35 N.Y.2d 647 (1975); People v. 21st Century Leisure Spa Int’l Ltd., 153 Misc.2d 939, 943 (Sup. Ct. N.Y. Co. 1959). Thus, it is well-settled that traditional elements of common law fraud such as reliance, actual deception, knowledge of deception and intent to deceive are not required to establish liability for statutory fraud. See People v. Apple Health & Sports Clubs, Ltd., 206 AD.2d 266, 267 (1st Dept. 1994), app. denied, 84 N.Y.2d 1004 (1994); State v. Ford Motor Co., 136 A.D.2d 154, 158 (3d Dept. 1988), aff’d, 74 N.Y.2d 495 (1989).

The test of fraudulent conduct under § 63(12) is whether the targeted act “has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud.” People v. Applied Card Systems, Inc., 27 A.D.3d 104, 106 (3d Dept. 2005), aff’d on other grounds, 11 N.Y.3d 105 (2008); State v. General Electric Co., 302 AD.2d 314 (1st Dept. 2003); see also Lefkowitz v. E.F.G. Baby Products Co., 40 A.D.2d 364, 368 (3d Dept. 1973). Exec. Law § 63(12) protects

the “credulous and the unthinking as well as the cynical and intelligent; the trusting as well as the suspicious.” Guggenheimer v. Ginburg, 43 N.Y.2d 268, 273 (1977); People v. Applied Card Systems, Inc., 27 A.D.3d 104, 106 (3d Dept. 2005); State v. General Elec. Co., 302 A.D.2d at 314; People v. Dell, Inc., 21 Misc.3d 1110(A), 4 (Sup. Ct. Alb. Co. 2008).

GBL § 349 is similarly broad. Like Executive Law § 63(12), GBL § 349 is “intended to be broadly applicable, extending far beyond the reach of common law fraud.” State v. Feldman, 210 F. Supp.2d 294, 301 (S.D.N.Y. 2002). Indeed, a practice may carry the capacity to mislead or deceive a reasonable person and thus violate GBL § 349, but not be fraudulent under common law. Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330, 384 (1999). Even omissions may be the basis for claims under GBL § 349. People v. Applied Card Systems, Inc., 27 A.D.3d at 107.

GBL § 349(a) declares unlawful “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in New York. As with statutory fraud under Exec. Law § 63(12), intent, proof of actual deception and reliance are not elements of a cause of action under GBL § 349. See General Elec. Co., 302 A.D.2d at 315; People v. Network Assocs. Inc., 195 Misc.2d 348, 389 (Sup. Ct. N.Y. Co. 2003); In re State v. Colorado State Christian College of the Church of the Inner Power, Inc., 76 Misc.2d 50, 56 (Sup. Ct. N.Y. Co. 1973). Moreover, because GBL § 349 “was intended to ‘afford a practical means of halting consumer frauds at their incipiency without the necessity to wait for the development of persistent frauds,’” Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25 (1995), the Attorney General may bring an action under this law before any consumer has been injured, and need not await consumer complaints. See GBL § 349(b)

(authorizing the Attorney General to seek injunctive relief when he believes a business “has engaged in or is about to engage in” deceptive acts or practices); Goshen v. Mut. Life Ins. Co. Of New York, 98 N.Y.2d 314, 324 (2002) (“Unlike private plaintiffs, the Attorney General may . . . seek injunctive relief [under GBL § 349] without a showing of injury”); Management Transaction Resources, Inc., 115 Misc.2d at 491 (“It is not necessary for the Attorney General to await consumer complaints before proceeding to enjoin”).

Respondents have repeatedly and persistently engaged in deceptive acts and practices in the course of their business in violation of Executive Law § 63(12) and GBL § 349. As set forth in Point I(B)(1) and (2), supra, Respondents offered for sale and sold products for consumer use that are in fact drugs in misbranded and misleading packaging that fails to disclose the ingredients of the products and the safety and health-related risks associated with use. Respondents also sold products for human consumption even though the labeling contradicted that use. For example, though Giggles Maeng Da Kratom was labeled “not for human consumption,” Respondents sold Inv. Shelmidine a pipe to use the product. Shelmidine Aff., ¶¶ 22 and 23, and Exhibit C annexed thereto. As set forth in Point I(B)(3), Respondents offered for sale and sold illegal products such as nitrous oxide. As set forth in the affidavit of Inv. Shelmidine, Respondents sold whip cream chargers that state on their packaging that they are not to be inhaled, but sold these products with accoutrements (cracker and balloon) that can only be used for one purpose -- the inhalation of the gas.

As a consequence, Respondents have engaged in repeated and persistent fraud and illegality in violation of Exec. Law § 63(12) and deceptive business practices in violation of GBL § 349.

POINT II

PETITIONERS ARE ENTITLED TO INJUNCTIVE RELIEF, PENALTIES AND COSTS

The Attorney General has been afforded a powerful arsenal of remedies under the consumer protection laws. Pursuant to Exec. Law § 63(12), courts are empowered to grant wide-ranging equitable relief to redress the kind of fraudulent and illegal conduct engaged in by respondents. Such remedial orders are to be broadly fashioned. See State v. Princess Prestige, 42 N.Y.2d 104 (1977); State v. Scottish American Association, 52 A.D.2d 528 (1st Dep't. 1976), app. dismissed, 39 N.Y.2d 1057 (1976); reported in full, 39 N.Y.2d 1033 (1976).

A. Respondents Should Be Enjoined From Engaging in Illegal, Deceptive and Fraudulent Business Practices

As set forth above, Respondents have repeatedly and persistently engaged in illegal, deceptive and fraudulent business practices. See Point I, infra. Courts routinely grant injunctions under such circumstances to prevent the continuance of illegal, deceptive or fraudulent business practices. See State v. Ford Motor Co., 74 N.Y.2d 495 (1989), State v. Princess Prestige, 42 N.Y.2d 104 (1977); State v. Daro Chartours, Inc., 72 A.D.2d 872 (2d Dep't. 1979). Thus, the Court should enjoin Respondents from engaging in the illegal, deceptive and fraudulent business practices set forth in the Verified Petition, to wit: selling misbranded and misleadingly labeled nonprescription drugs and selling nitrous oxide (i) without an exemption, (ii) to the general retail product, and/or (iii) with knowledge, imputed or otherwise, that the nitrous oxide will be inhaled.

B. Respondents Should Be Required to Post a \$100,000 Bond

Respondents should be required to post a \$100,000 bond. The court's power to grant equitable relief includes the requirement of a performance bond and New York courts routinely require businesses that have engaged in illegal, deceptive or fraudulent business practices to file a bond. See, e.g., People v. Allied Marketing Group, 220 A.D. 2d 370 (1st Dep't 1995) (\$500,000 bond ordered); People v. Helena VIP Personal Introductions Services of New York, Inc., N.Y.L.J., 1/17/92, p.26 Col. 3 (Sup. Ct. N.Y. Co.), aff'd, 199 A.D.2d 186 (1st Dep't 1993) (\$500,000 bond required); People v. Empyre Inground Pools, 227 A.D.2d 731, 732 (\$100,000 required); Scottish American Ass'n, 52 AD2d 528 (\$100,000 bond)

Here Respondents illegally and deceptively sold designer drugs. According Dr. Lundborg-Gray, a Fellow of the American Academy of Emergency Medicine, and a Fellow of the American College of Emergency Physicians, “[r]ecently the medical profession has been combating the public health challenge resulting from the use of these unlabeled, misbranded and misleadingly labeled designer drugs sold by headshops and other vendors. They pose an unreasonable risk of physical harm to the consuming public, and create an extremely dangerous situation both to the consumer, as well as to first responders. Poison Control numbers in New York State show a dramatic increase in calls related to all classes of these drugs over just the last three years.” Lundborg-Gray Aff., ¶ 3. Indeed, these designer drugs have contributed to a public health crisis in New York State and across the nation.

Respondents should be required to post a \$100,000 bond which they would forfeit if they sell (i) misbranded and/or misleadingly labeled drugs, or (ii) nitrous oxide.

C. Respondents Should Be Required To Provide An Accounting Of Both The Cream Chargers And Mislabeled And Misleadingly Labeled Drugs They Have Sold

For purposes of calculating appropriate penalties, see Point II(D), infra, Respondents should be required to provide an accounting of both the cream chargers and mislabeled and misleadingly labeled drugs they have sold. The power of the court to grant, and the standing of the Attorney General to seek, broad remedial relief is not simply a matter of statutory authorization under Executive Law § 63(12), but is grounded in general equitable principles. Dobbs, Remedies ¶ 222 et seq. (1973); see also 1 Pomeroy's Equity Jurisprudence (5th ed.), § 112, p. 144 et seq. Once the equitable jurisdiction of the court is invoked, the full range of equitable remedies becomes available not limited except by a clear provision of the statute. Furthermore, where the public interest is served, the court's powers are even broader than in private litigation. Porter v. Warner Holding Co., 328 U.S. 395, 397-98.

Here, Respondents have sold products that have contributed to a public health emergency in New York State and across the nation. They should be required to pay penalties proportionate with the products they have sold.

C. Respondents Should Be Ordered to Pay Penalties and Costs

GBL § 350-d provides for the assessment of a civil penalty of up to \$5,000 for each and every deceptive act and false advertisement of the respondent. The principles governing the appropriate amount of a penalty for violation of a consumer protection statute are set forth in Meyers Bros. Parking Systems, Inc. v. Sherman, 87 A.D.2d 562, 563 (1st Dep't. 1982), aff'd, 57 N.Y.2d 653 (1982). The penalty should not be so small as to represent merely a cost of doing business; to the contrary, the penalty should be large enough to serve as a warning to discourage the prohibited act. At the same time, the penalties imposed should not be "shocking to one's

sense of fairness.” Here, the Court should impose an appropriate civil penalty taking into account the volume of designer drugs they sold.

CPLR § 8303(a)(6) provides that the court may award the Attorney General “a sum not exceeding two thousand dollars against each defendant” in an Exec. Law § 63(12) special proceeding. Courts have routinely granted these costs. See e.g., State v. Daro Chartours, Inc., 72 A.D2d 872, 873 (3rd Dep’t. 1979); State v. Midland Equities of N.Y., Inc., 117 Misc.2d 203, 208 (Sup. Ct. N.Y. Co. 1982); People v. Therapeutic Hypnosis, 83 Misc.2d 1068, 1071-1072 (Sup. Ct. Albany Co. 1975); Lefkowitz v. Hotel Waldorf-Astoria Corp., 67 Misc.2d 90, 92 (Sup. Ct. N.Y. Co. 1971). Accordingly, this Court should impose \$2,000 in costs against Respondents.

D. The Court Should Grant the Temporary Restraining Order Requested in the Order to Show Cause.

Pursuant to Executive Law § 63(12), courts are empowered to grant wide-ranging equitable relief, including temporary restraining orders or preliminary injunctions, to redress the kind of fraudulent or illegal conduct engaged in by Respondents. See, e.g., Apple Health & Sports Club, Ltd., 80 N.Y.2d 803, 807. The power of the court to grant and the standing of the Attorney General to seek broad remedial relief is not simply a matter of statutory authority under Executive Law § 63(12), but is grounded in general equitable principles. Once the equitable jurisdiction of the court is invoked, the full range of equitable remedies becomes available to the court. The court’s power is not to be limited except by a clear provision in the statute. Porter v. Warner Co., 328 U.S. 395, 397-98 (1946). Furthermore, where the public interest is served, the court’s powers are even broader than in private litigation. Id. at 397-398. The court’s power to grant equitable relief under consumer protection statutes includes the power to award interim ancillary relief. See, e.g., F.T.C. v. Southwest Sunsites, Inc., 665 F.2d 711, 718-719 (5th Cir.),

cert. denied, 456 U.S. 973 (1982) (“In the exercise of this inherent equitable jurisdiction, the...court may order temporary, ancillary relief . . .”).

Here, the granting of the temporary restraining order serves the interests of the public. An order restraining Respondents from deceptively marketing designer drugs and from offering for sale and selling mislabeled and misbranded products, as well as nitrous oxide, is necessary to protect the public.

Without the preliminary relief ordered by the Court, there is great likelihood that numerous consumers, unknown by the OAG at this time, will suffer irreparable harm if Respondents are permitted to deceptively market and sell mislabeled and misbranded drugs and/or nitrous oxide. Consumers of these drugs may experience dire health consequences, including death. In addition, consumers often present a danger to first responders and health care professionals due to violent behavior resulting from the consumption of these products. The court should enjoin such attempts by Respondents during the pendency of this action.

CONCLUSION

For the reasons set forth above, the Court should grant the relief requested in the petition.

DATED: Poughkeepsie, New York
July 10, 2012

Respectfully submitted,

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