

2. The sale of designer drugs has contributed to a public health crisis in New York State and across the nation (*Id.* ¶¶ 3, 6, 7, 17, 18). These products are sold for their psychoactive effects akin to those obtained from illegal drugs (*Id.* ¶¶ 4, 8). Designer drugs often target people who wish to engage in recreational legal drug use (*Id.* ¶ 4). Many designer drugs are insufficiently labeled, mislabeled and/or misbranded, lacking identification of ingredients, adequate directions for use, adequate warning labels, and/or manufacturer, packer or distributor information.

3. Misrepresenting products as safe for human consumption and selling products that are mislabeled or misbranded is misleading and dangerous. Without knowing the contents of such products or how they are intended to be used, consumers cannot make informed decisions about what they are purchasing and whether those products are safe to ingest. Some designer drugs may cause serious health effects such as agitation, tachycardia (rapid heartbeat), hallucinations, seizures, extreme paranoia, panic, vomiting, mood swings, suicidal or homicidal thoughts, or even death (*Id.* ¶¶ 4, 5, 10, 12). Additionally, consumers who experience such health consequences may not receive appropriate medical treatment because they are only able to provide emergency personnel and health care providers with little or inaccurate information about the substances they ingested (*Id.* ¶¶ 16-19).

PARTIES AND JURISDICTION

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

5. Respondent Daze is a domestic corporation incorporated in October 2002, with its principal place of business at 574 Sunrise Highway, Baldwin, New York.

6. Respondent Kim Fulcher (a/k/a Kim Tasik) owns and operates Daze, and has formulated, directed, controlled or participated in the acts and practices of Daze.

7. Upon information and belief, Respondent Ryan Fulcher owns and operates Daze, and has formulated, directed, controlled or participated in the acts and practices of Daze.

8. Petitioner brings this special 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. As set out in further detail below, Respondents' offering for sale and/or sale of mislabeled drugs violates New York Agriculture and Markets Law § 194, and their offering for sale and/or sale of misbranded drugs violates New York Education Law § 6811.

9. Petitioner has timely served Respondents with prelitigation notice pursuant to GBL § 349(c).

FACTS

10. Kim Fulcher (a/k/a Kim Tasik), and upon information and belief Ryan Fulcher, own and operate Daze, a store that specializes in the retail sale of designer drugs and drug paraphernalia. Despite being marketed as innocuous products, designer drugs are designed to stimulate, sedate or cause hallucinations or euphoria when ingested or inhaled (Lundborg-Gray Aff. ¶ 2). 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 evidence that Daze offers for sale and sells mislabeled and/or misbranded designer drugs.

12. As detailed below, Daze offers for sale and sells the following designer drugs: Salvia Zone salvia, "Serenity," and "Nightlights."

13. On June 15, 2012, at approximately 3:07 p.m., Ryan Fannon, an Investigator Trainee employed by the OAG (“Investigator Fannon”), went to Daze, located at 574 Sunrise Highway, Baldwin, New York (Ryan Fannon Aff. (“Fannon Aff.”) ¶¶ 1-2).

14. Daze sells and offers for sale Salvia Zone salvia products (Fannon Aff. ¶¶ 7, 9, 10, 15). Salvia Zone’s labels refer to “NAP & Associates, LLC” but does not provide that entity’s address (Fannon Aff. Exs. A, B, F). According to Salvia Zone’s labels, the green box of salvia contains 16 mg/g Salvinorin A (*id.* Ex. A), the yellow box contains 28 mg/g Salvinorin A (*id.* Ex. B), and the red box contains 40 mg/g Salvinorin A (*id.* Ex. F). Salvia Zone’s labels also state: “It is extremely important that the product be used in accordance with its color-coded potency system. This allows users to become comfortable with the effects associated with each specific level before proceeding on to the next” (Fannon Aff. Exs. A, B, F). But these labels do not disclose the effects associated with each level (*See id.*). Each box also states that this product “was developed for responsible adults engaging in personal and spiritual exploration,” “[u]sed properly, Salvia Zone products are wonderfully helpful tools for anyone searching for a deeper understanding of one’s self,” and “[i]f this is not your intention [*i.e.*, to search for a deeper understanding of one’s self], then this product is not for you” (*Id.*).

15. According to the United States Drug Enforcement Administration (“DEA”), salvia divinorum is an herb in the mint family “abused for [its] ability to evoke hallucinogenic effects.” Salvinorin A is believed to be the ingredient responsible for the psychoactive effects of salvia divinorum. Salvia divinorum and Salvinorin A do not have any approved medical uses in the United States. In addition to hallucinations, side effects include losing coordination, dizziness and slurred speech. (Lundborg-Gray Aff. ¶ 9 & Ex. B.)

16. Daze also sells and offers for sale kratom (Fannon Aff. ¶ 13), which is typically consumed or smoked (Lundborg-Gray Aff. Ex. C). In response to Investigator Fannon’s request for kratom, Daze offered to sell and sold “Serenity” and “Nightlights” (Fannon Aff. ¶ 13).

17. According to the DEA, kratom is a tropical tree and the consumption of its leaves “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.” Kratom does not have any legitimate medical use in the United States. (Lundborg-Gray Aff. ¶ 10 & Ex. C.)

18. The “Serenity” label refers to “NutraGenomics MFG, LLC . . . Newport Beach, CA 92660” but does not provide that entity’s street address (Fannon Aff. Ex. D). It also states, “Mood Enhancement” and “Dietary Supplement” (*Id.*). The “Serenity” label does not list any potential health effects (*See id.*). In addition, it states, “[t]his product has not been evaluated by the Food and Drug Administration” and “[t]his product is not intended to diagnose, treat, cure or prevent any disease” (*Id.*). Its ingredients include “1,3 Dimethylamylamine” (*id.*), which “is known to narrow the blood vessels and arteries, which [in turn] can elevate blood pressure and may lead to cardiovascular events ranging from shortness of breath and tightening in the chest to heart attack” (Lundborg-Gray Aff. ¶ 12 & Ex. E).

19. The “Nightlights” label does not provide the name or contact information for a manufacturer, packer or distributor, or provide any statement of its quantity (*See Fannon Aff. Ex. E*). Nor does it identify its contents (*e.g.*, by common or usual name), aside from “Metaphysical Crystal Capsules” (*Id.*). The “Nightlights” label also states, “[n]ot for human consumption,” and

“[p]lace cap[sule] in window sill or on top of door frame to keep away negative energies and bad dreams” (*Id.*). Although “Nightlights” is labeled as not being for human consumption, Daze offered it for sale and sold it as kratom, which is commonly ingested or smoked (Lundborg-Gray Aff. Ex. C), and thus as a designer drug.

**FIRST CAUSE OF ACTION
VIOLATION OF EXECUTIVE LAW § 63(12)
REPEATED ILLEGALITY
VIOLATION OF AGRICULTURE AND MARKETS LAW § 194
(MISLABELED DRUGS)**

20. New York Agriculture and Markets Law § 194 prohibits selling, offering or exposing for sale any commodity that is labeled with any false description or false indication of, among other things, its number, quantity, weight or measure. N.Y. AGRIC. & MKTS. LAW § 194.

21. The term “commodities” is defined to include non-prescription drugs. *Id.* § 191(1)(b)(4). New York State law defines “drugs” to include “[a]rticles (other than food¹) intended to affect the structure or any function of the body of man.” N.Y. EDUC. LAW § 6802(7)(c).

22. A “label” is defined 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, identifying, or giving any information with respect to the commodity or to the contents of the package.” N.Y. COMP. CODES R. & REGS. tit. 1, § 221.2(e). A label must identify the commodity in the package “by its common or usual name, description, generic term, or the like,” *id.* § 221.3(a), and provide the name and address of the manufacturer, packer or distributor, *id.* § 221.4(a), and the quantity, such as the weight, of the product, *id.* § 221.5.

¹ “Food” includes “all articles of food, drink, confectionery or condiment, whether simple, mixed or compound, used or intended for use by man or animals, and shall also include all substances or ingredients to be added to food for any purpose.” N.Y. AGRIC. & MKTS. LAW § 2(3).

23. The following products offered for sale and sold by Respondents are intended to affect the function of the human body and are therefore “drugs”: Salvia Zone salvia, “Serenity,” and “Nightlights.” Accordingly, these products may be classified as non-prescription drugs and, as such, are “commodities” under New York Agriculture and Markets Law § 191(1)(b)(4).

24. The labels on these products fail to meet the requirements for commodities labeling under the Agriculture and Markets Law.

25. The Salvia Zone labels refer to “NAP & Associates, LLC” but fails to provide that entity’s address.

26. The “Serenity” label refers to “NutraGenomics MFG, LLC . . . Newport Beach, CA 92660” but fails to identify that entity’s street address.²

27. The “Nightlights” label fails to provide the name and address of its manufacturer, packer or distributor, and its quantity. It also fails to identify its contents (*e.g.*, by its common or usual name), aside from “Metaphysical Crystal Capsules.” In addition, Daze sold “Nightlights” to Investigator Fannon in response to his request for kratom, and kratom is typically consumed or smoked. Thus, the “Nightlights” package falsely and/or misleadingly (1) describes its contents as “[n]ot for human consumption,” and (2) instructs the user to “[p]lace cap[sule] in window sill or on top of door frame to keep away negative energies and bad dreams.”

28. By selling, offering and/or exposing for sale drugs that are falsely and/or inadequately labeled, Respondents have repeatedly and persistently violated the New York Agriculture and Markets Law.

² The street address may be omitted if it is shown in a current city directory or telephone directory. N.Y. COMP. CODES R. & REGS. tit. 1, § 221.4(a). Although a street address (2549B Eastbluff Drive #195) can be found for “NutraGenomics MFG, LLC” in Newport Beach, CA, that street address appears to be a UPS store.

**SECOND CAUSE OF ACTION
VIOLATION OF EXECUTIVE LAW § 63(12)
REPEATED ILLEGALITY
VIOLATION OF EDUCATION LAW § 6811
(MISBRANDED DRUGS)**

29. Under the New York Education Law, it is unlawful to sell or offer for sale any drug that is misbranded. N.Y. EDUC. LAW § 6811(9); *see also id.* § 6811(11), (12). “Drugs” are defined to include “[a]rticles (other than food) intended to affect the structure or any function of the body of man.” *Id.* § 6802(7)(c).

30. The following products sold by Respondents are “drugs” under New York Education Law § 6802 because they are articles (other than food) intended to affect the function of the human body: Salvia Zone salvia, “Serenity,” and “Nightlights.”

31. Under New York Education Law § 6815, a drug is deemed to be misbranded if, among other things:

- a. “its labeling is false or misleading in any particular,” N.Y. EDUC. LAW § 6815(2)(a);
- b. in package form, it fails to bear a label containing “the name and place of business of the manufacturer, packer or distributor,” and “an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count,” *id.* § 6815(2)(b);
- c. required information is not prominently placed on the label with conspicuousness and “in such terms to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use,” *id.* § 6815(2)(c);
- d. its label fails to bear “adequate directions for use,” and 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,” *id.* § 6815(2)(f);
- e. it is “an imitation of another drug,” “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,” *id.* § 6815(2)(h); 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,” *id.* § 6815(2)(i).

32. In determining whether a drug’s labeling is misleading and the drug is therefore misbranded, a court must consider (1) the representations made or suggested on the label, and (2) the extent to which the labeling fails to reveal facts that are material either (a) in light of such representations, or (b) with respect to potential consequences of using that drug under the conditions of use that were prescribed in the labeling or that are customary or usual. N.Y. EDUC. LAW § 6802(13).

33. The Salvia Zone products are misbranded for the following reasons:

- a. their labels fail to provide the place of business for their manufacturer, packer or distributor;
- b. their labels fail to fully disclose the products’ potential health effects;
- c. their labels fail to disclose the effects associated with each specific level, despite their labels’ claim that “[i]t is extremely important that the product be used in accordance with its color-coded potency system” “to allow[] users to become comfortable with the effects associated with each specific level before proceeding on to the next”; and
- d. their labels appear to disclaim the customary or usual use of these products, which is to obtain salvia’s hallucinogenic effects, by claiming that Salvia Zone is intended as a tool for self-exploration.³

34. The “Serenity” product is misbranded for the following reasons:

- a. its label fails to provide the street address of the place of business for its manufacturer, packer or distributor⁴;
- b. its label fails to identify the product’s potential health effects; and

³ For example, Salvia Zone “was developed for responsible adults engaging in personal and spiritual exploration,” and “[i]f this is not your intention [*i.e.*, to search for a deeper understanding of one’s self], then this product is not for you.”

⁴ See also *supra* note 2.

- c. its label falsely and/or misleadingly identifies its contents as “Dietary Supplement,” given that Daze sold “Serenity” to Investigator Fannon in response to his request for kratom.
35. The “Nightlights” product is misbranded for the following reasons:
- a. its label fails to provide the name and place of business for its manufacturer, packer or distributor;
 - b. its label fails to provide any statement, let alone an accurate one, of the package’s quantity;
 - c. its label fails to identify potential health effects from the product’s customary or usual usage; and
 - d. its label falsely and/or misleadingly (1) describes its contents as “[n]ot for human consumption,” and (2) instructs the user to “[p]lace cap[sule] in window sill or on top of door frame to keep away negative energies and bad dreams,” given that Daze sold “Nightlights” to Investigator Fannon in response to his request for kratom, which is typically consumed or smoked.
36. By offering for sale and/or selling misbranded drugs, Respondents have repeatedly and persistently violated the New York Education Law.

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

37. GBL § 349 declares unlawful any deceptive acts or practices in the conduct of any business, trade or commerce in this State. N.Y. GEN. BUS. LAW § 349(a).
38. As set forth above, Respondents have offered for sale and sold drugs that were mislabeled and/or misbranded.
39. By offering for sale and/or selling mislabeled and/or misbranded drugs, Respondents have repeatedly and persistently violated GBL § 349.

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

40. 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, false promise or unconscionable contractual provisions.” N.Y. EXEC. LAW § 63(12).

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

PRAYER FOR RELIEF

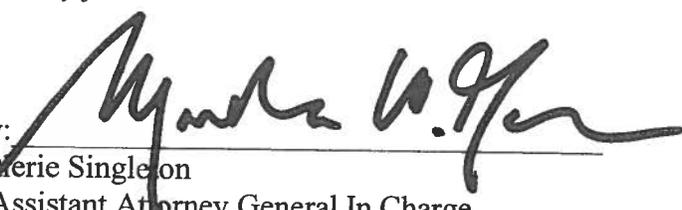
WHEREFORE, the People of the State of New York, pursuant to the powers vested by Executive Law § 63, respectfully request judgment as follows:

- a. permanently enjoining Respondents, 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 one or more of them may now or hereafter act or conduct business (collectively, “Respondents”) from offering for sale and/or selling mislabeled drugs in violation of Agriculture and Markets Law § 194;
- b. permanently enjoining Respondents from offering for sale and/or selling misbranded drugs in violation of Education Law § 6811;
- c. permanently enjoining Respondents from misleadingly offering for sale and/or selling products that are not for human consumption as designer drugs;
- d. permanently enjoining Respondents from violating GBL § 349 and from engaging in the fraudulent, deceptive and illegal practices alleged in the petition;
- e. requiring Respondents to comply with any and all state, federal and local labeling requirements;

- f. requiring Respondents to prepare an accounting of all commodities sold or offered for sale, from January 1, 2012 to July 10, 2012, including:
- (i) the 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 of units of the product sold;
- g. pursuant to GBL § 350-d, imposing a civil penalty of \$5,000 for each violation of GBL Article 22-A committed by Respondents;
- h. pursuant to New York Civil Practice Law and Rules 8303(a)(6), granting costs to the State of New York of \$2,000 against each named Respondent; and
- i. for such other and further relief as the Court deems just and proper.

Dated: July 10, 2012
Mineola, New York

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

By: 

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Assistant Attorney General In Charge
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VERIFICATION

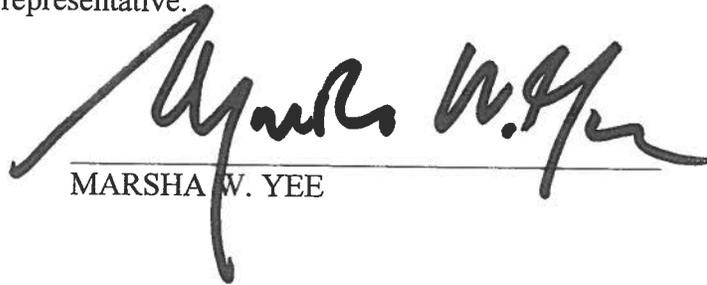
STATE OF NEW YORK)

COUNTY OF NASSAU) ss.:

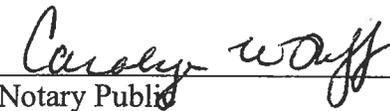
MARSHA W. YEE, being duly sworn, deposes and says: She is an Assistant Attorney General in the office of Eric T. Schneiderman, Attorney General of the State of New York, and is duly authorized to make this verification.

She has read the foregoing petition and knows the contents thereof, and the same is true to her own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters she believes them to be true.

The reason this verification is not made by petitioner is that petitioner is a body politic. The Attorney General is their statutory representative.


MARSHA W. YEE

Sworn to before me this
10th day of July 2012


Notary Public

CAROLYN W RUFF
Notary Public, State of New York
No. 01RU6257933
Qualified in Nassau County
Commission Expires March 19, 2016