

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONEIDA

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

Petitioner,

-against-

JONATHAN M. TEBO d/b/a GOODFELLAS
ALTERNATIVE SMOKE SHOP,

Respondent.

Index No.: CA2012-001302
RJI No.: 32-12-0504

JUDGE CLARK

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

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PRELIMINARY STATEMENT.....1

STATEMENT OF FACTS.....3

A. Background.....3

B. Products Purchased From Respondent's Store
 Located at 4754 Commercial Drive, New Hartford, New York.....5

ARGUMENT

POINT I: RESPONDENT'S ACTIVITIES CONSTITUTE REPEATED
 AND PERSISTENT FRAUD AND ILLEGALITY
 IN VIOLATION OF EXECUTIVE LAW § 63(12)

A. Introduction.....9

B. Respondent Has Engaged in Repeated and Persistent Illegal Conduct.....10

1. Respondent Has Engaged in Repeated Illegality in Violation of Executive Law
 § 63 (12) by Violating Agriculture & Markets Law § 194 (False Labels).....10

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

3. Respondent Has Engaged in Repeated Illegality in Violation of Executive Law
 § 63(12) by Illegally Selling Nitrous Oxide in Violation of Public Health Law
 § 3380.....15

4. Respondent Has Engaged in Repeated Illegality in Violation of Executive Law
 § 63(12) by Violating General Business Law, Article 22-A.....17

C. Respondent Has Engaged in Repeated and Persistent Fraud in Violation of Executive
 Law § 63(12) and Deceptive Practices in Violation of GBL § 349.....17

POINT II: PETITIONER IS ENTITLED TO INJUNCTIVE RELIEF

A. Respondent Should Be Enjoined From Engaging in Illegal, Deceptive and
 Fraudulent Business Practices.....20

B. Respondent Should Be Required to Post a \$100,000 Bond..... 21

C. Respondent Should be Ordered to Pay Penalties and Costs.....22

CONCLUSION.....23

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Index No.: CA2012- 001382
RJI No.: 32-12- 0504

JUDGE CLARK

PRELIMINARY STATEMENT

Petitioner brings this special proceeding pursuant to New York Executive Law § 63(12), and New York General Business Law (“GBL”) § 349 to enjoin Respondent Jonathan M. Tebo, (hereinafter referred to as “Respondent”) from engaging in deceptive, fraudulent and illegal practices in connection with his business, Goodfellas Alternative Smoke Shop (“Goodfellas”). Respondent sells 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 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 Marmelstein Aff. at ¶ 4 and Exhibit F, annexed thereto (FDA Guidance of Industry, Street Drug Alternatives).

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.” 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. 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 Marmelstein Aff., at ¶¶ __, and Exhibits __ and __, 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 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 *Marmelstein Aff.*, at ¶ 11, and Exhibit F, annexed thereto.

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

¹ Public Health Law § 3306.

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.

Marmelstein Aff. ¶ 12, and Exhibit F, 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"). Marmelstein Aff. ¶ 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 cannot be sold at retail to the public, 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 Respondent's Store Located at 4754 Commercial Drive, New Hartford, New York.

On June 6, 2012, Senior Investigator Chad Shelmidine (hereinafter Inv. Shelmidine) visited Respondent's store located at 4754 Commercial Drive, New Hartford, New York. Inv. Shelmidine was undercover, posing as a consumer. See Affidavit of Inv. Shelmidine, sworn to

on June 26, 2012 (hereinafter "Shelmidine Aff."), ¶ 2. He purchased an incense known as Make Scents from Respondent's store. Shelmidine Aff. ¶¶ 9-17 and Exhibit 1 annexed thereto.

According to the packaging, the product is an "Herbal Novelty sold for novelty and aroma purposes ONLY" and also warns, "DO NOT INSUFFLATE, INGEST, SMOKE OR BURN FOR ANY REASON!!! By purchasing this product, customer agrees to use only as directed and to indemnify seller & manufacturer from any damages that may result from intentional or accidental misuse. Any misuse is strictly prohibited and is solely the customers responsibility and in no way the responsibility of the retailer or manufacturers. If misuse occurs please contact POISON CONTROL @ 1-800-222-1222. MAKES SCENTS IS A NOVELTY PRODUCT AND IS INTENDED TO CREATE AROMA ONLY AND IS NOT FOR HUMAN CONSUMPTION." Also printed on the label was the following disclaimer: "LAB CERTIFIED DOES NOT CONTAIN NAPHTHOYLINDOLES, NAPHTHYLMETHYLINODOLES, NAPHTHOYLPYRROLES, NAPHTHMETHYLINDENES, PHENYLACETYLINDOLES, CYCLOHEXYLPHENOLS, DIBENZOPYRANS, BENZOYLINDOLES OR THEIR SALTS OR ISOMERS OF SALTS WHERE THE RINGS ARE PRESENT". No ingredients or manufacturer information are included. Later, Inv. Shelmidine asked the clerk if he needed a bubbler or a dry piece with the Makes Scents. The clerk responded that it was his choice and Inv. Shelmidine purchased a dry piece. Shelmidine Aff. ¶¶ 35-40 and Exhibit 4, annexed thereto. Incense of this nature been chemically treated to include a substance causing acute psychosis with hallucinations, delusions and bizarre behavior according to a review published in the April edition of the Cleveland Clinic Journal of Medicine. Other effects can include violent behavior, seizures, increased heart rate and death.

Inv. Shelmidine also purchased "Floories exotics - Jackacock". It also known as "kratom." Shelmidine Aff. ¶¶ 18-20 and Exhibit 2, annexed thereto. The label on this package included the following information: "50x Kratom, Kava, Kanna, 50x Blue Lotus Blend," "The Jackacock is Hyland Islands most complex creature. His steady diet of Kratom, Kava, Kanna, and Blue Lotus makes this crazed scavenger the perfect combination of the best the island has to offer!," "100% All Natural," "Chemical Free." The label on this product identified a website for the product: www.flooriesexotics.com. No ingredients or manufacturer information are included. Shelmidine Aff. ¶¶ 18-20, Exhibit 2 annexed thereto. 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. See Exhibit D annexed hereto. Blue lotus (*nymphaea caerulea*), found in Floories exotics - Jackacock, contains nuciferine, an alkaloid with a profile of action associated with dopamine receptor blockade. It induces catalepsy, conditioned avoidance response, amphetamine toxicity and stereotypy. It inhibits spontaneous motor activity. It also contains aporphine, one of a class of quinoline alkaloids. The net effect of ingesting these chemicals would likely be significant sedation.

Inv. Shelmidine also purchased a package of "Amped". (Shelmidine Aff. ¶¶ 22-33 and Exhibit 3 annexed thereto) On the front of the package is written "LAB CERTIFIED!" On the back of the package is written "Novelty Only. Not Sold to Minors. Not for Human Consumption. Does NOT contain Mephedrone (4-MMC), MDPV, or Methyone (M1)." The label on this product does not identify any manufacturer or distributor information. Amped is commonly known as a "bath salt". "Bath salts" contain stimulant compounds that mimic the high of cocaine, methamphetamines, and ecstasy, but are extremely dangerous to consume. Patients are presenting with severe and sometimes deadly health effects from using these products, commonly including agitation, tachycardia (rapid heartbeat), elevated blood pressure, hallucinations, seizures, extreme paranoia, panic, vomiting, mood swings, intense cravings to redose, and suicidal or homicidal thoughts. See Aff. of Dr. Maja Lunborg-Gray dated June 23, 2012 (hereinafter "Dr. Lunborg-Gray Aff.") at pages 2-3, ¶ 5.

Inv. Shelmidine observed a box of nitrous oxide chargers on display on a shelf behind the counter and asked to purchase a box. Shelmidine Aff., ¶ 42. The box of "BestWhip 24" nitrous oxide chargers included twenty-four 8 gram cream chargers. Shelmidine Aff., ¶ 48 and Exhibit 5, annexed thereto (photographs of the cream chargers, the cracker and the balloon).

Nitrous oxide can be used to make whipped 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. Inv. Shelmidine told the Clerk that he needed a cracker and a balloon. Inv. Shelmidine purchased 24 cream chargers, a cracker and a balloon. Shelmidine Aff., ¶¶ 47 and 48, and

Exhibits 5, 6 and 7, annexed thereto. 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 maintain 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).” Dr. Lundborg-Gray Aff. at ¶ 15, and Exhibit G annexed thereto.

ARGUMENT

POINT I

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

A. Introduction

Excutive 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, 107 (1977). The Attorney General is only required to show that “a 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. Respondent Has Engaged in Repeated and Persistent Illegal Conduct

Respondent has 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 Dept 1996); State v. E.F.G. Baby Products Co., 40 A.D.2d 364, 366 (3d Dept 1973); State v. Anderson, 137 A.D.2d 259, 265 (4th Dept 1988); State v. Scottish American Assn, 52 A.D.2d 528 (1st Dept 1976), appeal dismissed, 39 N.Y.2d 1057 (1976).

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

Respondent has repeatedly and persistently sold commodities that are falsely labeled in violation of the New York Agriculture and Markets Law. 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 drugs as “articles (other than food) intended to affect the

structure or any function of the body of man or animals.” Educ. Law § 6802.² Makes Scents, Floories exotics - Jackacock, Amped 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. (Dr. Lundborg-Gray Aff., ¶¶ 9, 10 and 15, and Exhibits C and G, annexed thereto). Since Makes Scents, Floories exotics - Jackacock, Amped and 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)

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

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).

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.

Makes Scents' label identifies the product as a novelty for aroma purposes for use with a "dry piece" or pipe. No name or address of any manufacturer, packer or distributor can be found on the panel. Therefore, it is mislabeled under 1 N.Y.C.R.R. § 221.4.

Floories exotics - Jackacock also fails to identify the name or address of the manufacturer or distributor. Therefore, it is mislabeled under 1 N.Y.C.R.R. § 221.4.

The label on the package of Amped fails to identify the name or address of the manufacturer or distributor. Therefore, it is mislabeled under 1 N.Y.C.R.R. § 221.4.

The cream chargers are packed in a box containing twenty-four 8 gram chargers. The brand is identified as BestWhip, Inc. Other than indicating the brand, there is no name or address of the manufacturer or distributor. Therefore, it is mislabeled under 1 N.Y.C.R.R. § 221.4.

- 2. Respondent Has Engaged in Repeated Illegality in Violation of Executive Law § 63 (12) by Violating Education Law § 6815 (Misbranding of Drugs)**

Respondent has 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)(1), Makes Scents, Floories exotics - Jackacock, Amped 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 of children 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).

Makes Scents is misbranded because it fails 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 is misleading because it bears the warning "not for human consumption" when the product is customarily ignited and inhaled to produce an intoxicating effect and was sold by Respondent for that purpose. The clerk acknowledged that a pipe might be used with the product and sold one to Inv. Shelmidine. 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).

Floories exotics - Jackacock is misbranded because the label fails to disclose the name of and place of business of the manufacturer, packer or distributor. Educ. Law § 6815(2)(b). In addition, the label and directions for use are misleading. This drug is customarily ingested by the user to produce an intoxicating effect and was sold by Respondent for this purpose.

Amped is misbranded because the label fails to disclose the name of and place of business of the manufacturer, packer or distributor. Educ. Law § 6815(2)(b). In addition, the label and directions for use are misleading. Although the label states that the product is "not for human consumption" this drug is usually ingested by the user to produce an intoxicating effect and was sold by Respondent for that purpose. As such, the product is misbranded pursuant to Educ. Law § 6802(13).

The package of the nitrous oxide whip cream chargers purchased by Inv. Shelmidine identifies the brand as BestWhip, Inc., but does not include an address for the company or distributor. Shelmidine Aff. ¶ 48, and Exhibits 5, 6 and 7, annexed thereto. Thus, this product is misbranded pursuant to Educ. Law § 6815(2)(b). The package includes direction for 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 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 fails to disclose that 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 "C", 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 to the public regardless of age. 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. Respondent Has 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 is 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.

Respondent violated Pub. Health Law § 3380 on several grounds. First, Respondent offers for sale and sells cases of nitrous oxide chargers at retail to the public in violation of Pub. Health Law § 3380. Shelmidine Aff. ¶¶ 44-48. Second, Respondent’s clerk sold the nitrous oxide to Inv. Shelmidine knowing that he would utilize the product for inhalation because he sold him a “cracker” and a 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 ¶ 48. Lastly, Pub. Health Law § 3380(5)(a) provides that no person may sell nitrous oxide to the retail public which is exactly what Respondent’s clerk did in the sale to Inv. Shelmidine.

For the reasons stated above, Respondent has 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. Respondent Has 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*, Respondent repeatedly and persistently violated GBL, Article 22-A and, thus, engaged in repeated and persistent illegality in violation of Exec. Law § 63(12).

C. Respondent Has 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), *lv. denied*, 35 N.Y.2d 647 (1975); *People v. 21st Century Leisure Spa Int’l Ltd.*, 153 Misc.2d 938, 943 (Sup. Ct. N.Y. Co. 1991). 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), *affd*, 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), *affd 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 not only the average consumer but also “the ignorant, the unthinking and the credulous.”

Guggenheimer v. Ginsburg, 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”).

Respondent has repeatedly and persistently engaged in deceptive acts and practices in the course of his business in violation of Executive Law § 63(12) and GBL § 349. As set forth in Point I(B)(1) and (2), supra, Respondent 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. Respondent also sold products for human consumption even though the labeling contradicted that use. For example, though both the Makes Scents and Amped were labeled “not for human consumption,” Respondent sold them to Inv. Shelmidine. Respondent also offered for sale and sold illegal products such as nitrous oxide. It was sold to Inv. Shelmidine along with the accoutrements needed for its use. As set forth in Point I(B)(3), Respondent offered for sale and sold illegal products such as nitrous oxide. As set forth in the affidavit of Inv. Shelmidine, Respondent sold whip cream chargers that state on their packaging that they are not to be inhaled, but sold these products with accoutrements (a cracker and a balloon) that can only be used for one purpose -- the inhalation of the gas.

As a consequence, Respondent has 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

PETITIONER IS 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. Respondent Should Be Enjoined From Engaging in Illegal, Deceptive and Fraudulent Business Practices

As set forth above, Respondent has 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 Respondent 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) to the general retail public, and/or (ii) with knowledge, imputed or otherwise, that the nitrous oxide will be inhaled.

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

Respondent 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 Respondent 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.” Dr. Lundborg-Gray Aff., ¶ 3. Indeed, these designer drugs have contributed to a public health crisis in New York State and across the nation.

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

C. Respondent 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 respondents. 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 Dept. 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 sold. To aid in its determination, and pursuant to its broad equitable powers in a proceeding under Executive Law 63(12), the court should require Respondent to provide an accounting of both the cream chargers and misbranded and misleadingly labeled drugs he has sold in order to determine the full amount of penalties to be awarded. Courts regularly order such accountings as an aid to determining the extent of restitution and/or penalties to be awarded in a proceeding pursuant to Executive Law § 63(12). See, e.g., People v. Telehublink Corp., 301 A.D.2d 1006, 1007 (3d Dept. 2003); People v. World Interactive Gaming Corp., 185 Misc. 2d 852, 865 (Sup. Ct. N.Y. Co. 1999); State v. Chazy Hardware, 176 Misc.2d 960, 961 (N.Y. Sup. Ct., Clinton Co.1998); State v. Lipsitz, 174 Misc.2d at 584; State v. Camera Warehouse, Inc., 130 Misc.2d 498, 499 (N.Y. Sup. Ct., Dutchess Co. 1985).

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 Executive Law § 63(12) special

proceeding. Courts have routinely granted these costs. See e.g., State of New York v. Daro Chartours, Inc., 72 A.D.2d 872, 873 (3rd Dept. 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 Respondent.

CONCLUSION

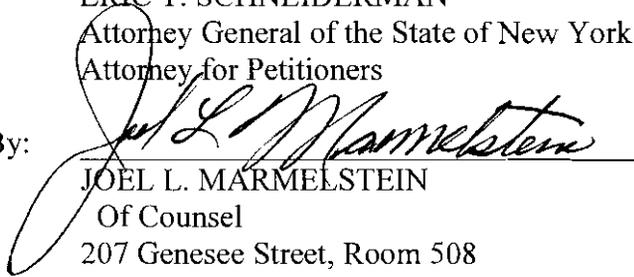
For the reasons set forth above, the Court should grant the relief requested in the petition.

DATED: Utica, New York
 July 10, 2012

Respectfully submitted,

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