

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BROOME

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

Petitioner,

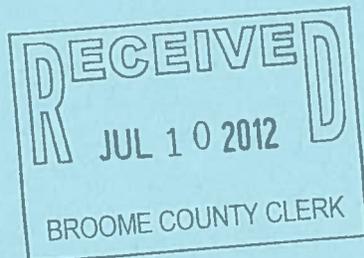
Index No.: 2012-1631

-against-

THOMAS J. LYNCH,
D/B/A ROLLING FIRE GLASSWORKS,

Respondent.

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



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|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| PRELIMINARY STATEMENT | 3 |
| STATEMENT OF FACTS..... | 5 |
| A. Background..... | 5 |
| B. Products Purchased From Respondent's Store Located at 300 North Nanticoke Avenue, Endicott, New York..... | 8 |
| ARGUMENT..... | 11 |
| POINT I | |
| RESPONDENT'S ACTIVITIES CONSTITUTE REPEATED AND PERSISTENT FRAUD AND ILLEGALITY IN VIOLATION OF EXECUTIVE LAW § 63(12) | 11 |
| A. Introduction..... | 11 |
| B. Respondent Has Engaged in Repeated and Persistent Illegal Conduct | 12 |
| 1. Respondent Has Engaged in Repeated Illegality in Violation of Executive Law § 63(12) by Violating Agriculture and Markets Law § 194(False Labels)..... | 12 |
| 2. Respondent Has Engaged in Repeated Illegality in Violation of Executive Law § 63 (12) by Violating Education Law § 6815 (Misbranding of Drugs) | 15 |
| 3. Respondent Has Engaged in Repeated Illegality in Violation of Executive Law §63(12) by Illegally Selling Nitrous Oxide in Violation of Pub. Health Law §3380..... | 18 |
| 4. Respondent Has Engaged in Repeated Illegality in Violation of Executive Law §63(12) by Violating General Business Law, Article 22-A..... | 21 |
| C. Respondent Has Engaged in Repeated and Persistent Fraud in Violation of Executive Law § 63(12) and Deceptive Practices in Violation of GBL §349..... | 21 |
| POINT II | |
| PETITIONER IS ENTITLED TO INJUNCTIVE RELIEF, PENALTIES AND COSTS | 24 |
| A. Respondent Should Be Enjoined From Engaging in Illegal, Deceptive and Fraudulent Business Practices..... | 24 |
| B. Respondent Should Be Required to Post a \$100,000 Bond..... | 25 |
| C. Respondent Should Be Ordered to Pay Penalties and Costs | 26 |
| D. The Court should grant the temporary restraining order requested in the Order to Show Cause | 27 |
| CONCLUSION | 29 |

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Respondent.

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 Respondent Thomas J. Lynch, doing business as Rolling Fire Glassworks (hereinafter referred to as “Respondent”), from engaging in deceptive, fraudulent and illegal practices in connection with his business, Rolling Fire Glassworks. 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 are 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 Affidavit of Assistant Attorney General Michael J. Danaher, Jr., sworn to on July 9, 2012 ("Danaher Aff.") at ¶ 4 and Exhibit 3, annexed thereto (FDA Guidance of Industry, Street Drug Alternatives). The Food and Drug Administration (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 USC §§ 321(p)(1), 352(f)(1). See Danaher Aff. ¶ 5, and Exhibit 3, p.3, annexed thereto.

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 Danaher Aff. at ¶¶ 8-9 and Exhibit 3, pp. 9-13, 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

¹ Public Health Law § 3306.

order called for sales and distribution of these products to cease immediately. See Danaher Aff., at ¶ 11, and Exhibit 3, pp. 15-22, 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 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.

Danaher Aff. ¶ 12, and Exhibit 3, 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 Danaher 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 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 Respondent's Store Located at 300 North Nanticoke Avenue, Endicott, New York.

On May 15, 2012, Senior Investigator Chad Shelmidine (hereinafter Inv. Shelmidine) visited Respondent's store located at 300 North Nanticoke Avenue, Endicott, New York. Inv. Shelmidine was undercover, posing as a consumer. See Affidavit of Inv. Shelmidine, sworn to on July 3, 2012 (hereinafter "Shelmidine Aff."), ¶¶ 4 and 19. Respondent purchased a green leafy substance, resembling marijuana, in a clear plastic baggie from Respondent's store. Shelmidine Aff. ¶¶ 9 and 14. The clear plastic baggie does not contain any written information identifying the manufacturer, packer or distributor and fails to contain any product information, directions for use or warnings. Shelmidine Aff. ¶11. Respondent's clerk told Inv. Shelmidine that it was an "All natural blend" and that its pretty f_____ awesome." Shelmidine Aff. ¶10. The clerk also recommended that Inv. Shelmidine smoke the green leafy substance using "[a] metal pipe, or like a one hitter." Shelmidine Aff. ¶16.

Inv. Shelmidine also purchased a package of "Blaze It." Shelmidine Aff. ¶¶12 and 14. The Blaze It comes in a predominately black package with the name of the product on the front. It does not identify the name or address of the manufacturer, distributor or packer and it specifically warns in bold, capital print that it is "**FOR USE AS AN AROMATHERAPY INCENSE ONLY.**" Shelmidine Aff. ¶13. Despite this warning, Respondent's clerk described the product to Inv. Shelmidine as: "It's alright, I don't think it tastes very good and you definitely gotta smoke a good amount of it to get high." Shelmidine Aff. ¶12.

Inv. Shelmidine also purchased a package of P.E.P. 100% Mushrooms, Fly Agaric (*Amanita Muscaria*). Shelmidine Aff., ¶ 17. According to the label, the product is not intended for human consumption, and is sold as a botanical/horticultural/herbarium specimen. See Exhibit E of Shelmidine Aff.. However, Respondent's clerk explained to Inv. Shelmidine that "Um, you gotta eat a lot of them but they do pretty nice." Shelmidine Aff., ¶ 17.

According to the Food and Drug Administration, Fly Agaric (*Amanita muscaria*) mushrooms produce ibotenic acid and muscimol. Both substances produce the same effects, but muscimol is approximately five times more potent than ibotenic acid. Symptoms of poisoning generally occur within 1 to 2 hours after the mushrooms are ingested. Abdominal discomfort may be present or absent initially, but the chief symptoms are drowsiness and dizziness (sometimes accompanied by sleep), followed by a period of hyperactivity, excitability, derangement of the senses, manic behavior, and delirium. Periods of drowsiness may alternate with periods of excitement, but symptoms generally fade within a few hours. Fatalities rarely occur in adults, but in children, accidentally consuming large quantities of these mushrooms may result in convulsions, coma, or other neurologic problems for up to 12 hours. Affidavit of Dr. Maja Lundborg-Gray sworn to on July 5, 2012 (hereinafter Dr. Lundborg-Gray Aff.) Aff., ¶11.

On a second visit to respondent's store on May 23, 2012, Inv. Shelmidine purchased a box of 24 nitrous oxide chargers. Shelmidine Aff. ¶32. The box contained statements that "Dessert Cream Chargers are for the preparation of food only," "misuse can be dangerous to your health" and "do not inhale." See Shelmidine Aff. ¶25 and Exhibit G annexed thereto (photographs of nitrous oxide box).

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. Shelmidine Aff., ¶ 27. The clerk asked Inv. Shelmidine if he needed a cracker and a balloon. Shelmidine Aff., ¶ 26. However, he clerk was unable to locate any in the store. Shelmidine Aff., ¶¶ 28-29.

Nitrous oxide is an inhalant that is often inhaled using a balloon (method explained bellow). 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.

Inv. Shelmidine also asked respondent's clerk what type of Kratom they had for sale. The clerk described the different types of powders and pills. Inv. Shelmidine chose a package of "Kratom Zone." Shelmidine Aff. ¶30.

The package of "Kratom Zone" warns that "improper or excessive use may lead to a less than favorable experience." It also recommends "that further research be completed to understand the traditional uses, preparations, benefits, and effects of Kratom." See Exhibit H of Shelmidine Aff.

According to the DEA, 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 Dr. Lundborg-Gray Aff. at ¶ 10. Respondent's clerk informed Inv. Shelmidine that you stir the Kratom Zone into "pretty warm water and just pounding it down as quickly as you can is the best way to do it. You know it is kinda like mushrooms it taste like sh__ but it's worth it in the end." Shelmidine Aff. ¶ 31.

ARGUMENT

POINT I

RESPONDENT'S 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. 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 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. 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”). 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 drug as “articles (other than food) intended to affect the structure or any function of the body of man or animals.” Educ. Law § 6802.² Consumer commodities are defined in Ag.& Mkts. Law § 191 to include non-prescription drugs. The green leafy substance in the clear plastic baggie, Blaze It, Kratom, Fly Agaric Mushrooms 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. See, Dr. Lundborg-Gray Aff., ¶¶ 10, 11 and 15, and Exhibits C and G, annexed thereto). See also, Shelmidine Aff. ¶¶ 10, 12, 17, 24 and 31. Since the green leafy substance in the clear plastic baggie, Blaze It, Kratom, Fly Agaric Mushrooms 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.

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).

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.

The package of the green leafy substance, resembling marijuana, does not contain any labeling. There is no declaration of quantity on the package. Likewise, the packaging does not identify the manufacturer, packer or distributor. Most importantly, there is no information on the identity of the green leafy substance. Therefore, it is a mislabeled commodity under 1 N.Y.C.R.R. §2214.

Blaze It's label indicates the package contains a premium blend of several ingredients. No name or address of any manufacturer, packer or distributor is located anywhere on the package. Therefore, it is mislabeled under 1 N.Y.C.R.R. §221.4.

The label on the package of P.E.P. 100% Organic Grade A+ + + Mushrooms (Fly Agaric (Amanita Muscaria) appears to indicate that it is manufactured, packaged or distributed by NAP & Associates LLC, but it fails to identify the address of the company. Therefore, it is a mislabeled under 1 N.Y.C.R.R. §221.4.

The XXX Platinum Cream Chargers are packed in a box containing twenty-four nitrous oxide chargers. The label fails to identify the name or address of the manufacturer, packer or

distributor. Therefore, the XXX Platinum Cream Chargers are 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), the green leafy material in the clear plastic baggie, Blaze It, Kratom, Fly Agaric Mushrooms 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 or by 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).

The clear plastic baggie containing the green leafy substance resembling marijuana is misbranded because it fails to bear any labeling, whatsoever. It does not contain a label with the name of and place of business of the manufacturer, packer or distributor. Educ. Law § 6815(2)(b). It does not contain any product information, even though it is intended to be smoked to produce an intoxicating effect. Indeed, Respondent's clerk recommended a particular pipe to be used to smoke the product. Shelmidine Aff. ¶¶ 15-16. The label fails to identify the product and the potential health effects that may result from customary and usual use of this product., the label is misleading, and the product is misbranded pursuant to Educ. Law § 6802(13).

The Blaze It is mislabeled because it fails to bear a label containing the name 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. Though the label states that the product is "**FOR USE AS AN AROMATHERAPY INCENSE ONLY**," this drug is customarily smoked by the user to produce an intoxicating effect. In fact, Respondent's clerk recommended a pipe to smoke the product. Shelmidine Aff. ¶¶14-16. The label fails to identify potential health effects that may result from the customary and usual use of this product and is thus misbranded.

Kratom Zone is misbranded because 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. 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. Dr. Lundborg-Gray Affidavit, ¶ 10, and Exhibit C annexed thereto. The package does not provide any potential and dangerous consequences of its use, except that "improper or excessive use may lead to less than favorable experience." By failing to include warnings of its potential dangerous health effects, the label of Kratom Zone is misleading. Kratom Zone is thus misbranded pursuant to the Educ. Law § 6815.

P.E.P. Fly Agaric Mushrooms is misbranded because the label fails to disclose the name of and place of business of the manufacturer, packer or distributor in violation of Educ. Law § 6815(2)(b). In addition, the label and directions for use are misleading. Though the label states that the product is "not intended for human consumption," this drug is customarily eaten by the user to produce an intoxicating effect. As such the product is misbranded pursuant to Educ. Law § 6802(13).

The XXX Platinum nitrous oxide cream charger package purchased by Inv. Shelmidine does not include the name and address for the manufacturer, packer or distributor. See Exhibit G of Shelmidine Aff. Thus, the product is misbranded pursuant to Educ. Law § 6815(2)(b). The package includes direction that it is to be used for food preparation only. It contains warnings including a statement that misuse can be dangerous to your health.. Consumers are also instructed: "Do not inhale contents." 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 inconspicuously on the side of the box and the warning "Misuse can be

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 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, nitrous oxide chargers can not be sold at retail without an exemption, and under no circumstances may nitrous oxide chargers be sold to a person under age 21. Therefore, the XXX Platinum 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 Executive 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).

Respondent violated Pub. Health Law § 3380 on several grounds. First, Respondent offers for sale and sells boxes of nitrous oxide chargers at retail to the public in violation of Pub. Health Law § 3380. Shelmidine Aff. ¶ 24. Second, Respondent’s clerk sold the nitrous oxide to Inv. Shelmidine knowing that he would utilize the product for inhalation because the clerk specifically asked Inv. Shelmidine if he needed a cracker and balloons (both devices used to open the canister and inhale the gas), thereby constituting a separate violation of Pub. Health Law § 3380. Shelmidine Aff. ¶ 26. 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 Respondent sells nitrous oxide “at retail to the public,” by definition he 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, Respondent is not eligible for such an exemption since he sells drug-related paraphernalia and other items used for the inhalation of nitrous oxide in his retail store. Pub. Health Law § 3380(5)(f)(v).

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 Executive 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 Executive 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 not only the average consumer but also “the ignorant, the unthinking and the credulous.” 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”).

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 the Blaze It was labeled "FOR USE AS AN AROMATHERAPY INCENSE ONLY", and the P.E.P. Fly Agaric Mushroom was labeled "this product is not intended for human consumption," Respondent sold those products to Inv. Shelmidine for the purpose of human consumption. Respondent's clerk sold Inv. Shelmidine a pipe to smoke the Blaze It. He also said "...you definitely gotta smoke a good amount of it to get high." Shelmidine ¶12 and

Exhibits C and E, annexed thereto. In reference to the P.E.P. Fly Agaric Mushrooms, the clerk stated "you gotta eat a lot of them but they do pretty nice." Shelmidine Aff. ¶17. 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 nitrous oxide chargers that state on their packaging that they are not to be inhaled, but sold these products to be used with accoutrements (crackers and balloons) that can only be 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, supra. 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) without an exemption, (ii) to the general retail public, and/or (iii) 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 head shops 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 practice 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 Respondent sold. To aid in its determination, and pursuant to the its broad equitable powers in a proceeding under Executive Law 63(12), the court should require Respondents 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 Exec. Law § 63(12). See, e.g., People v. Telehublink Corp., 301 A.D.2d 1006, 1007 (3d Dep’t 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 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); Abrams 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); People 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.

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 Respondent 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.

According to Dr. Lundborg-Gray, who is board-certified in emergency medicine and a Fellow of both the American Academy of Emergency Medicine and the American College of Emergency Physicians:

Recently the medical profession has been combating the public health challenge resulting from the use of . . . 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 first responders.

For many presenting patients it is difficult to differentiate between a true psychiatric episode and the effects of these new, undisclosed intoxicants. Although many patients are treated and released, some experience severe outcomes, including organ failure and death.

Dr. Lundborg-Gray Aff., ¶¶3 and 19 (emphasis added).

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 Respondent is 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.

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Respectfully submitted,

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