

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

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

Petitioner,

Index No. 2012-2171

-against-

PAMO B. NANDWANI a/k/a PAUL NANDWANI,
doing business as Pavilion International,

Respondent.

-----X

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

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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 Pamo Nandwani a/k/a Paul Nandwani ("Respondent" or "Nandwani") doing business as Pavilion International ("Pavilion"), from engaging in deceptive, fraudulent and illegal practices in connection with his business, Pavilion. Respondent sells so-called "designer drugs," which are synthetic versions of illegal drugs, as well as other street drug alternatives, which are products that are marketed with claims that use mimics the effect of controlled substances (referred to collectively as "designer drugs"). Designer drugs are marketed to avoid the provisions of existing drug laws; they are intended to stimulate, sedate or cause hallucinations or euphoria when ingested or inhaled. Petitioner also seeks civil penalties and costs, as authorized by statute, to be paid to the State of New York.

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 getting high, 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.” Affirmation of Assistant Attorney General James M. Morrissey, affirmed to on July 9, 2012 (“Morrissey Aff. ”), ¶ 2 and Exhibit Q, p. 3 to the Notice of Petition (FDA Guidance of Industry, Street Drug Alternatives). The FDA considers any product that is promoted as a street drug alternative to be an unapproved new drug and a misbranded drug in violation of sections 505 and 502 of the Federal Food, Drug, and Cosmetic Act. Exhibit Q, p. 3 to the Notice of Petition

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-methylenedioxypropylvalerone (MDPV) and Methylone, chemicals that serve as the active ingredients 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 cannabinoid, 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. Morrissey Aff., ¶¶ 3-5 and Exhibit Q to the Notice of Petition, pp. 5-14.

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

Earlier this year, State Health Commissioner Nirav Shah issued an order of summary action banning the sale of synthetic marijuana products in New York State. These substances, generally referred to as "synthetic marijuana", consist of plant material coated by chemicals that mimic THC, the active ingredient in marijuana. These products are being sold as a "legal alternative" to marijuana in convenience stores, smoke shops, and tobacco stores with brand names such as "Spice", "K2", "Mr. Nice Guy", and "Galaxy Gold". The order states that "synthetic cannabinoids have been linked to severe adverse reactions, including death and acute renal failure, and commonly cause: tachycardia (increased heart rate); paranoid behavior, agitation and irritability; nausea and vomiting; confusion; drowsiness; headache; hypertension; electrolyte abnormalities; seizures; and syncope (loss of consciousness)." The Commissioner's order called for sales and distribution of these products to cease immediately. Morrissey Aff., ¶ 7 and Exhibit Q to the Notice of Petition, p. 15.

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.

Morrissey Aff., ¶ 8 and Exhibit Q to Notice of Petition, p. 23, 25.

In response to this growing problem, the Attorney General commenced a statewide investigation earlier this year focused on the retail sale of intoxicating products at head shops across New York State (the "Investigation"). The Investigation revealed that numerous head shops in New York State are selling intoxicating street 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. Morrissey Aff., ¶ 9.

The Attorney General's investigation has revealed that (i) the labeling of these designer drugs is insufficient, often omitting the true contents of the products and the safety and health-related risks associated with the products (ii) the labeling of designer drugs falsely describes their intended use (iii) head shops are selling nitrous oxide in violation of New York State law, (iv) head shops are selling products that state on their label that they are not fit for human consumption but, along with those products, sell accoutrement that can only be used for only one purpose – human consumption and (v) head shops sell products with labels that state they are "not for human consumption" knowing full-well that the products will be ingested or inhaled by the purchaser since, put simply, the products have no other purpose. Morrissey Aff., ¶ 10.

B. Products Purchased From Respondent's Store Located at 3234 Main Street, Buffalo, New York.

On May 7, 2012, Senior Investigator Chad Shelmidine purchased Purple Sticky Salvia from respondent's store located at 3234 Main Street, Buffalo, New York. According to the packaging, the product was "pure salvinorin-A" that "contains highly potent rare precious salvinorin A extract of salvia divinorum." Affidavit of Senior Investigator Chad Shelmidine, sworn to on June 25, 2012 ("Shelmidine Aff."), ¶¶ 2-10.

According to the DEA, salvia divinorum is an herb in the mint family native to certain areas of the Sierra Mazateca region of Oaxaca, Mexico. Salvia divinorum products are "abused for their ability to evoke hallucinogenic effects, which, in general, are similar to those of other scheduled hallucinogenic substances." Salvinorin-A is believed to be the ingredient responsible for the hallucinogenic effects. Neither Salvia divinorum nor its active ingredient, Salvinorin-A, has any approved medical uses in the United States. See Exhibit B to Petitioner's Notice of Petition; see also the Affidavit of Maja Lundborg-Gray, M.D., FAAEM, FACEP, sworn to on July 5, 2012 ("Dr. Lundborg-Gray Aff."), ¶ 9.

Salvia is sold by the gram and is smoked in a water pipe using a lighter called a "torch." Respondent's clerk recommended that Senior Investigator Chad Shelmidine ("Sr. Inv. Shelmidine") purchase a torch and smoke the salvia using a water pipe. Shelmidine Aff., ¶¶ 10-11. Sr. Inv. Shelmidine purchased the salvia, a water pipe and a torch. Respondent's clerk cautioned Sr. Inv. Shelmidine on two occasions to use on a "pinch" of the salvia since it was so potent. Shelmidine Aff., ¶¶ 8 and 10; see also Exhibit I to Petitioner's Notice of Petition.

On May 25, 2012, Sr. Inv. Shelmidine returned to Respondent's store located at 3234 Main Street, Buffalo, New York to determine if respondent sold nitrous oxide. Shelmidine Aff., ¶ 16. According to the DEA, nitrous oxide is an inhalant that is often inhaled using a balloon (method explained bellow). According to a bulletin issued by the Massachusetts Department of

Health, Bureau of Substance Abuse, "Nitrous oxide (N₂O), also known as "laughing gas," is a colorless, odorless, weak anesthetic gas that is being abused for its drug-like effects by teenagers and adults" that "can cause health problems, accidents and death." See Exhibit G to Petitioner's Notice of Petition; see also Dr. Lundborg-Gray Aff. 15.

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., ¶¶ 18-22.

When Sr. Inv. Shelmidine asked Respondent's clerks if they has "nitrous" one responded "Cream chargers? Yeah." Shelmidine Aff., ¶ 19. Sr. Inv. Shelmidine asked the clerks if they had "crackers" and "balloons" which they did. Sr. Inv. Shelmidine purchased 24 cream chargers, a cracker and a balloon. Shelmidine Aff., ¶¶ 20-25.

C. Products Purchased From Respondent's Store Located at 1099 North Country Road, Stonybrook, New York.

On June 15, 2010, Investigator Ryan Fannon ("Inv. Fannon") went to Respondent's store located at 1099 North Country Road, Stonybrook, New York. Inv. Ryan asked the clerk if the store had kratom. Affidavit of Investigator Ryan Fannon, sworn to on June 27, 2012 ("Fannon Aff."), ¶¶ 2, 5. 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 Exhibit C to Petitioner's Notice of Petition; see also Dr. Lundborg-Gray Aff., ¶ 10.

Inv. Fannon purchased 2 different kratom products. He purchased Kratom OPM, which has what he believes to be renditions of poppy plants, the source of opium, on the packaging. Inv. Fannon believes that the letters "OPM" are a play on the word "opium." The packaging states: "WELCOME TO THE OPM DEN!" OPM KRATOM IS THE FIRST OF MANY KRATOM PRODUCTS FORMULATED TO TAKE YOUR KRATOM EXPERIENCE TO THE NEXT LEVEL. 'OPM' IS FOR LEARNING; THOSE WITH STRONG HEARTS WILL RECEIVE MESSAGES FROM THE GODS." See Exhibit M to Petitioner's Notice of Petition for photographs of the packaging of Kratom OPM and Fannon Aff., ¶ 8.

Inv. Fannon also purchased a product called Intrigue which is labeled as "premium Kratom leaf." The packaging indicates that the product, which comes in capsule form, is "not for human consumption." See Exhibit M to Petitioner's Notice of Petition for photographs of the packaging of Kratom OPM and Fannon Aff., ¶ 9.

Inv. Fannon asked the clerks if they had nitrous oxide. A clerk showed him a box of 24 whip cream chargers which he purchased along with a cracker and a balloon. Fannon Aff., ¶¶ 12-17; see also Exhibits N, O and P to Petitioner's Notice of Petition for photographs of the cream chargers, the cracker and the balloon.

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, 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 NY 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 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 & 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"). 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 an "article[] (other than food) to affect the structure or any function of the body of man or animals." Educ. Law § 6802.¹ Salvia, kratom and nitrous oxide are drugs for purposes of this definition 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., ¶¶ 9, 10 and 15 and Exhibits B, C and G to Petitioner's Notice of Petition. Since salvia, kratom 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,

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

identifying, or giving any information with respect to the commodity or to the contents of the package.”² 1 N.Y.C.R.R. § 221.2(e).

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

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

The Salvia product is named as "Purple Sticky Salvia. It has a paper display panel, which is attached to a transparent plastic bag containing the drug. See Exhibit I to Petitioner's Notice of Petition for photographs of the packaging. No name or address of any manufacturer, packer or distributor can be found on the paper panel. In addition, there is no net quantity on the panel besides a line stating that "40ATOMIX." This statement is not an indication of the quantity or net weight within the meaning of 1 N.Y.C.R.R. § 221.5. Atomix is not a metric unit as listed in Section 221.5. Therefore, the salvia product, "Purple Sticky Salvia" is mislabeled under 1 N.Y.C.R.R. §§ 221.4, 221.5.

Neither of the kratom products purchased by Inv. Fannon – Kratom OPM or Intrigue -- sets forth the name or address of manufacturer, distributor, or packer on the packaging. The Kratom OPM packaging did not include the quantity or net weight on the packaging. See Exhibit

² 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 NYCRR 221.2(b).

M to Petitioner's Notice of Petition. Therefore, the kratom products are mislabeled under 1 N.Y.C.R.R. § 221.4, 221.5

The whip cream chargers purchased by Sr. Inv. Shelmidine are packed in a white paper box. See Exhibit J to Petitioner's Notice of Petition for photographs of the product. On the bottom of the box the following text appears: "Made in Czech Republic Under Strict Supervision of Austrian Technicians by European Union Facility." No name or address is indicated about manufacturer or its supervision agency. Besides this statement, no other information about its manufacturer, distributor, or packer appears on the box. See Exhibit J to Petitioner's Notice of Petition. Therefore, the whip cream chargers are mislabeled under 1 N.Y.C.R.R. § 221.4.

The whip cream chargers purchased by Inv. Fallon are also packed in a white paper box. See Exhibit N to Petitioner's Notice of Petition. On the bottom of the box, the following text appears: "Produced in a European Community facility." No name or address is indicated about manufacturer or its supervision agency. Besides this statement, no other information about its manufacturer, distributor, or packer appears on the box. See Exhibit N to Petitioner's Notice of Petition. Therefore, the whip 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)(2), salvia, kratom and nitrous oxide are drugs for purposes of Education 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 package must comply with the Education Law and they may not be misbranded.

A drug is misbranded if: (1) its labeling is false or misleading in any particular; (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 by children where its use may be dangerous to health; or (4) it is dangerous to health when used in the dosage suggested in the labeling. Educ. Law § 6815(2)(a), (b), (f), (i)

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. N.Y. Educ. Law § 6802(13). Here, the products are misbranded in different respects insofar as the deficiencies of their packages fit into two or more categories under Educ. Law §§ 6815(2)(a), (b), (f), (i).

The packaging of the Purple Sticky Salvia purchased by Sr. Inv. Shelimdine does not set forth name or business address of its manufacturer, packer, or distributor or the quantity of its contents. See Exhibit I to Petitioner's Notice of Petition for photographs of the packaging. Further, the packaging has no direction for its use, and no warnings about the product's potential danger to health. According to its packaging, Purple Sticky Salvia is "pure salvinorin-A." According the DEA, smoking pure salvinorin-A can causes psychic effects including perceptions of bright light, vivid colors and shapes, body movements and body or object distortions. Other effects could include dysphoria, uncontrolled laughter, a sense of loss of body, overlapping realities, and hallucinations. It may also cause adverse physical effects, including incoordination, dizziness, and slurred speech. See Exhibit B to Petitioner's Notice of Petition and the Dr. Lundborg-Gray Aff., ¶ 9. Therefore, Purple Sticky Salvia is misbranded and violates Educ. Law § 6815.

The packaging of the kratom products does not provide any information about its manufacturer, packer, or distributor and the packaging of the Kratom OPM does not set forth the quantity of its contents. Further, the packaging of the kratom products does not indicate any direction of use or warning for its potential dangerous effect to health. 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. With respect to individuals addicted 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. See Exhibit C to Petitioner's Notice of Petition and the Dr. Lundborg-Gray Aff., ¶ 10. The package does not provide any of the potential and dangerous consequences of its use. See Exhibit M to Petitioner's Notice of Petition for photographs of the packaging. Therefore, the kratom products are misbranded and violate Educ. Law § 6815.

The package of the nitrous oxide product whip cream chargers purchased by Sr. Inv. Shelmidine provides that it is made in Czech Republic, but it does not provide the specific name and address of the producer. See Exhibit J to Petitioner's Notice of Petition for photographs of the product. The package includes direction of use and warnings including "keep out of reach of children", "do not inhale content" and "misuse can be dangerous to your health." Despite of these warnings, the packaging is still misleading. First, these warnings appear on the side of the box and the warning "misuse can be dangerous to your health" can be easily overlooked. Second, the warning is over-generalized and thus, is not sufficient. Nitrous oxide can cause not only health problems, but also accidents and death. Breathing the pure gas

can produce asphyxiation and cause suffocation. Exposure to concentrations of nitrous oxide in excess of 10% can compromise a person's ability to think and act safely and has been a factor in deaths related to accidents and car crashes. Long term exposure, even at very low level, may result in infertility or a vitamin B12 deficiency, which causes anemia and nerve degeneration, producing painful sensations in limbs, unsteady gait, loss of balance, irritability, and intellectual deterioration. See Exhibit G to Petitioner's Notice of Petition and the Dr. Lundborg-Gray Aff., ¶ 15. Therefore, the whip cream chargers purchased by Sr. Inv. Shelmidine are misbranded and violate Educ. Law § 6815.

For the same as set forth above, the nitrous oxide product whip cream chargers purchased by Inv. Fannon, which have packaging very similar to the packaging of the chargers purchased by Sr. Inv. Shelmidine, violate Educ. Law, § 6815. See Exhibit N to Petitioner's Notice of Petition for photographs of the product.

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.

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.

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 Public 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.” See Pub. Health Law § 3380(5)(f)-(v).

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. See *Shelmidine Aff.*, ¶¶ 18-25 and *Fannon Aff.*, ¶¶ 12-17. Second,

Respondent's clerks sold the nitrous oxide to Investigators Shelmidine and Fannon knowing that they would utilize the product for inhalation because they sold them "crackers" and "balloons" as well (both devices used to open the canister and inhale the gas), thereby constituting a separate violation of Pub. Health Law § 3380. See Shelmidine Aff, ¶¶ 18-25 and Fannon Aff., ¶¶ 12-13.

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 stores. 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 Public Health Law § 3380, and repeated illegality in violation of Executive 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 Executive 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.

Executive 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 Executive 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 A.D.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 A.D.2d 314 (1st Dept. 2003); see also *Lefkowitz v. E.F.G. Baby Products Co.*, 40 A.D.2d 364, 368 (3d Dept. 1973). Executive Law § 63(12) protects 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), § 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, 348 (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 Executive 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 384, 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 and fraudulent 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 mislabeled and misbranded packaging that does not disclose the ingredients of the products, and the safety and health-related risks associated with the products.

As set forth in Point I(B)(3), Respondent offered for sale, and sold illegal products as legal, such as the nitrous oxide products.

As set forth in the affidavits of Sr. Inv. Shelmidine and Inv. Fannon, Respondent sold whip cream chargers that state on their packaging that they are not to be inhaled, but sold those products with accoutrements (crackers and balloons) that can only be used for one purpose -- the inhalation of the gas.

Last, Respondent sold Kratom OPM which deceptively states on its label that it "is not sold for human consumption" when clearly they were. See Exhibit M to Petitioner's Notice of Petition. Yet the label includes renditions of poppy plants, the source of opium which is meant for human consumption. The label further states, in a much larger font than the disclaimer, the following: "WELCOME TO THE OPM DEN!" OPM KRATOM IS THE FIRST OF MANY KRATOM PRODUCTS FORMULATED TO TAKE YOUR KRATOM EXPERIENCE TO THE NEXT LEVEL. 'OPM" IS FOR LEARNING; THOSE WITH STRONG HEARTS WILL RECEIVE MESSAGES FROM THE GODS." One would be hard-pressed to understand how the user would be transported "to the next level" without ingesting or inhaling the kratom. Last, the label warns: "Do not use while operating a motor vehicle, machinery, if you are pregnant or nursing,

or if you are taking prescription or non-prescription medication or drugs." This warning about its "use" would be superfluous if the product was not meant or intended for human consumption.

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

POINT II

PETITIONERS ARE ENTITLED TO INJUNCTIVE RELIEF, PENALTIES AND COSTS

The Attorney General has been afforded a powerful arsenal of remedies under the consumer protection laws. Pursuant to Executive 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, 105 (1977); *State v. Scottish-American Assn.*, 52 A.D.2d 528 (1st Dept. 1976), *app. dismd.* 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, 499 (1989), *State v. Princess Prestige*, 42 N.Y.2d 104, 106 (1977); *State v. Daro Chartours, Inc.*, 72 A.D.2d 872 (3d Dept. 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) in retail to the general 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 Dept 1995) (\$500,000 bond ordered); *People v. Helena VIP Personal Introductions Services of New York, Inc.*, 199 A.D.2d 186 (1st Dept 1993) (\$500,000 bond required); *People v. Empyre Inground Pools*, 227 A.D.2d 731, 732 (\$100,000 bond required); *Scottish-American Ass'n*, 52 A.D.2d 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 he 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 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 Executive 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 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.

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

Pursuant to Executive Law § 63(12), courts are empowered to grant wide-ranging equitable relief, including temporary restraining orders or preliminary injunctions, to redress the kind of fraudulent or illegal conduct engaged in by Respondents. *See, e.g., Apple Health & Sports Club, Ltd.*, 80 N.Y.2d 803, 807. The power of the court to grant and the standing of the Attorney General to seek broad remedial relief is not simply a matter of statutory authority under Executive Law § 63(12), but is grounded in general equitable principles. Once the equitable jurisdiction of the court is invoked, the full range of equitable remedies becomes available to the court. The court's power is not to be limited except by a clear provision in the statute. *Porter v. Warner Co.*, 328 U.S. 395, 397-98 (1946). Furthermore, where the public interest is served, the court's powers are even broader than in private litigation. *Id.* at 397-398. The court's power to grant equitable relief under consumer protection statutes includes the power to award interim ancillary relief. *See, e.g., F.T.C. v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718-719 (5th Cir.), *cert. denied*, 456 U.S. 973 (1982) ("In the exercise of this inherent equitable jurisdiction, the...court may order temporary, ancillary relief . . ."). Here, the granting of the temporary restraining order serves the interests of the public. An order restraining Respondents from deceptively marketing designer drugs and from offering for sale and selling mislabeled and misbranded products, as well as nitrous oxide, is necessary to protect the public.

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 temporary restraining order, temporarily enjoining Respondent from deceptively marketing and selling mislabeled and misbranded drugs and/or nitrous oxide, there is, in the words of Dr. Lundborg-Gray, an unreasonable risk that consumers will suffer physical harm.

CONCLUSION

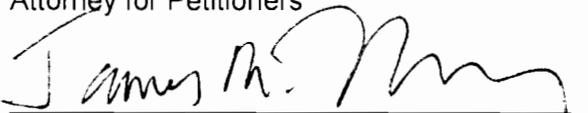
The Court should grant the relief requested in the petition.

DATED: Buffalo, New York
July 9, 2012

Respectfully submitted,

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