

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

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

Petitioner,

-against-

THERESA J. DYER, Doing Business As
LOOK AH HOOKAH,

Respondent.

**VERIFIED
PETITION**

INDEX NO.

2012 - 7558

2012 JUN 10 5:11 PM '12

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

PRELIMINARY STATEMENT

1. Petitioner brings this special proceeding pursuant to New York Executive Law § 63(12) and New York General Business Law (“GBL”) § 349 to enjoin Respondent Theresa J. Dyer, doing business as Look ah Hookah, from engaging in deceptive, fraudulent and illegal practices in connection with her business (commonly known as a “head shop”). 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 the effect of their use mimics controlled substances. Designer drugs and other street drug alternatives (hereinafter “designer drugs”) are marketed to avoid the provisions of existing drug laws; they are intended to stimulate, sedate or cause hallucinations or euphoria when ingested or inhaled. Petitioner also seeks civil penalties and costs, as authorized by statute, to be paid to the State of New York.

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

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

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

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

5. In addition, the New York State Public Health Law (hereinafter “Pub. Health Law”) § 3380 proscribes the retail sale of nitrous oxide to the public. Respondent offers for sale and sells nitrous oxide canisters to the public.

PARTIES AND JURISDICTION

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

7. Respondent Theresa J. Dyer is a resident of Monroe County. Respondent Dyer does business as Look ah Hookah. Look ah Hookah stores are located at 452 Ridge Road West, Rochester, New York 14626, 1635 East Henrietta Road, Rochester, New York 14623 and 1075 Ridge Road, Webster, New York 14580. A certificate of individual doing business under assumed name was filed in Monroe County on January 4, 2008, it certified that Theresa Jo Dyer was transacting business as Look ah Hookah at 192 Pond View Heights, Rochester, New York 14612. Theresa J. Dyer shall hereinafter be referred to as “Dyer,” “Respondent” or “Look ah Hookah.”

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

Article 22-A, which authorizes the Attorney General to seek injunctive relief, restitution and civil penalties against any person or business entity that has engaged in deceptive business practices.

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

FACTS

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

11. The Office of the New York State Attorney General Eric T. Schneiderman ("OAG") conducted an undercover investigation that revealed extensive evidence that Look ah Hookah offers for sale and sells mislabeled and misbranded designer drugs and nitrous oxide to the public.

12. The Food and Drug Administration (FDA) also considers any product that is promoted as a street drug alternative to be an unapproved new drug and misbranded drug in violation of sections 505 and 502 of the Federal Food, Drug, and Cosmetic Act. 21 U.S.C. §§ 321(p)(1), 352(f)(1).

13. As detailed below, Look ah Hookah offers for sale and sells designer drugs including but not limited to: Kratom, Salvia, Fly Agaric Mushrooms, Makes Scents MJ Blueberry and MJ VOODOO. Look ah Hookah also offers for sale and sells canisters of nitrous oxide, despite its lack of an exemption by the Commissioner of the State Health Department to

sell such products. Indeed, New York State Law does not allow exemptions for retail sale of nitrous oxide to the public.

14. On May 8, 2012 and May 25, 2012., Chad Shelmidine, a Senior Investigator employed by the OAG (“Inv. Shelmidine”), went to Look ah Hookah, located at 452 Ridge Road West, Rochester, New York 14626 and 1635 East Henrietta Road, Rochester and purchased designer drugs and pipes used to smoke the products.

15. Look ah Hookah offers for sale and sells MJ “VOODOO,” a type of designer drug that sales staff refer to as a form of “K2”.

16. The VOODOO packaging shows the letters MJ in flames to indicate smoking “Mary Jane” which is commonly used as a slang term for marijuana.

17. According to the product packaging, VOODOO contains 2 gram of an “Aromatic Potpourri” containing Verbascum Thapsus, Artemesia Vulgaris, and Alviae Folium.” The label claims that the product is “Cannabinoid Free” but “NOT FOR HUMAN CONSUMPTION.” Although the product is labeled not for human consumption, in fact, Look ah Hookah sales staff offer VOODOO as a designer drug to be smoked by users. Look ah Hookah sales staff acknowledged that a wooden pipe would work well to smoke it.

18. Look ah Hookah offers for sale and sells “Makes Scents” another type of designer drug.

19. According to its label, Makes Scents is a “Herbal Novelty”, the label reads “This product is intended for novelty and aroma purposes ONLY. DO NOT INSUFFLATE, INGEST, SMOKE OR BURN FOR ANY REASON!!! By purchasing this product, customer agrees to use only as directed and to indemnify the seller & manufacturer from any damages that may result from intentional or accidental misuse. Any misuse is strictly prohibited and is solely the customers responsibility and in no way the responsibility of the retailer or manufactures [sic]. If misuse occurs

please contact POISON CONTROL @ 1-800-222-1222. MAKES SCENTS IS A NOVELTY PRODUCT AND IS INTENDED TO CREATE AROMA ONLY AND IS NOT FOR HUMAN CONSUMPTION.", and "LAB CERTIFIED DOES NOT CONTAIN NAPHTHOYLINDOLES, NAPHTHYLMETHYLINODOLES, NAPHTHOYLPYRROLES, NAPHTHMETHYLINDENES, PHENYLACETYLINDOLES, CYCLOHEXYLPHENOLS, DIBENZOPYRANS, BENZOYLINDOLES OR THEIR SALTS OR ISOMERS OF SALTS WHERE THE RINGS ARE PRESENT." Thus, despite the description on the product label, there is no indication of what the package contains.

20. Look ah Hookah also offers for sale and sells "Kratom," another type of designer drug or street drug alternative.

21. According to the product packaging, the product is experience™ Kratom Black Label™, version 1.0. The label states that it is "100% Legal, 100% Effective, 100% Organic/All Natural," and "100% Guaranteed Not to Show Up on a Drug Test." The ingredients are identified as "200% Pure Extracted Mitrogyna Speciosa Leaf Enhanced with a Mitrogyna Speciosa 40% Alkaloid signature blend." A printed warning states, "Use with caution. Do not use while operating a motor vehicle or machinery, if you are pregnant or nursing, or taking any prescription or non-prescription drugs." There is a disclaimer that the product has not been evaluated by the FDA and is not intended to diagnose, treat or prevent any disease. By stating that the product is "100% Guaranteed Not to Show Up on a Drug Test," the product is being marketed as an alternative to an illegal drug.

22. The directions printed on the label instruct users to "Mix 2-3 grams of Kratom with 1 cup (250 mL) of boiling water or prepare according to your own preferences. Effects will last approx. 45-60 minutes."

23. According to the United States Department of Justice Department of Drug Enforcement, kratom is a tropical tree native to Southeast Asia. Like psycho-stimulant 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.

24. Look ah Hookah offers for sale and sells MJ “Blueberry,” a type of designer drug that sales staff refer to as a form of "K2".

25. The Blueberry packaging shows the letters MJ in flames to indicate smoking “Mary Jane” which is commonly used as a slang term for marijuana.

26. According to the product packaging, Blueberry contains 2 grams of an “Aromatic Potpourri” containing Verbascum Thapsus, Artemesia Vulgaris, and Alviae Folium.” The label claims that the product is “Cannabinoid Free” but “NOT FOR HUMAN CONSUMPTION.” Although the product is labeled not for human consumption, in fact, Look ah Hookah sales staff offer Blueberry as a designer drug to be smoked by users. Look ah Hookah sales staff acknowledged that a wooden pipe would work well to smoke it.

27. Look ah Hookah also offers for sale and sells “Fly Agaric Mushrooms (Amanita Muscaria)”

28. According to the packaging, the product contains “P.E.P. 100% Organic Mushrooms.” The label describes the product as the “highly sought after” “Eastern European Mushrooms” that are “Popular in pop culture and forever ingrained in our minds through its

classic portrayal in video games and in classic novels.” Pep mushrooms are described on the label as “grade A + + +, meaning they’re the finest grade mushrooms that were produced during harvest season. Because of this high grade, we only source the mushroom caps, never the stems. When you buy from Pep, you’re sure to get the highest quality product available.”

29. The label also bears a warning that “THIS PRODUCTS [SIC] IS NOT INTENDED FOR HUMAN CONSUMPTION” and states that the product is sold as a “botanical/horticultural/herbarium specimen only.”

30. 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.

31. Respondent offered for sale to the retail public a product called experienceTM brand Salvia 150fx. According to the packaging, the product was "pure salvinorin-A" that "contains highly potent rare precious salvinorin A extract of savia divinorum."

32. According to the U.S. Department of Justice Drug Enforcement Administration, salvia divinorum is an herb in the mint family native to certain areas of the Sierra Mazateca region of Oaxaca, Mexico. Salvia divinorum products are "abused for their ability to evoke

hallucinogenic effects, which, in general, are similar to those of other scheduled hallucinogenic substances." Salvinorin-A is believed to be the ingredient responsible for the hallucinogenic effects. Neither *Salvia divinorum* nor its active ingredient, Salvinorin-A, has any approved medical uses in the United States.

33. The experience Salvia 150fx was sold in a silver package with a sticker on the front which read: "Experience Salvia 150fX", "Pure Salvinorin A Standardized Extract", "The Journey Begins", "Version 4.0", "Intensity: Enjoyable", and "Contents: 1g". The back of the package contained the following information: "Experience Salvia 150fX", "Pure Salvinorin A Standardized Extract", "15x Market Equivalent", "Directions for use: Place 500mg per person into your favorite vessel and burn until effects occur within seconds. Effects will last 10-15 minutes per use.", "Use with Caution: Do not use while operating a motor vehicle, if you are pregnant, or nursing, or if you are taking any prescription or non-prescription medication or drugs.", "Manufactured exclusively by Experience Alternatives Inc., P.O. Box 1122, 141, 6200 McKay Ave., Vancouver, B.C., Canada, V5H-4M9", and "www.ExperienceAlternatives.com 1-800-309-1159".

34. Look ah Hookah sales staff indicated that Salvia is a hallucinogenic and that is "best to use through a water pipe" because Salvia has a "Relatively awful taste to it and the water works as a filter, and these pipes allow the user to take a much bigger hit, which would be more effective."

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

36. Respondent also offers for sale and sells "crackers," a device used to 'crack' the seal on the nitrous oxide chargers to inhale the gas and balloons. After piercing the seal, the cracker allows the gas to escape in a controlled fashion. A balloon is attached to the cracker to

capture the gas and allow it to absorb enough heat to be inhaled safely. It is then inhaled by the user to get high.

37. According to the packaging, the box contained twenty-four 8 gram cream chargers, each charger containing pure nitrous oxide (N₂O). The label included instructions that the chargers are specially made for making whipped cream in Cream Whippers and were not for use for any other purpose, and cautioned “do not inhale.” The label misleadingly states that nitrous oxide canisters may not be sold to persons under the age of 18; in New York State such canisters may not be sold for any reason to persons under age 21 and can not be sold at retail. There was no address or contact information for the manufacturer or distributor.

38. Look ah Hookah offers for sale and sells whipped cream chargers with accoutrements ("crackers" and balloons) that can only be used for one purpose - the inhalation of the nitrous gas.

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

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

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

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

42. The following products offered and sold by Respondent to the retail public are intended to affect the function of the human body: MJ VOODOO, MJ Bluebeery, Makes Scents, Salvia, Kratom Black Label, fly agaric mushrooms, and nitrous oxide. They are thus, classifiable as non-prescription drugs and are commodities under New York State Ag. & Mkts. § 191(4).

43. The above product labels do not satisfy the requirements for commodity labeling pursuant to the Ag. and Mkts. Law. The labels on these products fails to provide any information about the product’s identity (common or usual name, description, generic term) and consequently constitutes an additional infraction of the Ag & Mkts. Law labeling requirements.

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

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

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

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

47. The following products sold by Respondent are drugs pursuant New York State Educ. Law § 6802 since they constitute articles (other than food) intended to affect the structure or any function of the body of man or animals: MJ VOODOO, MJ Blueberry, Makes Scents, Salvia, Kratom, Fly Agaric Mushrooms and nitrous oxide.

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

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

49. In considering whether a drug is misbranded because it is misleading, the court must consider (i) the representations made or suggested by the manufacturer, but also (ii) in view of those representations, the failure of the manufacturer to disclose material facts with respect to

the consequences which may result from the customary or usual use of the drug. Educ. Law § 6802(13).

50. MJ VOODOO is misbranded for the following reasons:
 - a. It fails to bear a label containing the name of and place of business of the manufacturer, packer or distributor.
 - b. The label is misleading because it bears the warning “not for human consumption” when, in fact, this product is customarily and usually smoked by the user to produce an intoxicating effect.
 - c. The label fails to identify potential health effects that may result from customary and usual use of this drug.

51. MJ Blueberry is misbranded for the following reasons:
 - a. It fails to bear a label containing the name of and place of business of the manufacturer, packer or distributor.
 - b. The label is misleading because it bears the warning “not for human consumption” when, in fact, this product is customarily and usually smoked by the user to produce an intoxicating effect.
 - c. The label fails to identify potential health effects that may result from customary and usual use of this drug.

49. Makes Scents is misbranded for the following reasons:
 - a. The label fails to disclose the name of and place of business of the manufacturer, packer or distributor.
 - b. The label and directions for use are misleading because it states that the product is “not meant for human consumption” and is lab certified not to contain specific banned chemicals and recommend against burning the product, when, in fact, this product is customarily and usually smoked by the user to produce an intoxicating effect. Indeed, the label states that the product is lab certified not to contain specific banned chemicals, belying the fact that the product is not meant for human consumption.
 - c. The label fails to identify potential health effects that may result from customary and usual use of this drug.

50. Kratom Black Label 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.

51. Salvia 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.

52. PEP Fly Agaric Mushrooms are misbranded for the following reasons:

- a. The label fails to disclose the name of and place of business of the manufacturer, packer or distributor.
- b. The label and directions for use are misleading. Though the label states that the product is “not intended for human consumption,” this drug is customarily and usually smoked by the user to produce an intoxicating effect.

53. BestWhip Chargers is misbranded for the following reasons

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

54. Educ. Law §§ 6811(9) and (11) makes it a misdemeanor to sell, or receive in commerce, a misbranded drug. The labels of the MJ VOODOO, MJ Blueberry, Makes Scents, Salvia Kratom, Fly Agaric Mushrooms and Best Whip nitrous oxide are misbranded.

55. By offering for sale and/or selling misbranded drugs, Respondent has repeatedly and persistently violated Article 137 of the Educ. Law, Article 137.

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

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

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

58. Pursuant to the Pub. Health Law, there can be no exemptions for retail sale of nitrous oxide to the public.

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

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

61. Notwithstanding, to the extent that Pub. Health Law § 3380(5)(f) allows a seller to apply for an exemption to sell nitrous oxide to the public at retail, 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).

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

63. By offering for sale and selling nitrous oxide for the purpose of causing a condition of intoxication, inebriation, excitement, stupefaction, or dulling of the brain or nervous system, respondent repeatedly and persistently violated the New York Public Health Law.

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

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

65. Respondent has engaged in deceptive acts and practices including the following: (1) offering for sale and selling mislabeled and/or misbranded products for consumer use; (2) offering for sale and selling mislabeled and/or misbranded products making it impossible for customers to make an informed decision as to the intended use of the products, and the safety and health-related risks associated with the products; (3) deceptively marketing and promoting illegal products as legal, such as the nitrous oxide products; (4) repeatedly encouraging consumers to ingest or smoke products that he sells without disclosure of product ingredients, manufacturer information, dietary information, and/or other warnings; and (5) encouraging and promoting the use of products that are specifically labeled “not for human consumption” for ingestion and/or inhalation by consumers.

66. As set forth above, Respondent offered for sale mislabeled and misbranded drugs.

67. By offering for sale and/or selling mislabeled and misbranded drugs, respondent has repeated and persistently violated GBL § 349.

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

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

69. By offering for sale, and/or selling mislabeled and misbranded drugs, respondent has repeated and persistently engaged in fraud in violation of Executive Law, § 63(12).

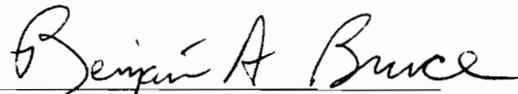
WHEREFORE, the People of the State of New York, pursuant to the powers vested by New York State Executive Law § 63(12) respectfully request judgment as follows:

- a. permanently enjoining Respondent, and his agents, trustees, servants, employees, successors, heirs and assigns, or any other person under his direction and control, whether acting individually or in concert with others, or through any corporate or other entity or device through which he may now or hereafter act or conduct business (“Respondent”), from offering for sale and/or selling mislabeled drugs in violation of Ag. and Mkts. Law § 194;
- b. permanently enjoining Respondent from offering for sale and/or selling misbranded drugs in violation of Educ. Law §§ 6802 and 6815;
- c. permanently enjoining Respondent from misleadingly offering for sale and/or selling products as designer drugs or other street drug alternatives, including encouraging ingestion of products that are labeled or specifically designated “not for human consumption;”
- c. permanently enjoining Respondent from offering for sale and selling nitrous oxide to the public in violation of Public Health Law § 3380;
- d. permanently enjoining Respondent, from engaging in the fraudulent, deceptive and illegal practices alleged in the petition in violation of GBL § 349;
- e. requiring Respondent to prepare an accounting of all commodities he sold, or offered for sale, from January 1, 2012 to June 25, 2012 including the (i) name of the product, (ii) the manufacturer and/or distributor of the product, (iii) a description of the product, (iv) the retail price of the product, and (iv) the number units of the product sold;

- f. requiring that Respondent comply with any and all state, local or federal labeling requirements;
- g. pursuant to GBL § 350-d, imposing a civil penalty of \$5,000 for each deceptive act committed by Respondent;
- h. pursuant to CPLR § 8303(a)(6), granting costs to the State of New York of \$2,000; and
- i. for such other and further relief as the court deems just and proper.

Dated:
Rochester, New York
July 9, 2012

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Attorney for Petitioner



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