

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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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.:
RJI No.:

-against-

DAN HEINS, doing business as SHINING STAR
ENTERPRISES,

Respondent.

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

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PRELIMINARY STATEMENT.....1

STATEMENT OF FACTS.....2

A. Background.....2

B. Products purchased from Respondent's store located at
244 Lark Street, Albany, New York.....5

ARGUMENT

POINT I: RESPONDENT'S ACTIVITIES CONSTITUTE REPEATED
AND PERSISTENT FRAUD AND ILLEGALITY
IN VIOLATION OF EXECUTIVE LAW § 63(12).....10

A. Introduction.....10

B. Respondent has engaged in repeated and persistent illegal conduct.....11

1. Respondent has engaged in repeated illegality in violation of
Executive Law § 63(12) by violating Agriculture & Markets Law
§ 194 (false labels).....11

2. Respondent has engaged in repeated illegality in violation of
Executive Law § 63(12) by violating Education Law § 6815
(misbranding of drugs).....14

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.....18

4. Respondent has engaged in repeated illegality in violation of
Executive Law § 63(12) by violating General Business Law § 349.....20

C. Respondent has engaged in repeated and persistent fraud in violation of
Executive law § 63(12) and deceptive practices in violation of GBL § 349.....20

POINT II: PETITIONER IS ENTITLED TO INJUNCTIVE RELIEF.....23

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.....24

C. Respondent should be ordered to pay penalties and costs.....25

D. The Court should grant the Temporary Restraining Order requested in the
Order to Show Cause.27

CONCLUSION.....28

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 Dan Heins, doing business as Shining Star (hereinafter referred to as “Respondent”) from engaging in deceptive, fraudulent and illegal practices in connection with his business. Respondent sells so-called “designer drugs,” which are synthetic versions of illegal drugs, as well as other street drug alternatives (referred to collectively as “designer drugs”). Designer drugs are manufactured, marketed and distributed as alternative to illegal street drugs. Designer drugs are intended to stimulate, sedate or cause hallucinations or euphoria when ingested or inhaled and are often marketed with claims that use mimics the effect of controlled substances. Petitioner also seeks civil penalties and costs, as authorized by statute, to be paid to the State of New York.

The sale of designer drugs has contributed to a public health crisis in New York State and across the nation. These products are typically labeled as innocuous products and packaged with 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, manufacturer information, directions for use and/or adequate health warnings.

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, 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 Nelson Aff. at ¶ 4 and Exhibit III, pp. 3-4, 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 Nelson Aff. ¶ 5, and Exhibit III, annexed thereto pp 3.

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 Methyone, 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 Nelson Aff., at ¶¶ 7-9, and Exhibit III at 5-14, 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 Methylenedioxypropylamphetamine, also known as MDPV - - which are known to have hallucinogenic effects.

¹ 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. See Nelson Aff., at ¶ 11, and Exhibit III at 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.

Nelson Aff. ¶ 12, and Exhibit III, 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 Nelson Aff., ¶ 13-14. 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, is 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 244 Lark Street, Albany, New York.

On May 22, 2012, Senior Investigator Chad Shelmidine (hereinafter Inv. Shelmidine) visited Respondent's store located at 244 Lark Street, Albany, New York. Inv. Shelmidine was undercover, posing as a consumer. See Nelson Aff., Exhibit I, Affidavit of Inv. Shelmidine, sworn to on July 6, 2012 (hereinafter "Shelmidine Aff."), ¶ 2. Respondent purchased five drug products from Respondent's store, including salvia, encapsulated kratom, liquid kratom, Glide 150, and nitrous oxide. See Shelmidine Aff. ¶ 47, 63. Each product is illegally labeled and misbranded.

The salvia product was contained in a clear plastic baggy with a paper seal labeled, "SALVIA," "\$12.99," "RAW LEAF," "5 grams." Shelmidine Aff. ¶ 42, Ex. E. There was no other information on the packaging. Nowhere on the package was there manufacturer or distributor information. See Shelmidine Aff. ¶ 42, Ex. E, annexed thereto. Respondent's clerk advised Inv. Shelmidine that the salvia was a "very psychedelic experience, but it's not exactly psychedelic experience like psychedelic LSD or something like that other especially, ha that other stuff...Um, it's not quite so happy go lucky." Shelmidine Aff. ¶ 19. Further, "You might forget your name," "You can't talk," and "You can't tell the difference between what you hear and what you think." "You may think you've lost your mind." Shelmidine Aff. ¶¶ 20-21.

The respondent informed Inv. Shelmidine that the salvia product needed to be burned at a very high temperature for effect, and that is why they sell torch lighters. Shelmidine Aff. ¶ 22. Respondent suggested that Investigator Shelmidine purchase a pipe for using the salvia so that it didn't mix with other substances in the pipe. Shelmidine Aff. ¶ 43-46, Ex. F.

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 active ingredient responsible for the hallucinogenic effects. Neither salvia divinorum nor Salvinorin-A, have any approved medical uses in the United States. See Exhibit B. Side effects also include losing coordination, dizziness and slurred speech. Nelson Aff., at Exhibit II, Lundborg-Gray, MD, Affidavit (hereinafter "Lundborg-Gray Aff.") at ¶ 9, Exhibit B.

Inv. Shelmidine also purchased a package of five "Lucky Kratom" capsules. According to the label, Lucky Kratom capsules were "Maximum Potency" and "Rx Strength," indicating that they were for human consumption. The label also advises "USE WITH CAUTION: Do not use while operating a motor vehicle, machinery, if you are pregnant or nursing, or if you are taking any prescription or non-prescription medication or drugs. Keep out of reach of children. This product has not been evaluated by the FDA & is not intended to diagnose, treat or prevent any disease." Shelmidine Aff. ¶ 33, Ex. B. The respondent described these capsules as "entry level" kratom, meant for pain relief, and suggested taking one capsule, waiting an hour, then taking another. Shelmidine Aff. ¶ 31. The respondent then stated, "I'm not sure if it's take two then two more or one then one more." Shelmidine Aff. ¶ 32. He then shrugged and said, "I think it's two." *Id.* There are no directions for use or dosage, nor anticipated effect listed on the label. Shelmidine Aff. at Ex. B. There is no information regarding the manufacturer or distributor address relative to this product, either.

Lucky Kratom Liquid Suspension was also purchased by Inv. Shelmidine. Respondent noted this selection was, "Very adventuresome!" Shelmidine Aff. ¶ 35, Ex. C. The kratom liquid was in a small dark vial inside a plastic sleeve. The plastic sleeve was stickered with the price (\$44.44), a number (P-4052) and the words, "Lucky Liquid." Shelmidine Aff. ¶ 37, Ex. C. The vial itself had a label which stated as follows on the front panel: "100% NATURAL", "LUCKY KRATOM", "MAXIMUM POTENCY", "MAENG DA", "Pure Alkaloid Suspension", "225mg = 9 grams of liquid in each bottle", "12ml". The rear panel stated: "MFG. By Nuevotanicals", "Botanical Extract Specimen", "ALL NATURAL XTRACTN- Alcohol, Acetone & Petroleum FREE", "NO SYNTHETIC INGREDIENTS".

The respondent instructed that the user has to cook about a dime-sized portion of the kratom liquid in an oil burner and then obtained a diffuser from under the counter. He indicated that the diffuser could also be used as a vaporizer. Shelmidine Aff. ¶ 38-39, Ex. D.

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 Lundborg-Gray Aff. at ¶ 10, and Ex. C, annexed thereto (DEA Drug Fact Sheet: Kratom).

Inv. Shelmidine also purchased a package of Glide 150 "Mindex". See Shelmidine Aff., ¶¶ 24-27, and Ex. A, annexed thereto. According to the label, the product is not intended for human consumption, but does not state an alternate use. See Shelmidine Aff., ¶ 26, and Ex. A, annexed thereto. The Glide was in a short cylindrical container and had a handglider depicted on the top label. The top label also stated: "GLIDE 150", "Mindex", "1/2 Stregth", "SOLD AS: 1 tablet 50 mg.," "ALL ABOARD," "FOR ADULTS ONLY!" Shelmidine Aff. ¶ 25, Ex. A. The bottom label of the Glide product had a smiley face surrounded by "NOT FOR HUMAN CONSUMPTION" written three times. It also states, "WARNING!! Always drink Lots of Water. Never use with alcohol. STRICTLY for SALE to ADULTS 18 years & over. Do not operate a motor vehicle or machinery. We promote moderation, safety & overall wellness. We

oppose irresponsibility, indulgence and excess." Shelmidine Aff. ¶ 26. Respondent explained to Inv. Shelmidine that while another product, "Flight 300," was "[l]ike 300-minutes of feeling really really really really really really really really really really really good...and then it just stops like *that* (snapping fingers)," the Glide product had a similar effect, but only for 150-minutes. "After 150-minutes, BOOM, you're back." Shelmidine Aff. ¶ 24.

There was no manufacturer, packer or distributor information on the Glide 150 label, and the label is misleading insofar as it states that it is not for human consumption, but the product is customarily ingested. The obvious indications that this is ingested are the warnings to drink a lot of water, avoid alcohol, do not drive or operate heavy equipment, and refrain from irresponsibility, indulgence and excess.

Inv. Shelmidine requested nitrous oxide chargers, and was given three alternatives. Shelmidine Aff. ¶ 53. He purchased a 50-cannister box of "NITRO whip". See Shelmidine Aff., ¶ 55-56. The box of nitrous oxide chargers included fifty chargers. See Shelmidine Aff., ¶ 56 and Ex. H, annexed thereto.

The "NITRO whip" box listed "IMPORTANT INFORMATION" including in part, "Not for sale to anyone under 18 or anyone suspect [sic] to misuse (21 in Ohio)", "Please use in accordance with manufacturers instructions.", "Do not inhale!", "Danger to health," "Keep out of reach of children," "Only to be used with cream whippers." There was no information regarding the identity of the manufacturer of "NITRO whip" on the box. Shelmidine Aff. ¶¶ 56-57, Ex. H.

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. See Shelmidine Aff., ¶ 58-60. Inv. Shelmidine told the respondent that he needed a cracker and a balloon. Inv. Shelmidine purchased 50 cream chargers, a cracker and a balloon. Shelmidine Aff., ¶ 63, and Exh. H, I, J, annexed thereto.

Nitrous oxide is an inhalant that is often inhaled using a balloon (method explained above). 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, difficulty maintaining 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).” See Lundborg-Gray Aff. at ¶ 15, and Exh. G, annexed thereto (Nitrous Oxide Alert Bulletin).

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. N.Y. Co. 1982).

B. Respondent Has Engaged in Repeated and Persistent Illegal Conduct

Respondent has engaged in repeated and persistent illegality in violation of Executive Law § 63(12). A violation of state, federal or local law constitutes illegality within the meaning of Executive Law § 63(12) and is actionable thereunder when persistent or repeated. State v. Princess Prestige, 42 N.Y.2d at 105; State v. Empyre Inground Pools, Inc., 227 A.D.2d 731, 732-733 (3d Dept 1996); State v. E.F.G. Baby Products Co., 40 A.D.2d 364, 366 (3d Dept 1973); State v. Anderson, 137 A.D.2d 259, 265 (4th Dept 1988); State v. Scottish American 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 drugs as “articles (other than food) intended to affect the structure or any function of the body of man or animals.” Educ. Law § 6802.² Salvia, Lucky Kratom Capsules, Lucky Kratom Liquid Suspension, Glide 150 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 Lundborg-Gray Aff., ¶¶ 5, 9, 10 and 15, and Exhibits B, C, and G, annexed thereto). Since Salvia, Lucky Kratom Capsules, Lucky Kratom Liquid Suspension, Glide 150 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 of a drug 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 salvia’s label identifies the product only as "salvia," though it was sold by Respondent’s clerk as a strong hallucinogenic product and for use with a torch and pipe. According to the label, the package contains a total 5g of salvia. No name or address of any manufacturer, packer or distributor can be found on the paper panel. Therefore, it is a mislabeled under 1 N.Y.C.R.R. § 221.4.

Lucky Kratom Capsules have a label indicating the package contains five capsules of "Rx Strength KRATOM" prepared with "Chemical Free Advanced Extraction Methods." Respondent stated it was to be used for pain relief. The label fails to identify the name or address of the manufacturer or distributor. Therefore, it is a mislabeled under 1 N.Y.C.R.R. § 221.4.

The label on the Lucky Kratom Liquid Suspension fails to identify the name and address of the manufacturer or distributor. Therefore, it is also mislabeled under 1 N.Y.C.R.R. § 221.4.

The Cream Chargers are packed in a box containing twenty-four 8 gram chargers. The brand is identified as "NITRO whip." Other than indicating the brand (“NITRO whip”), there is

no address indicated for the manufacturer or distributor. See Shelmidine Aff, ¶ 40, and Exh. F, annexed thereto. Therefore, the Whip Cream Charger is mislabeled under 1 N.Y.C.R.R. 221.4.

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

Respondent has repeatedly and persistently sold drugs in packaging that is misbranded in violation of the New York Education Law. As set forth in Point I(B)(2), salvia, Lucky Kratom Capsules, Lucky Kratom Liquid Suspension, Glide 150 and Nitrous Oxide are drugs for purposes of Educ. Law § 6802 since they affect the structure, or any function of the body, by stimulating, sedating, or causing hallucinations or euphoria when ingested or inhaled. As such, the packaging must comply with the requirements of the Educ. Law.

A drug is misbranded if: (1) its labeling is false or misleading; (2) its package does not contain the name and place of business of the manufacturer, packer, or distributor and accurate quantity of the contents; (3) its labeling does not include adequate directions for use and adequate warnings against use in those pathological conditions of 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 salvia product is misbranded because it fails to bear a label containing the name of and place of business of the manufacturer, packer or distributor. Educ. Law § 6815(2)(b). In addition, the product is misbranded because it is being sold as a hallucinogenic drug. The product is customarily smoked to produce an intoxicating effect and was sold by Respondent for that purpose. Indeed, Respondent's clerk made a recommendation and sold Investigator Shelmidine a pipe for its inhalation. Shelmidine Aff. ¶¶ 41-46. Since the product label fails to reveal any facts about potential health consequences associated with its customary use, the label is misleading, and the product is misbranded pursuant to Educ. Law § 6802(13).

Lucky Kratom Capsules is misbranded because the label fails to disclose 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 "Rx Strength" and "Maximum Potency," the label fails to identify the product and the potential health effects that may result from customary and usual use of this product.

Similarly, the Lucky Kratom Liquid Suspension is identified as a "Botanical Extract Specimen" with "MAXIMUM POTENCY," "Pure Alkaloid Suspension" and "NO SYNTHETIC INGREDIENTS." Shelmidine Aff. ¶¶ 35-37. The respondent then instructs on how to "cook" the liquid in a diffuser to inhale the toxins. The Lucky Kratom 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 become 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 Lundborg-Gray Affidavit, ¶ 10, and Ex. C, annexed thereto. Though the sole ingredient is claimed to be "100% NATURAL" "MAENG DA" "Pure Alkaloid Suspension", the package does not provide any potential and dangerous consequences of its use. See Shelmidine Aff., Ex. C. By failing to include warnings of its potential dangerous health effects, the labels of both Lucky Kratom products are misleading. Consequently, Lucky Kratom Capsules and Lucky Kratom Liquid Suspension are misbranded pursuant to the Educ. Law § 6815.

Glide 150 "Mindex" 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 ingested by the user to produce an intoxicating effect and was sold by Shining Star for that purpose. As such the product is misbranded pursuant to Educ. Law § 6802(13).

The package of the nitrous oxide product whip cream chargers purchased by Inv. Shelmidine identifies the brand as "NITRO whip," but does include an address for the company or distributor. Shelmidine Aff. ¶ 57, and Ex. H, annexed thereto. Thus, this product is misbranded pursuant to Educ. Law § 6815(2)(b). The package includes direction of use and

warnings including a statement that cream whipper and chargers should be used only in accordance with instruction and not for any other purpose. Consumers are instructed "Do not inhale!," "Danger to health!," and "Keep out of reach of children." 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 on the side of the box and the warnings 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 levels, 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 Lundborg Gray Aff., ¶ 15, and Ex. 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, 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. Therefore, the NITRO whip cream charger purchased by Inv. Shelmidine is misbranded because its package does not provide manufacturer, packer or distributor information and its labeling is misleading.

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

Pub. Health Law § 3380 specifically proscribes selling nitrous oxide to the public for the purpose of intoxication. The inhalation of nitrous oxide for purposes of inebriation, intoxication, excitement, stupefaction or euphoria is a dangerous practice among youths, which has led to death and injury. Sponsor Memo, Bill Jacket, L 1982, ch. 771 (Senator Goodhue). The purpose of this legislation is to ban the retail sale of nitrous oxide to prevent young people from purchasing it for “recreational use.” Sponsor Memo, Bill Jacket, L 1989, ch. 677 (Senator Masiello)

Pub. Health Law § 3380(2) states that: “No person shall, for the purpose of causing a condition of intoxication, inebriation, excitement, stupefaction, or the dulling of his brain or nervous system, intentionally smell or inhale the fumes from any hazardous inhalants or from any glue containing a solvent having the property of releasing toxic vapors or fumes; provided, that nothing in this section shall be interpreted as applying to the inhalation of any anesthesia or inhalant for medical or dental purposes.”

This section of the Pub. Health Law also sets forth the prohibition against selling nitrous oxide:

No person shall sell, or offer to sell, to any other person any tube or other container of any hazardous inhalants or glue containing a solvent having the property of releasing toxic vapors or fumes: (a) if he has knowledge that the product sold, or offered for sale, will be used for the purpose set forth in subdivision two of this section. [...]” Further, “[n]o person shall sell any canister or other

container of nitrous oxide unless granted an exemption pursuant to this subdivision.

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 cases of nitrous oxide chargers at retail to the public in violation of Pub. Health Law § 3380. See Shelmidine Aff, ¶ 53 and Ex. H, annexed thereto. Second, Respondent’s clerk sold the nitrous oxide to Inv. Shelmidine knowing that he would utilize the product for inhalation because he sold him “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. ¶ 63 and Ex. H, I, J, annexed thereto. 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 Exec. Law § 63(12) by Violating General Business Law, Article 22-A.

As set forth in Point I(C), *infra*, Respondent repeatedly and persistently violated GBL, Article 22-A and, thus, engaged in repeated and persistent illegality in violation of Exec. Law § 63(12).

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

Exec. Law § 63(12) defines the words “fraud” or “fraudulent” to include “any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression,

false pretense, false promise or unconscionable contractual provisions.” Courts have consistently applied an extremely broad view of what constitutes fraudulent and deceptive conduct in proceedings brought by the Attorney General under Exec. Law § 63(12). See, e.g., Lefkowitz v. Bull Investment Group, 46 A.D.2d 25, 28 (3d Dept. 1974), lv. denied, 35 N.Y.2d 647 (1975); People v. 21st Century Leisure Spa Int’l Ltd., 153 Misc.2d 938, 943 (Sup. Ct. N.Y. Co. 1991). Thus, it is well-settled that traditional elements of common law fraud such as reliance, actual deception, knowledge of deception and intent to deceive are not required to establish liability for statutory fraud. See People v. Apple Health & Sports Clubs, Ltd., 206 AD.2d 266, 267 (1st Dept. 1994), app. denied, 84 N.Y.2d 1004 (1994); State v. Ford Motor Co., 136 A.D.2d 154, 158 (3d Dept. 1988), 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. Ginsburg, 43 N.Y.2d 268, 273 (1977); People v. Applied Card Systems, Inc., 27 A.D.3d 104, 106 (3d Dept. 2005); State v. General Elec. Co., 302 A.D.2d at 314; People v. Dell, Inc., 21 Misc.3d 1110(A), 4 (Sup. Ct. Alb. Co. 2008).

GBL § 349 is similarly broad. Like Executive Law § 63(12), GBL § 349 is “intended to be broadly applicable, extending far beyond the reach of common law fraud.” State v. Feldman, 210 F. Supp.2d 294, 301 (S.D.N.Y. 2002). Indeed, a practice may carry the capacity to mislead

or deceive a reasonable person and thus violate GBL § 349, but not be fraudulent under common law. Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330, 384 (1999). Even omissions may be the basis for claims under GBL § 349. People v. Applied Card Systems, Inc., 27 A.D.3d at 107.

GBL § 349(a) declares unlawful “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in New York. As with statutory fraud under Exec. Law § 63(12), intent, proof of actual deception and reliance are not elements of a cause of action under GBL § 349. See General Elec. Co., 302 A.D.2d at 315; People v. Network Assocs. Inc., 195 Misc.2d 348, 389 (Sup. Ct. N.Y. Co. 2003); In re State v. Colorado State Christian College of the Church of the Inner Power, Inc., 76 Misc.2d 50, 56 (Sup. Ct. N.Y. Co. 1973). Moreover, because GBL § 349 “was intended to ‘afford a practical means of halting consumer frauds at their incipiency without the necessity to wait for the development of persistent frauds,’” Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25 (1995), the Attorney General may bring an action under this law before any consumer has been injured, and need not await consumer complaints. See GBL § 349(b) (authorizing the Attorney General to seek injunctive relief when he believes a business “has engaged in or is about to engage in” deceptive acts or practices); Goshen v. Mut. Life Ins. Co. Of New York, 98 N.Y.2d 314, 324 (2002) (“Unlike private plaintiffs, the Attorney General may . . . seek injunctive relief [under GBL § 349] without a showing of injury”); Management Transaction Resources, Inc., 115 Misc.2d at 491 (“It is not necessary for the Attorney General to await consumer complaints before proceeding to enjoin”).

Respondents have 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, Respondents offer for sale and sell 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 Glide 150 was labeled “not for human consumption,” Respondent encouraged its ingestion. See Shelmidine Aff., ¶24. The store clerk also discussed the physical effects of consuming kratom, and suggested inhalation methods for the Lucky Kratom Liquid Suspension. See Shelmidine Aff., ¶ 8-10, 38-39. As set forth in Point I(B)(3), Respondent offered for sale and sold illegal products such as nitrous oxide. As set forth in the affidavit of Inv. Shelmidine, Respondent sold whip cream chargers that state on their packaging that they are not to be inhaled, but sold these products with accoutrements (crackers and balloons) that can only be used for one purpose -- the inhalation of the gas. See Shelmidine Aff., ¶ 53-63.

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

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 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 product, 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 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.” See Lundborg-Gray Aff., ¶ 3.

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

CPLR § 8303(a)(6) provides that the Court may award the Attorney General “a sum not exceeding two thousand dollars against each defendant” in an Executive Law § 63(12) special proceeding. Courts have routinely granted these costs. See e.g., State of New York v. Daro Chartours, Inc., 72 A.D.2d 872, 873 (3rd Dept. 1979); State v. Midland Equities of N.Y., Inc., 117 Misc.2d 203, 208 (Sup. Ct. N.Y. Co. 1982); People v. Therapeutic Hypnosis, 83 Misc.2d 1068, 1071-1072 (Sup. Ct. Albany Co. 1975); Lefkowitz v. Hotel Waldorf-Astoria Corp., 67 Misc.2d 90; 92 (Sup. Ct. N.Y. Co. 1971). Accordingly, this Court should impose \$2,000 in costs against Respondent.

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.

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 Respondent during the pendency of this action.

CONCLUSION

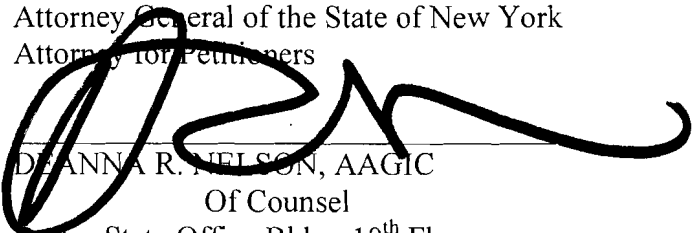
For the reasons set forth above, the Court should grant the relief requested in the petition.

DATED: July 9, 2012

Respectfully submitted,

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY**

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

Petitioner,

-against-

DAN HEINS,
d/b/a **SHINING STAR ENTERPRISES,**
244 Lark Street
Albany, New York 12207,

Respondent.

Index No.
RJI No.

MEMORANDUM OF LAW

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