

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

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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.

IAS Part _____

-against-

Assigned to Justice

**NIAZ KHAN, PHILLIP PULCCA, AIDA GUACH,
LISANKA SANCHEZ, JOHN DOE and/or JANE DOE
d/b/a LEGALHERBALBUD.COM,**

Respondents.

-----X
**MEMORANDUM OF LAW
IN SUPPORT OF VERIFIED PETITION**

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Petitioner
Harlem Regional Office
163 West 125th Street, 13th Floor
New York, New York 10027
(212) 364-6010

ROBERTO G. LEBRON
Assistant Attorney General In Charge
Harlem Regional Office

JASON M. CLARK
Assistant Attorney General
Of Counsel

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PRELIMINARY STATEMENT

The Office of the New York State Attorney General ("Petitioner") brings this summary proceeding pursuant to New York Executive Law § 63(12), New York Agriculture & Markets Law § 194, and New York Education Law §§ 6808 and 6815 to enjoin the respondents, Niaz Khan, Phillip Pulcca, Aida Guach, Lisanka Sanchez, and John and/or Jane Doe, doing business as Legalherbalbud.com (collectively referred to as "Respondent" or "Legalherbalbud"), from illegally and fraudulently selling falsely labeled and misbranded designer drugs. By selling drugs without registering with the New York State Education Department, Legalherbalbud is in essence, operating a de facto pharmacy in violation of New York Education Law § 6808. Legalherbalbud has also violated New York General Business Law §§ 349 and 350 by engaging in deceptive business practices and false advertising.

Legalherbalbud is an online retailer of designer drugs. Many of its designer drugs are stylized as synthetic marijuana, which is a drug that induces mind-altering and euphoric effects. Often, the chemical formulations used to manufacture these drugs are so novel that they have not yet been incorporated into any criminal "controlled substances" lists.¹ These rapidly evolving designer drugs are known to cause hallucinations, seizures, organ failure, and in some cases, can even be life-threatening. Legalherbalbud falsely characterizes its products as "herbal incense" and "potpourri," and affixes a deceptive "not for human consumption" disclaimer to the packaging. Legalherbalbud has violated New York State's labeling laws by: 1) failing to label its products with an identifying common or generic name; 2) omitting statutorily required manufacturer information; 3) affixing misleading and false information to its packaging; 4) omitting proper dosage directions; and 5) failing to disclose significant health risks that may occur even when used as directed. Legalherbalbud is also liable for engaging in deceptive conduct and false advertising because it misrepresents its products to be herbal incense, potpourri, and "not for human consumption," when in fact, they are designer drugs sold for consumption purposes. Furthermore, Legalherbalbud has violated New York Education Law § 6808 and General Business Law § 130 by selling drugs without registering as a pharmacy, manufacturer, or distributor; and by operating a business under an assumed name without registering the assumed name with the county clerk's office.

¹ See Affidavit of Chief Medical Officer at Metropolitan Hospital Center Dr. John T. Pellicone, attached as Exhibit C to the Clark Affirmation, ¶ 4.

This case is brought in response to the recent surge in designer drugs being sold to New York consumers.

STATEMENT OF FACTS

A. Background

The sale of designer drugs, including synthetic marijuana, has led to a public health crisis throughout New York State. From April 6, 2015 to June 30, 2015, the number of synthetic marijuana patients admitted to critical care units in New York State increased 44% when compared with admission numbers from April 1, 2011 to June 5, 2015. See NEW YORK STATE DEPARTMENT OF HEALTH REGULATION - Synthetic Phenethylamines and Synthetic Cannabinoids (SP & SC) Prohibited (January 2, 2013) p. 8, https://www.health.ny.gov/regulations/recently_adopted, (“NYS Department of Health Synthetic Phenethylamines & Synthetic Cannabinoids Regulation”), attached as Exhibit K to the Affirmation of Jason M. Clark (“Clark Affirmation”). In fact, from January 1, 2015 through December 31, 2015, there were over 4,500 synthetic cannabinoid-related visits to New York City emergency departments. See New York City Department of Health & Mental Hygiene 2015 Advisory #36: Increase in Synthetic Cannabinoid (K2)-Related Adverse Events & Emergency Department New York City Visits (“NYC Department of Health 2015 Advisory #36”), attached as Exhibit L to the Clark Affirmation, p. 1. Nationally, there were fifteen deaths attributed to synthetic marijuana last year, including one in New York City. See, NYC Department of Health 2015 Advisory #36, Clark Affirmation, Exhibit L, p. 1; see also NYS Department of Health Synthetic Phenethylamines & Synthetic Cannabinoids Regulation, Clark Affirmation,

Exhibit K, at p. 15. Furthermore, as recently as July 12, 2016, 33 New York City residents were hospitalized for synthetic marijuana overdoses, which then rose 130 victims over the next six days. See Eli Rosenberg & Nate Schweber, “33 Suspected of Overdosing on Synthetic Marijuana in Brooklyn, N.Y. Times,” July 13, 2016, at p. 1; see also Sarah Nir, “K2 Overdoses Surging in New York: At Least 130 Cases This Week Alone,” N.Y. Times, July 15, 2016 at p. 1, both attached as Exhibit N to the Clark Affirmation.

According to the United States Food & Drug Administration (“FDA”), “street drug alternatives” are: (i) “manufactured, marketed, or distributed as alternatives to illicit street drugs;” (ii) “intended to be used for recreational purposes to effect psychological states (e.g. to get high, to promote euphoria, or to induce hallucinations),” and/or (iii) purport to “mimic the effects of controlled substances.” See FDA’s Guidance for Industry: Street Drug Alternatives (“FDA Street Drug Alternatives Guide”), attached as Exhibit G to the Clark Affirmation, ¶3. Albert Hofmann, an early synthetic drug chemist, noted that synthetic drug manufacturers are constantly changing their formulas to keep their drugs off government controlled substances lists:

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.

Gregory Kau, Comment, Flashback to the Federal Analog Act of 1986: Mixing Rules & Standards in the Cauldron, 156 U. PA. L. REV. 1077 (2008), attached as Exhibit J to the Clark Affirmation, at p. 1083.

The United States Drug Enforcement Administration ("DEA") has used its emergency scheduling authority to control five types of synthetic cannabinoids. See Office of National Drug Control Policy: Synthetic Drugs, <https://www.whitehouse.gov/ondcp/ondcp-fact-sheets/synthetic-drugs-k2-spice-bath-salts> (last visited July 15, 2016), attached as Exhibit H to the Clark Affirmation, p. 2. The federal government has also enacted the Synthetic Drug Abuse Prevention Act, permanently classifying twenty-six forms of synthetic chemicals (including synthetic marijuana analogues) as prohibited substances. See id. In 2012, New York State Health Commissioner Nirav Shah issued an order of summary action banning the sale of synthetic cannabinoid products in New York State. See IN RE THE SALE AND DISTRIBUTION OF SYNTHETIC CANNABINOIDS, Order of Summary Action, New York State Department of Health (March 28, 2012), attached as Exhibit I to the Clark Affirmation. Then, on August 3, 2015, New York City Department of Health & Mental Hygiene Commissioner Mary T. Bassett issued an order for summary action prohibiting the sale and distribution of all products containing synthetic cannabinoids. See IN RE ORDER OF THE COMMISSIONER TO RETAIL VENDORS OF PRODUCTS CONTAINING SYNTHETIC CANNABINOIDS IN THE CITY OF NEW YORK, Order of Summary Action, New York City Department of Health & Mental Hygiene ("NYC Synthetic Cannabinoids Order for Summary Action") (dated August 3, 2015), attached as Exhibit M to the Clark

Affirmation. The NYC Synthetic Cannabinoids Order for Summary Action prohibits the sale of any synthetic cannabinoids misbranded as “herbal incense,” and specifically bans 111 popular brands, including several products sold by Legalherbalbud to the Petitioner such as the following: AK47, California Kronic, Caution, Diablo, Green Giant, iBlown, Joker, Kisha Cole, Psycho, Red Eye Jack, Red Giant, Scooby Snax, and Smacked. Compare id. at p. 3 with See Affidavit of New York State Attorney General Senior Investigator Cynthia Kane (“Kane Affidavit”), attached as Exhibit B, to the Clark Affirmation, at ¶¶ 6, 16, 29, 40.

1. Legalherbalbud’s Designer Drug Sales to Petitioner

On January 12, 2016, Office of New York State Attorney General Senior Investigator Chad Shelmidine (“Investigator Shelmidine”) created a fictitious identity in conjunction with an investigation into the website Legalherbalbud.com. See Affidavit of New York State Attorney General Senior Investigator Chad Shelmidine (“Shelmidine Affidavit”), ¶ 19, attached as Exhibit A to the Clark Affirmation. After creating an account on the Legalherbalbud website, Investigator Shelmidine attempted to purchase several products by adding them to the online “checkout cart.” See id. at ¶ 20. The Legalherbalbud website describes each of its advertised products as a “K2 alternative.” See, e.g., Shelmidine Affidavit, Clark Affirmation, Exhibit A, at Exs. A-6 through A-9. The term “K2” is a common name for synthetic marijuana stylized designer drugs. See Office of National Drug Control Policy: Synthetic Drugs, Exhibit H, at p. 1. Before Investigator Shelmidine could complete the purchase, he received a phone call from an individual who identified herself as “Samantha from the Legalherbalbud.com Wholesale

Department.” See id. at ¶ 21. Investigator Shelmidine introduced himself to her using a pseudonym and claiming to be the owner of a company named “East Coast Pipe Dreams.” See id. Samantha explained that Legalherbalbud does not accept orders online, and that he would have to use Western Union or Moneygram to pay for his purchase. See id. at ¶ 22. She also directed him not to address his payment to Legalherbalbud directly, but rather to an individual named Aida L. Guach. See id. at ¶ 24.

After several phone conversations with Samantha, on January 28, 2016, Investigator Shelmidine ordered an assortment of smokeable designer drugs in a synthetic marijuana-type format from Legalherbalbud costing a total of \$530.00. See id. at ¶ 23. He completed the order by transferring \$530.00 to Aida Guach. See id. The next day, Investigator Shelmidine received an e-mail from Samantha stating “This is Samantha, send here teh [sic] receipt [sic] of Western Union later this is my email using for my Wholesale transaction.” Id. at ¶ 26.

Investigator Shelmidine e-mailed Samantha a receipt from Western Union confirming that he wired \$530.00 to Aida Guach. See id. at ¶ 26. Samantha responded by acknowledging receipt and replying “I’ll get back to you later to send here [sic] what products that I will sent [sic] it to you I will check first what products we have stocks now for top sellers.” Id. at ¶ 27. She also requested additional sender information explaining that “[w]e need that one for Aida to claim the money.” Id. The following day, Samantha informed Investigator Shelmidine that a shipment of Legalherbalbud products had been mailed to him and that the tracking number for the shipment was

EK882111458US. See id. at ¶ 28.

On February 1, 2016, New York State Attorney General Investigator Cynthia Kane retrieved a package from a United States Post Office box in East Harlem, New York County. See Kane Affidavit, Clark Affirmation, Exhibit B at ¶ 4. The inside address read “Freddy Ortiz, 2746 Holland Ave, Bronx New York 10467,” but the mailing address matched the address Investigator Shelmidine sent Samantha. See id. at ¶ 5. The tracking number was EK882111458US, which also matches the tracking number Samantha gave Investigator Shelmidine. Compare Shelmidine Affidavit, Clark Affirmation, Exhibit A at ¶ 29, with Kane Affidavit, Clark Affirmation, Exhibit B at ¶ 5. The shipment contained 36 packages of synthetic marijuana from five different brands. See Shelmidine Affidavit, Clark Affirmation, Exhibit A at ¶ 30. There were 10 packages of “Deadman Walking,” 10 packages of “AK47,” 6 packages of “Caution,” 5 packages of “Green Giant,” and 5 packages of “Kisha Cole.” See id.

On February 19, 2016, Investigator Shelmidine placed a second order with Legalherbalbud. See id. at ¶ 31. As with the previous purchase, Samantha instructed him to send payment to Aida Guach via Western Union. See id. Investigator Shelmidine sent Ms. Guach \$530.00. See id. The next day, Samantha sent an e-mail confirming that the order had been shipped. See id. at ¶ 33. On February 23, 2016, Investigator Cynthia Kane retrieved the package from a United States Post Office box in East Harlem, New York County. See Kane Affidavit, Clark Affirmation, Exhibit B, at ¶ 14. The shipment included 34 packages of synthetic marijuana from seven different brands. See Shelmidine Affidavit, Clark Affirmation, Exhibit A, at ¶ 35. There were 5 packages of

“Green Giant,” 5 packages of “Scooby Snax: Green Apple,” 2 packages of “Scooby Snax: Hydro,” 5 packages of “Diablo,” 3 packages of “Psycho,” 5 packages of “iBlown,” 3 packages of “Joker,” and 6 packages of “AK47.” See id. As with the previous purchase, the inside address listed a “Freddy Ortiz, 2745 Holland Avenue, Bronx, New York 10467.” Id.

On May 31, 2016, Investigator Shelmidine made a third purchase by e-mailing Legalherbalbud the following:

Hey Samantha, I'm ready to make another order. I know I missed your big wholesale weekend sale but that's ok. I've just been very busy!! I'd like to make another order for 35 bags. First I need 5 bags of your AK-47. I promised one of my customers I would order more of that for him. He said that it is the most potent stuff he has ever smoked and can still feel the effects from it more than three hours later. He has been coming into the store almost every day asking for more so he will be happy when this next shipment comes in!!

Shelmidine Affidavit, Clark Affirmation, Exhibit A, at Ex. A-25.

That same day, Samantha sent the following response:

Good morning! :) Busy is good in the business, anyway I will check first from our Shipping Incharge [sic] if we have those products that you wanted. Because last week [sic] items are easily run out of stock since we have the weekend sale! Good to hear that your customer love [sic] our Ak47, honestly it is really one of our top seller [sic]. I'll get back to you as soon as I have a reply already.

Id.

Samantha sent directions for Investigator Shelmidine to wire \$530.00 to an individual named Lisanka Sanchez. See id. at ¶ 42. She also sent the United States Post Office tracking number, EL356093222US. See id. On June 2, 2016, Investigator Kane received a delivery from a “Juan Rivera” with a return address of 817 Freeman St., Apt. 2, Bronx, New York 10459. See Kane Affidavit, Clark Affirmation, Exhibit B, at ¶¶ 27, 28. The

inside label was addressed to "East Coast Pipe Dreams," and the tracking number matched the number Samantha gave him. See Shelmidine Affidavit, Clark Affirmation, Exhibit A at ¶ 43. The shipment included 36 packages of smokeable synthetic marijuana-type designer drugs from seven different brands. See id. at ¶ 44. There were 5 packages of "Mind Trip," 5 packages of "Incredible Hulk," 5 packages of "Deadman Walking," 5 packages of "California Kronic Potpourri: 24K," 5 packages of "Red Eye Jack," 6 packages of "Black Lion," and 5 packages of "Scooby Snax." Id.

Investigator Shelmidine made a final purchase on June 14, 2016. See id. at ¶ 46. He wired \$330.00 to Aida Guach, and received the following United State Post Office tracking number for the shipment: EL092254984US. See id. at ¶ 48. On June 20, 2016, Investigator Kane received a delivery in East Harlem, New York County from Freddy Ortiz, addressed to "East Coast Pipe Dreams." See Kane Affidavit, Clark Affirmation, Exhibit B at ¶¶ 38, 39, Ex. B-24. The tracking number matched the number given to Investigator Shelmidine by Legalherbalbud and included 14 packages of Red Giant and 2 packages of Smacked. See Shelmidine Affidavit, Clark Affirmation, Exhibit A at ¶ 49.

1. E-mail Promotions

Upon commencing this investigation, Investigator Shelmidine began receiving monthly e-mail promotions from Legalherbalbud. See id. at ¶ 16. One e-mail promotion, which was sent on February 13, 2016, featured the product AK-47. See id. The advertisement read:

This little O.G. has been re-branded to be more potent than before. When our retailers told us this, we knew we had to market it right away and spread the word to our faithful fan base...Please note all items will be

replaced with the next potent blend if one potent blend is not available. Keep in mind it's not the packaging but what is inside it :-).
Id. at Ex. A-16 (emphasis added).

Similarly, on June 13, 2016 he received an e-mail promotion for the product "Red Giant" that read:

This bad boy is the cousin of Green Giant. We here at LegalHerbalBud.com know exactly who is buying what. That is why we know how popular Green Giant is to every potent Aroma Therapy lover. If you want that potent refreshing scent that will leave you in cloud 9 every burn then you should not turn your back on this newest 2016 upgrade. This product is now banned in NEW YORK, however it is still legal in all other states. Please note if you are from NEW YORK CITY please do not purchase this product as it may cause legal issues in your state. Due to high potency and recent chemical upgrades since it is brand new other states have not yet caught up."

....
Don't forget to leave a positive feedback review so other Aroma lovers just like you can relate and be reassured that what they are purchasing is simply the best on the net from us!
Id. at Ex. A-31, p.1.

2. Product Packaging Labels and Customer Reviews

In total, nineteen brands of Legalherbalbud products were purchased on January 28, 2016, February 19, 2016, March 31, 2016, and June 14, 2016. The brands are: Green Giant, AK47, Caution, Deadman Walking, Joker, Psycho, Diablo, Kisha Cole, Scooby Snax (Green Apple), Scooby Snax (Hydro), iBlown, Mind Trip, Black Lion, California Kronic Potpourri: 24K, Red Eyed Jack, Incredible Hulk Kush, Red Giant, Smacked (Lemon-Lime) and Smacked (Strawberry). See Kane Affidavit, Clark Affirmation, Exhibit B at ¶¶ 6, 16, 29, 40. As of December 24, 2016, the Legalherbalbud website also advertised the following additional products for sale: Bizarro, Shaggy's Mix, Jazz Mango, Pineapple Kush, Insane, Orgazmo, Bomb Marley, OMG, Krazy Jack, and

California Dreams. See Shelmidine Affidavit, Clark Affirmation, Exhibit A at Ex. A-6, p. 1. In the “About us” section of the Legalherbalbud website, it states that “These products are K2 alternatives which are currently legal in 50 states.” See id. at p. 2. The packages on the products purchased from Legalherbalbud read as follows:

a. Green Giant

Front Packaging: “Green Giant: Herbal Potpourri,” 5G, “Warning: Extra Potent Blend.”

Back Packaging: “Not for Human Consumption: Green Giant,” Ingredients: Damiana Leaf, Marshmallow Leaf, Coltsfoot, Sage, Mullein, and Blue Lotus Leaf.

See Kane Affidavit, ¶ 9, Exhibit B-4; Ex. A-8, p.1

The Legalherbalbud website lists seventeen customer reviews for Green Giant, including six customer reviewers Legalherbalbud had designated as “verified buyers.” One reviewer named “Jason from LA,” wrote in reference to Green Giant, “I absolutely love this product. I am in the military so I can’t smoke the real thing...but this is better than the real thing. Strongly recommend it.” See Shelmidine Affidavit, Exhibit A, Ex. A-8, p.

1.

b. AK47

Front packaging: AK47: 24 Karat Gold, 5g

Back packaging: AK47. Premium Products. Herbal Simmering Potpourri. Instructions for use: Take desired amount of potpourri, place into a simmering pot or pan on your stove. Add a half inch of water into the pot or pan. Turn on the simmering pot or place stove temp to medium low, which will fill the air with the sweet aroma of potpourri. This product is intended for aroma purposes and use only. Ingredients: Proprietary blend of cut and sifted Raspberry leaf, Safflower, natural scenting oils along with other natural herbs and spices. Caution: USE AS DIRECTED ONLY. DO NOT INTENTIONALLY INHALE, INGEST OR BURN FOR ANY REASON!!! By purchasing this product, customer agrees to use only as directed. Indemnifying the seller and manufacturer from any damages that may result

from any use not in accordance with the directions and cautions whether intentional or accidental, is strictly prohibited and is solely the customers [sic] responsibility and in no way the responsibility of the retailer or manufacturer. If ingested immediately contact a MEDICAL profession or POISON CONTROL @ 1-800-222-1222. AK-47 IS A [sic] AROMA THERAPY PRODUCT AND IS INTENDED TO CREATE AROMA ONLY AND IS NOT INTENDED FOR CONSUMPTION.

See Kane Affidavit, Exhibit B, ¶ 11, Ex. B-6.

The Legalherbalbud website lists 31 customer reviews for AK47, including three customer reviewers Legalherbalbud had designated as “verified buyers.” Below are three customer reviews for AK47:

- *“Jonathon McCoy from Orange Va.”* – “Best herb I have ever smoked just ordered more today can't wait too bad USPS is slow as hell.”
- *“Nate from USA”* – This stuff is awesome if you want to feel like you've done every drug at one time. I for one do not want to feel that way which is why I threw what was left of mine away.”
- *“John alanis from Utah USA,”* – “Hi peeps my name is john alanis [a]nd I would recommend ak-47 for everyone who loves to get up in the clouds without failing a DT [Drug Test].”

See Exhibit A-7, pp. 1, 2.

c. Caution

Front packaging: Caution: Super Strong Incense. You think you can handle it? For aromatherapy only. Burn in a well-ventilated area. Not for human consumption. Manufacturers and retailers of this product take no responsibility for the incorrect use or misuse of this product. 4 gram.

Back packaging: Caution: For fragrance purposes only. Not for human consumption. Keep out of reach of children and pets and make sure all ashes fall in ashtrays or burners smoky inhalation may cause light-headedness and be harmful to your health. Burn in a well-ventilated area. Tested and certified by: Toxicology Association Inc. Does not contain JWH-018, JWH-073, JWH-133, JWH-200, JWH-210, HU-210, HU-211, CP47, 497 2, WIN 55, 212-2.

See Kane Affidavit, ¶ 12, Exhibit B, Ex.B-7.

As of the date of this affidavit, Caution was not listed on the Legalherbalbud website, but was readily available for purchase. There were no customer reviews available.

d. Deadman Walking

Front packaging includes the following: Deadman Walking. Warning, Extra potent blend. 4G.

Back packaging includes the following: Not for Human Consumption. Deadman Walking. Ingredients: Tussilago Farfara, Althaea, Tumed Diffusa, Artemisia Vulgaris, Verbascum Thapsus

See Kane Affidavit, ¶ 10, Exhibit B, Ex.B-5.

As of the date of this affidavit, Deadman Walking was not listed on the Legalherbalbud website, but was readily available for purchase. There were no customer reviews available.

e. Joker

Front packaging: New Joker. Premium natural blend. 5g. Six Generation: SWALHA +18.

Back packaging: New Joker. Caution: For fragrance purposes only. Not for human consumption. Keep out of reach of children and pets. DO NOT BURN. www.fairly-legal-incense.com. DOES NOT CONTAIN: AM-2201, JWH-081, JWH-019, JWH-018, JWH-073, JWH-015, JWH-200, JWH-250, HU-210, HU-211,[CP 47.497], [CP 47, 497-C8(Homologue)]. Delta-THC(natural). Previous bags are counterfeited please visit our website for more information. most [sic] be 18 or older.

See Kane Affidavit, Exhibit B, ¶ 21, Ex.B-12.

The Legalherbalbud website lists eleven customer reviews for Joker, including three customer reviewers Legalherbalbud had designated as “verified buyers.” One reviewer named “First time customer from Indiana,” referring to Joker, posted the following: “I ordered the five gram joker and got it in five days it smells so good and it burns slow its sweet almost fruity. Its [sic] very relaxing i only burned a little bit of it and i feel great so it will last a long time. I'm highly satisfied i will shop here again.” See Shelmidine Affidavit, Exhibit A, Ex. A-9, p.8.

f. Psycho

Front packaging: Psycho. 5g. Next generation. Herbal Potpourri. Does not contain AM2201 or any DEA Banned Substance.

Back packaging: Ingredients: Bay Bean, Siberian Motherwort, Mugwort, Blue Lotus, Lion Tail, Aroma Essence. sold as incense only. not for human consumption. Potpourri does not contain any of the following: JWH-018, JWH-073, HU-210, HU-211, CP-47, 497, AM-2201. It's Legal in 50 States, 100% Legal.
See Kane Affidavit, ¶ 20, Exhibit B, Ex.B-11.

The Legalherbalbud website lists five customer reviews for Psycho, including one customer reviewer Legalherbalbud designated as a "verified buyer." One reviewer named "Jimmy D from Brielle, New Jersey," referring to Psycho, described it as an "Awesome product one of the strongest k2 herbal incense out on the market right now, great buzz without that weird feeling you get with others. Enjoy this one." See Shelmidine Affidavit, Exhibit A, Ex. A-9, p.10

g. Kisha Cole

Front packaging: Kisha Cole by Hobo, 4G

Back packaging: 100% Cannabinoid Free/DEA Compliant. The use of this product is the sole responsibility of the user. Manufacturer, wholesaler and retailer are not responsible for misuse of this product. Using this product inconsistent with its labeling could be a violation of Federal and State laws. This product is not to be purchased by or sold to anyone under the age of 18. This product complies with Federal Bill 2011. Oklahoma Bill SB919 and Texas Bill SB331.
See Kane Affidavit, Exhibit B, ¶ 8, Ex.B-3.

As of the date of this affidavit, Kisha Cole was not listed on the Legalherbalbud website, but was readily available for purchase. There were no customer reviews available.

h. Scooby Snax

Front packaging: "Scooby Snax: Potpourri," Green Apple/Hydro, 4g

Back packaging: "Scooby Snax: Potpourri," "Not for Human Consumption" Disclaimer: This product is legal under the new Florida law HP1175, effective march-23-2012. Scooby Snax is designed specifically for aromatic potpourri use and is not meant to be burned, smoke, or incinerated in any manner. It should be kept out of reach of children. This manufacturer, wholesaler and/or retailer are not responsible for any misuse of this product by the consumer. Must be 18 or older to purchase. KEEP OUT OF REACH OF CHILDREN.

See Kane Affidavit, Exhibit B, ¶¶ 19, 24, 35; Exs.B-10, B-14.

The Legalherbalbud website lists 34 customer reviews for Scooby Snax, including eight customer reviewers Legalherbalbud had designated as "verified buyers." One reviewer named "BIG T from Hawaii" wrote, referring to Scooby Snax, "Best K2 yet hands down. We toke on weekends and this is WICKED...HIGHLY RECOMMENDED." See Shelmidine Affidavit, Exhibit A, Ex. A-9, p.12.

i. iBlown

Front packaging: iBlown (The packaging appears to be designed to resemble an iphone)

Back packaging: Blueberry

See Kane Affidavit, Exhibit B, Ex.B-13.

The Legalherbalbud website lists five customer reviews for iBlown, including six customer reviewers Legalherbalbud had designated as "verified buyers." One reviewer named "Ricardo Gonzales from Pueblo, Colorado" posted, referring to iBlown, "his [sic] is the best iBlown product ever [sic] strawberry is very good would recommend for customers 10/10 smell 10/10 taste 10/10 [e]very thing ;)." See Shelmidine Affidavit, Exhibit A, Ex. A-9, p.4.

j. Diablo

Front packaging: Caution: open at ur own risk, 5g, Complies with Senate Bill 3187 and HB 1175

Back packaging: ingredients: Bay Bean, Siberian Motherwort, Mugwort, Blue Lotus, Lion Tail, Aroma Essence. sold as incense only. not for human consumption. Potpourri does not contain any of the following: JWH-018, JWH-073, HU-210, HU-211, CP-47, 497, AM-2201. It's Legal in 50 States, 100% Legal.
See Kane Affidavit, Exhibit B, ¶ 25, Ex.B-15.

The Legalherbalbud website lists seventeen customer reviews for Diablo, including six customer reviewers Legalherbalbud had designated as "verified buyers." One reviewer named "Andrew from Gadsen AL." posted, referring to Diablo, that "I ordered 4 caution gold, and received Diablo 5G but let me tell you it only takes a whiff and reality fades quicker than a bleached shirt. This product is a one hit wonder." See Shelmidine Affidavit, Exhibit A, Ex. A-9, p.1.

k. California Kronic Potpourri: 24K

Front packaging: California Kronic Potpourri: 24K. 5g.

Back packaging: California Kronic Potpourri: 24K Special Blend, Made in California. Not for Human Consumption. Keep out of Reach of Children. Lab Certified. Does not contain any of the JWH's WIN's HU's AM's CB's CP's Cannabicyclohexanol
See Kane Affidavit, Exhibit B, ¶ 33, Ex.B-20.

The Legalherbalbud website lists seven customer reviews for California Kronic Potpourri: 24K, including three customer reviewers Legalherbalbud had designated as "verified buyers." One reviewer named Damien, posted, referring to California Kronic, "Not the best the best I ever had, but definitely not a bad product at all. The buzz is significant, but not overwhelming and lasts about 10-20 minutes. A definite safe bet." See Shelmidine Affidavit, Exhibit A, Ex. A-9, p.14.

l. Incredible Hulk Kush

Front packaging: Incredible Hulk Kush Fragrant Potpourri

Back packaging: 4G Purple Cronic. Lab Certified. Does not contain JWH-018, JWH-073, JWH-81, JWH-122, JWH-200, JWH-250, JWH-398, CP47,497, HU-210, HU-211, AM-694, Cannabicyclohexanol, or any other rohibited [sic] ingridients [sic]. Not for Human Consumption. Keep away from children. Must be 18 or older to purchase. www.bbtdistributors.net.

See Kane Affidavit, Exhibit B, ¶ 34, Ex.B-21.

As of the date of this affidavit, Incredible Hulk Kush was not listed on the Legalherbalbud website, but was readily available for purchase. There were no customer reviews available.

m. Mind Trip

Front packaging: Mind Trip. Warning! Extra Potent Blend. 4g.

Back packaging: Not for Human Consumption. Mind Trip. Ingredients: Tussilago Farfara, Althaea Officinalis, Turnera Diffusa, and Artemisia Vulgaris. Also from Rush Party USA: Joker and Deadman Walking
See Kane Affidavit, Exhibit B, ¶ 36, Ex.B-22.

As of the date of this affidavit, Mind Trip was not listed on the Legalherbalbud website, but was readily available for purchase. There were no customer reviews available.

n. Red Eye Jack

Front packaging: Red Eye Jack 100% Legal.

Back packaging: Caution. For Fragrant Purposes only. Keep out of reach of children and pets. Never leave burning incense unattended. Make sure all ashes fall in ashtray or burners. Only burn in well ventilated areas. Smoke inhalation may cause lightheadedness and may be harmful to your health. Tested and certified by Toxicology Associates inc. Does not contain JWH 018, 073, 081, 122, 133, 200, 250, OR HU 210, 211, CP 47, WIN55, 212. Not for human consumption!
www.smoothspice.com.

See Kane Affidavit, Exhibit B, ¶ 32; Ex. B-19.

As of the date of this affidavit, Red Eye Jack was not listed on the Legalherbalbud website, but was readily available for purchase. There were no customer reviews available.

o. Black Lion

Front packaging: Black Lion. 4g.

Back packaging: 100% Cannabinoid Free/DEA Compliant. The use of this product is the sole responsibility of the user. Manufacturer, wholesaler, and retailer are not responsible for misuse of this product. Using this product inconsistent with its labeling could be a violation of Federal and State laws. This product is not to be purchased by or sold to anyone under the age of 18. This product complies with Federal Bill 2011, Oklahoma Bill SSB919, and Texas Bill SB331.
See Kane Affidavit, Exhibit B, ¶ 31, Ex. B-18.

As of the date of this affidavit, Black Lion was not listed on the Legalherbalbud website, but was readily available for purchase. There were no customer reviews available.

p. Smacked

Front Packaging: Lemon Lime/Strawberry Potpourri. SMACKED! 5g

Back Packaging: This has been certified by laboratory analysis and does not contain HU 210, JWH-018, JWH-0873, JWH-200, CP 47,497 or any other chemical [sic] and/or plant ingredients prohibited by state or federal law. This product is designed specially as potpourri product and is not meant to be burned, smoked, or incinerated in any manner. It should not be inhaled or consumed and should be kept out of reach of children. The manufacturer, wholesaler and/or retailer are not responsible for any misuse of the product.

See Kane Affidavit, Exhibit B, ¶¶ 43, 44, Exs. B-26, B-27.

As of the date of this affidavit, Smacked was not listed on the Legalherbalbud website, but was readily available for purchase. There were no customer reviews available.

q. Red Giant

Front Packaging: "Red Giant: Herbal Potpourri," 5G, "Warning: Extra Potent Blend."

Back Packaging: “Not for Human Consumption: Red Giant,” Ingredients: Damiana Leaf, Marshmallow Leaf, Coltsfoot, Sage, Mullein, and Blue Lotus Leaf. Also from Rush Party USA Mind Trip, Joker and Deadman Walking. www.RushPartyUSA.com See Kane Affidavit, Exhibit B, ¶ 42, Ex. B-25.

3. Legalherbalbud Facebook Page

On or about January 25, 2014, Legalherbalbud launched a Facebook Fanpage located at <https://www.facebook.com/LegalHerbalBud>. See *id.* at ¶ 14 and Ex. A-10. In the “About us” section, it read, “we provide only the best quality herbal incense and k2 alternative spice. Please like our page if you feel marijuana and natural herbs should be legal. <http://www.LegalHerbalBud.com>.” *Id.* Below are three posts published by the administrator of the Legalherbalbud Facebook Fanpage, who went by the pseudonym “Herbal Incense.” See Shelmidine Affidavit, Exhibit A, Ex. A-10, p. 1.

January 30, 2014: “Rule #1: Don’t get high on your own supply... failed miserably lol. www.LegalherbalBud.com”

February 1, 2014: “100% Legal Potent Herbal Incense 2014 ‘Spice’ Available Now For Cheap With FREE SHIPPING to every state! Visit www.LegalHerbalBud.com to get top quality legal weed alternative. Roll one up now!”

May 14, 2014 : “Lighting up a fatty.”
Id. at Ex. A-10, pp. 3, 9.

The Facebook page also includes a February 2, 2014 video posted by “Herbal Incense” reviewing Scooby Snax, which was a product Legalherbalbud was featuring. *Id.* at ¶ 16. In the video review, the “Herbal Incense” speaker remarks “it’s the extra potent one, has better taste, texture, brings a lot more in a sense of smoking. You got a lot of joints here, about a hundred joints, who knows, depending how you smoke ‘em.” *Id.*

ARGUMENTS

POINT I

LEGALHERBALBUD VIOLATED NEW YORK EXECUTIVE LAW § 63(12) BY REPEATEDLY VIOLATING SEVERAL NEW YORK STATE STATUTES AND ENGAGING IN FRAUD

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 Inv. Group, 46 A.D.2d 25, 28 (3d Dept. 1974), appeal denied, 35 N.Y.2d 647 (1975); People v. 21st Century Leisure Spa Int'l Ltd., 153 Misc.2d 938, 943 (N.Y. Sup. Ct. 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), appeal 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 for fraudulent conduct under Executive Law § 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 Sys., Inc., 27 A.D.3d 104, 106 (3d Dept. 2005), aff'd on other grounds, 11 N.Y.3d 105 (2008); State v. Gen. Elec. Co., 302 A.D.2d 314 (1st Dept. 2003); see also Lefkowitz v. E.F.G. Baby Prod. Co., 40 A.D.2d 364, 368 (3d Dept.

1973). Executive Law § 63(12) protects not only the average consumer but also “[t]he ignorant, the unthinking and the credulous.” Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 273 (1977); Applied Card Sys., 27 A.D.3d at 106; Gen. Elec. Co., 302 A.D.2d at 314; People v. Dell, Inc., 2008 N.Y. Misc. LEXIS 5879, at *11-12 (N.Y. Sup. Ct. May 28, 2008).

A. Legalherbalbud Violated New York Agriculture & Markets Law § 194 by Affixing False and Inadequate Labels to its Products.

Legalherbalbud has engaged in repeated illegality, as defined under New York Executive Law § 63(12) by violating New York Agriculture & Markets Law § 194. Agriculture & Markets Law § 194 prohibits the use of 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 [...]

The term “consumer commodities,” as it pertains to Agriculture & Markets Law § 194, has an expansive definition which includes non-prescription drugs. See Agr. & Mkts. Law § 191(b). Under New York State law, a drug is an “article[] (other than food) to affect the structure or any function of the body of man or animals.” Educ. Law § 6802.²

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

1. Legalherbalbud is required to comply with Agriculture & Markets Law § 194 because its products are consumer commodities.

Legalherbalbud sells synthetic marijuana stylized designer drugs that are intended to affect the function of the body by mimicking popular street drugs. Synthetic marijuana is a dangerous drug that leads to “extreme anxiety, seizures, and convulsions upon ingestion.” Affidavit of Chief Medical Officer at Metropolitan Hospital Center Dr. John T. Pellicone (“Pellicone Affidavit”), attached as Exhibit C to the Clark Affirmation, ¶ 6. Legalherbalbuds’ products are being sold for the purposes of affecting the function of the body. Thus, they fit the definition of a nonprescription drug, and constitute “consumer commodities” as described under Agriculture & Markets Laws §§ 191 and 194.

Furthermore, in an August 3, 2015 Order for Summary Action, New York City Department of Health & Mental Hygiene Commissioner Mary T. Bassett decreed that the following products are synthetic cannabinoids: AK47, California Kronic, Caution, Diablo, Green Giant, iBlown, Joker, Kisha Cole, Psycho, Red Eye Jack, Red Giant, Smacked and Scooby Snax. See NYC Synthetic Cannabinoids Order for Summary Action, Clark Affidavit, Exhibit M, at p. 3. Since synthetic drugs affect the function of the body, see Pellicone Affidavit, Clark Affirmation, Exhibit C at ¶ 3, Legalherbalbud’s products constitute consumer commodities under Agriculture & Markets Law § 194.

2. Legalherbalbud’s Products Are Mislabeled Because They Are Not Identified by a Common or Usual Name, and Lack Proper Manufacturer Information.

Pursuant to 1 New York Codes, Rules & Regulations § 221.2(e), 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, identifying, or giving any information with respect to the commodity or to the contents of the package.”³

New York Codes, Rules & Regulations 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.

In this case, none of the labels on the products purchased by Investigator Shelmidine satisfy the commodity labeling requirements mandated by New York State’s Agriculture & Markets Law § 194 or New York Codes, Rules & Regulations Title 1. First, they do not include the drug’s common or usual identity. Second, Legalherbalbud’s labels do not include the name and address of their manufacturer, packer or distributor.⁴ For example, Legalherbalbud product iBlown contains virtually no information on its

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 New York Codes, Rules & Regulations 221.2(b).

⁴ On the back packaging for products “Green Giant” “Deadman Walking,” “Mind Trip,” and “Red Giant,” there is a reference to an entity named “Rush Party USA.” See Kane Affidavit, Clark Affirmation, Exhibit B, at Exs.B-4, B-5, B-22, B-25. However, there is no statement affirming that Rush Party USA is the manufacturer, packer or distributor of either drug. Additionally, none of said products’ labels include a business address as is also required by 1 N.Y.C.R.R. § 221.4.

packaging and labelling except a picture of an iPhone. See Kane Affidavit, Exhibit B, Ex. B-13.

Third, while the packaging in most instances, does appear to include weight measurements, these measurements are not always correct. For example, in an April 2, 2016 e-mail Investigator Shelmidine received from Legalherbalbud for the product Green Giant, the e-mail states that “Even though [the package] says 3G, you get 2 extra grams for free.” See Shelmidine Affidavit, Clark Affirmation, Exhibit A, at ¶ 17. Similarly, in a February 13, 2016 e-mail advertisement Investigator Shelmidine received for the product AK-47, it states “Keep in mind it’s not the packaging but what is inside it :-).” Id. Investigator Shelmidine received these e-mails because he was a repeat customer. However if a first-time buyer purchased Green Giant or AK-47, the only information he or she would have would be the information on the packaging, which Legalherbalbud has acknowledged is not always accurate. Accurate quantity listings are especially important in the context of drug products. A consumer who relies on the statements made on the packaging may unwittingly consume more drugs than intended leading to serious health consequences.

B. Legalherbalbud Violated New York Violating Education Law § 6815 by Selling and Offering for Sale Misbranded Drugs.

Legalherbalbud engaged in repeated and persistent illegal conduct by selling 121 packages of falsely labeled and misbranded drugs to Petitioner on four separate occasions. As previously discussed, Legalherbalbud’s products fit the definition of a drug as defined by Education Law § 6802 because they are sold for the purposes of

affecting the function of the body. Accordingly, Legalherbalbud is bound by the drug branding standards set forth in Education Law § 6815.

Under Education Law § 6815, a drug is misbranded if, inter alia, its: (1) labeling is false or misleading in any particular manner; (2) packaging does not contain the name and place of business of the manufacturer, packer, or distributor and accurate quantity of the contents; (3) labeling does not include adequate directions for use and adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health; or (4) if there are possible health hazards even when used in the dosage suggested on the labeling. Educ. Law § 6815(2)(a), (b), (f), (i). In determining whether a commodity is misbranded, one must take into account, not only statements, words and direct representations, but also any material omissions regarding the consequences prescribed or customary use of the drug or device may cause. See Educ. Law § 6802(13).

1. The labeling is false and misleading.

Legalherbalbud has violated Education Law § 6815 by selling synthetic-type drugs misrepresented as herbal incense and potpourri on their packaging. Thirteen of the nineteen products purchased from Legalherbalbud have false labels identifying the product as herbal incense and potpourri, when in fact, they are synthetic marijuana stylized designer drugs. See Kane Affidavit, Clark Affirmation, Exhibit B, at Exs. B-4, B-6, B-7, B-10, B-11, B-12, B-14, B-15, B-19, B-20, B-21, B-25, B-26, B-27. If Legalherbalbud's products were truly herbal incense or potpourri, which are items used for aromatic purposes, they would not be promoted for their drug effects. This ruse is so

well-known that drug consumers describe “herbal incense” and “potpourri” on the popular website “Urban Dictionary” as “synthetic marijuana,” but with “effects on your body [that] are more like LSD mixed with speed.”⁵

Furthermore, statements Legalherbalbud makes on its own website confirm that these products are being sold for drug purposes. For example, in the “About us” section of its website, Legalherbalbud states that “[t]hese products are K2 alternatives.” See Shelmidine Affidavit, Clark Affirmation at Exs. A-6, p. 2. It also advertises each of its online products as “Legal Herbal Spice for Sale” multiple times. See, e.g., id. at Exs. A-6 through A-9. K2 and Spice are common names for synthetic marijuana stylized drugs, whose effects are achieved through inhalation. See Office of National Drug Control Policy: Synthetic Drugs, Exhibit H, at p. 1; Pellicone Affidavit, Clark Affirmation, Exhibit C, at ¶ 2. However, Legalherbalbud’s products are not K2 “alternatives,” but rather K-2 itself, as evident by the New York City Health Commissioner’s list of embargoed synthetic marijuana products. See NYC Synthetic Cannabinoids Order for Summary Action, Clark Affidavit, Exhibit M, at p. 3. By mischaracterizing its products

⁵ “Herbal Incense” – “Synthetic Marijuana. It has the short term effects that resembles weed, but the effects on your body are more like LSD mixed with speed, and after a while, severe psychological, respiratory, and gastrointestinal side effects can surface. Dude, after i went home after we smoked that herbal incense the other day i woke up in the hospital and the doctors said i had a seizure. #spice#mojo #k2 #legal weed #incense #sense.” By “MBLCLA,” Urban Dictionary, July 14, 2011. Available at http://www.urbandictionary.com/define.php?term=Herbal+Incense&utm_source=search-action

“Potpourri:” – “A substance that imitates marijuana. Literally, it's potpourri, with chemicals added that produce a sweet smelling and great tasting high. Some people have been known to trip on this, if given enough. It's also been known to give headaches, and I've even heard of people having seizures from it, though I never have. It loves me, and I love it right back. Also known as ‘pope.’ Potpourri is completely legal and so far, undetectable in any kind of test. Side effects are same as marijuana. It comes in different flavors and concentrations. The more powerful the pope, the more expensive it can be. For the cheap kind, runs \$15 a gram, expensive kind is up to \$45 a gram. AYyy dude, you got some pope we can toke? XD That new potpourri stuff. my favorite flavor is orange crush. It's XXX! pope#potpourri #toke#mairjuana#smoke#high#pop.” by “SOOOHIGH,” Urban Dictionary, December 13, 2010. Available at <http://www.urbandictionary.com/define.php?term=potpourri>.

as herbal incense and potpourri rather than synthetic marijuana, Legalherbalbud's product labels are false and misleading.

Additionally, the customer reviews Legalherbalbud promotes on its website strongly imply that Legalherbalbud's products are being sold as drugs. Below are just a few of the reviews posted on the Legalherbalbud website:

"I ordered 4 caution gold, and received Diablo 5G but let me tell you it only takes a whiff and reality fades quicker than a bleached shirt. This product is a one hit wonder."

- *Andrew from Gadsen AL, "September 24, 2014 (Referring to Diablo)*
Shelmidine Affidavit, Clark Affirmation, Exhibit A, Ex. A-9, p.1

"Hi peeps my name is john alanis [a]nd I would recommend ak-47 for everyone who loves to get up in the clouds without failing a DT [Drug Test]."

- *"John alanis from Utah USA," October 12, 2015 (Referring to AK47)*
Id. at Ex. A-7, pp. 1, 2.

"Best K2 yet hands down. We toke on weekends and this is WICKED."

- *"Big T from Hawaii," November 24, 2015 (Referring to "Scooby Snax")*
Id. at Ex. A-9, p.12.

"Best herb I have ever smoked[. I] just ordered more today can't wait[. T]oo bad [the United States Postal Service] is slow as hell."

- *"nate from usa," November 19, 2015 (Referring to AK47)*
Id. at Exhibit A-7, p. 2.

"Awesome product one of the strongest k2 herbal incense out on the market right now, great buzz without that weird feeling you get with others. Enjoy this one."

- *"Jimmy D from Brielle, New Jersey," March 4, 2016 (Referring to Psycho)*
Id. at Ex. A-9, p.10.

Each of the customer reviews above can be found on Legalherbalbud's website. If Legalherbalbud did not want their customers to believe that their products are synthetic drugs, they would not have posted these reviews on its website.

2. The packaging does not contain the name and place of business of the manufacturer, packer, or distributor.

As discussed previously in Point I(A)(2), Legalherbalbud's drugs do not include the name and address of their manufacturer, packer or distributor.

3. The labels do not include adequate health warnings or proper instructions

Dr. John Pellicone, the Chief Medical Officer at Metropolitan Hospital Center, attests that synthetic drugs are promoted to young people as a 'legal' high and sold under the false pretense that it is safe and legal." Pellicone Affidavit, Clark Affirmation, Exhibit C at ¶ 5. However, not only is synthetic marijuana unsafe and illegal, it also causes "extreme anxiety, seizures and convulsions upon ingestion," *id.* at ¶¶ 5-6, as well hallucinations and organ failure. See IN RE THE SALE AND DISTRIBUTION OF SYNTHETIC CANNABINOIDS, Order of Summary Action, New York State Department of Health, Clark Affirmation, Exhibit I at p. 5. It is also "addictive, can lead to severe withdrawal symptoms, and may have contraindications for some users because of their specific health conditions. In some instances, synthetic marijuana can even be life-threatening." Pellicone Affidavit, Clark Affirmation, Exhibit C, at ¶ 5.

Thus, in order for consumers to be able to make informed decisions about the safety of the products they are ingesting, they need to be made adequately aware of the risks. Yet, none of the labels for any of Legalherbalbud's products mention the health risks identified by Dr. Pellicone. Some products, such as Caution and Red Eye Jack, do state that consumption can cause "lightheadedness" and be "harmful to your health." See Kane Affidavit, Clark Affirmation, Exhibit B, Exs. B-7, p.2, B-19, p.2. However, these

warnings are woefully insufficient because they fail to disclose the serious dangers synthetic marijuana use poses.

4. Legalherbalbud's products do not include directions for proper use.

Since January 2015, over 4,500 patients have been admitted to New York City emergency departments for synthetic cannabinoid-related ailments. See NYC Department of Health 2015 Advisory #36, Exhibit L, at p. 2. In fact, in July 2016, 33 New York City residents were hospitalized for synthetic marijuana overdoses, which then rose to 130 victims in just one week. See Eli Rosenberg & Nate Schweber, "33 Suspected of Overdosing on Synthetic Marijuana in Brooklyn, N.Y. Times," July 13, 2016, at p. 1; see also Sarah Nir, "K2 Overdoses Surging in New York: At Least 130 Cases This Week Alone," N.Y. Times, July 15, 2016 at p. 1, both attached as Exhibit N to the Clark Affirmation. Synthetic marijuana stylized designer drug products are dangerous under any circumstances, but they are especially dangerous when they lack proper directions. Only AK47 includes detailed directions, but only for use as a potpourri or herbal incense. However, given that these products are being purchased for their drug effects, directions for use as a potpourri are insufficient, and likely only included for the purposes of evading detection from law enforcement.

5. Poses health hazards when used in the dosage suggested on the labeling.

None of the labels provide dosage information required by New York Education Law § 6815.

C. Legalherbalbud Violated New York Education Law § 6808 by Failing to Register as a Pharmacy, Wholesaler, Manufacturer or Outsourcing Facility.

Education Law § 6808 states that “[n]o person, firm, corporation or association shall possess drugs, prescriptions or poisons for the purpose of compounding, dispensing, retailing, wholesaling, or manufacturing, or shall offer drugs, prescriptions or poisons for sale at retail or wholesale unless registered by the department as a pharmacy, wholesaler, manufacturer or outsourcing facility.”

On January 28, 2016, February 19, 2016, May 31, 2016, and June 14, 2016 Legalherbalbud sold Investigator Shelmidine a total of 121 packets of synthetic drugs that include the brands Green Giant, Diablo, Psycho, Joker, iBlown, Scooby Snax, AK47, Kisha Cole, Deadman Walking, Caution, Mind Trip, Black Lion, Incredible Hulk Kush, California Kronic Potpourri: 24K, Smacked, and Red Giant. See Shelmidine Affidavit, Clark Affirmation, Exhibit A at ¶¶ 30, 35, 44, 46. However, according to the “State Education Department, Certification of Records to Operate as a Pharmacy Not Possessed by the NYS Education Department,” there is no record that Niaz Khan, Phillip Pulcca, Aida Guach, or Lisanka Sanchez, is registered as a pharmacy, wholesaler, manufacturer or outsourcing facility in New York State. See State Education Department, Certification of Records to Operate as a Pharmacy Not Possessed by the NYS Education Department (“NYS Education Dept’s Certificate of Records Not Possessed”), attached as Exhibit E to the Clark Affirmation.

Accordingly, Niaz Khan, Phillip Pulcca, Aida Guach and Lisanksa Sanchez have violated Education Law § 6808 by selling and offering for sale drugs without registering as a pharmacy, wholesaler, manufacturer or outsourcing facility.

D. Niaz Khan, Phillip Pulcca, Aida Guach, Lisanka Sanchez and John and/or Jane Doe Violated General Business Law § 130 by Failing to File a Certificate of Assumed Name with the Queens County Clerk's Office.

General Business Law § 130 states that any person who conducts a business under a name other than his or her legal name must file a certificate providing the name or designation of the business with the office of the clerk in the county in which the business is conducted. According to Web.com Records Custodian Linda Shutterly and records produced by Perfect Privacy, Niaz Khan has regularly listed 4705 Center Boulevard, Queens, New York 11109 as the business address for Legalherbalbud.⁶ See Affidavit of Web.com Records Custodian, Linda Shutterly, attached as Exhibit D to the Clark Affirmation, at ¶ 4; see also Legalherbalbud's Perfect Privacy Billing Records, attached as Exhibit O to the Clark Affirmation, at p. 18.

The Queens County Clerk's Office has no record of an assumed name certificate submitted by Niaz Khan, Phillip Pulcca, Aida Guach, Lisanka Sanchez, or any other individual conducting business under the name Legalherbalbud or Legalherbalbud.com. See "Queens County Certificates Confirming the Nonfiling of Any Assumed Name Certificate" by Respondents Niaz Kahn and Phillip Pulcca, attached as Exhibit F to the Clark Affirmation, at p.1. Thus, Niaz Khan, Phillip Pulcca, Aida Guach, Lisanka

⁶ Perfect Privacy records reflect that Niaz Khan's address has also previously been recorded as 1314 Franklin Avenue, Flushing, New York, 11355 which is also located in Queens County. See Perfect Privacy Billing Records, attached as Exhibit O to the Affirmation of Jason M. Clark, p. 18.

Sanchez, and John and/or Jane Doe violated General Business Law § 130 by operating Legalherbalbud.com without registering an assumed name certificate with the Queens County Clerk's Office.

POINT II

LEGALHERBALBUD VIOLATED NEW YORK GENERAL BUSINESS LAW § 349 BY ENGAGING IN DECEPTIVE PRACTICES

General Business Law § 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). Thus, a practice may carry the capacity to mislead or deceive a reasonable person and thus, violate General Business Law § 349, but not be fraudulent under common law. Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330, 348 (1999). Even omissions may be the basis for claims under General Business Law § 349. People v. Applied Card Sys., Inc., 27 A.D.3d 104, 107 (3d Dept. 2005).

Pursuant to General Business Law § 349(a), it is unlawful to engage in “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in the State of New York. As with statutory fraud under Executive Law § 63(12), intent, proof of actual deception and reliance are not elements for a cause of action under General Business Law § 349. See Gen. Elec., 302 A.D.2d at 315; People v. Network Assocs. Inc., 195 Misc.2d 384, 389 (N.Y. Sup. Ct. 2003); In re State v. Colorado State Christian Coll. of the Church of the Inner Power, Inc., 76 Misc.2d 50, 56 (N.Y. Sup. Ct. 1973).

Moreover, because General Business Law § 349 “was intended to ‘afford a practical means of halting consumer frauds at their incipency 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) (quoting Mem. of Governor Rockefeller, 1970 N.Y. Legis. Ann., at 472-473), the Attorney General may bring an action under this law before any consumer has been injured, and need not await consumer complaints. See General Business Law § 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 General Business Law § 349] without a showing of injury.”); State v. Mgmt. Transition Res., Inc., 115 Misc. 2d 489, 491 (1982) (“It is not necessary for the Attorney General to await consumer complaints before proceeding to enjoin . . .”).

A. Deceptively Labeled “Not for Human Consumption”

Legalherbalbud engaged in deceptive business practices by selling synthetic marijuana falsely labeled “not for human consumption.” Merely affixing a false label that reads “not for human consumption” does not shield synthetic and designer drug sellers from liability under General Business Law § 349. In a similar case that also involved the illegal selling of designer drugs, the Honorable Kevin K. Ryan held, “[w]hile all of the items were labeled ‘not for human consumption’, it staggers the imagination to believe they were not intended to be consumed....” People v. Brotherton,

No. 12-0969 (N.Y. Sup. Ct.2012)(unpublished) (attached to the Clark Affirmation as Exhibit P) (respondent found liable for New York State labeling violations and engaging in deceptive practices after selling synthetic marijuana products “Bizarro” and “Avalanche” mislabeled ‘not for human consumption.’”); People v. Jamail, 51 Misc. 3d 940 (N.Y. Sup. Ct. 2016) (respondent found liable for engaging in deceptive practices after selling designer drugs falsely promoted as sold for “research, education and propagation purposes only.”); People v. Tebbetts, No. 2012-1708, (N.Y. Sup. Ct. March 27, 2013)(unpublished) (attached to the Clark Affirmation as Exhibit Q) (respondent found liable for labeling violations and engaging in deceptive practices for selling designer drugs mislabeled “not for human consumption.”).

Here, despite the “not for human consumption” disclaimers, it is clear Legalherbalbud is selling products for consumption purposes. First, many of the products Legalherbalbud sold Petitioner are well-established brands of synthetic marijuana-type drugs. AK47, Black Lion, California Kronic, Caution, Dead Man Walking, Diablo, Green Giant, iBlown, Joker, Kisha Cole, Psycho, Red Eye Jack, Red Giant, Scooby Snax, Smacked, and The Incredible Hulk, which are all products Legalherbalbud sold Petitioner, are synthetic drug products banned by the New York City Department of Health & Mental Hygiene Commissioner Mary T. Bassett’s August 3, 2015 Order for Summary Action. See NYC Synthetic Cannabinoids Order for Summary Action, Clark Affirmation, Exhibit M, at p. 3. Further, given that synthetic marijuana’s effects are achieved through consumption, it is implausible to believe that these products are being

sold for purposes other than human consumption. See Pellicone Affidavit, Clark Affirmation, Exhibit C, at ¶ 2.

Second, Legalherbalbud sold synthetic drugs to an undercover investigator even after being told that the drugs were being purchased for consumption purposes. On May 31, 2016, Investigator Shelmidine wrote Legalherbalbud Representative Samantha the following e-mail:

Hey Samantha, I'm ready to make another order. I know I missed your big wholesale weekend sale but that's ok. I've just been very busy!! I'd like to make another order for 35 bags. First I need 5 bags of your AK-47. I promised one of my customers I would order more of that for him. He said that is the most potent stuff he has ever smoked and can still feel the effects from it more than three hours later. He has been coming into the store almost every day asking for more so he will be happy when this next shipment comes in!!

Shelmidine Affidavit, Clark Affirmation, Exhibit A at ¶38.

That same day, Samantha provided the following response:

Good morning! :) Busy is good in the business, anyway I will check first from our Shipping Incharge [sic] if we have those products that you wanted. Because last week items are easily run out of stock since we have the weekend sale! Good to hear that your customer [sic] love our Ak47, honestly it is really one of our top seller. I'll get back to you as soon as I have a reply already [sic].

Id. at ¶ 39.

Legalherbalbud's response reflects satisfaction that a consumer used its product as a drug, and a willingness to sell more products to a consumer even after being informed that they were being purchased for consumption purposes.

B. Misleadingly Branded as "Herbal Incense" and "Potpourri"

Given that Legalherbalbud's products are being sold as products to be smoked and for their drug effects, they cannot accurately be described as "herbal incense" or

“potpourri.”⁷ Unlike synthetic marijuana, herbal incense and potpourri are used for their aromatic effects and not meant for human consumption. Also, as mentioned previously, the majority of Legalherbalbud’s products are well-known brands of synthetic marijuana.

C. Fail to Disclose Significant Health Risks

Even if some consumers are aware that Legalherbalbud’s products are designer drugs, without proper warnings, reasonable consumers would not know the extensive health risks they pose. This is especially true when Legalherbalbud’s products are being marketed as “legal.” Under General Business Law § 349, a party may be held liable for omissions that are likely to mislead a consumer acting reasonably under the circumstances. See Applied Card Sys., 27 A.D.3d at 107. Synthetic marijuana stylized designer drugs can lead to a host of health conditions yet, nowhere does Legalherbalbud disclose any of these risks to the consumer. Similarly, Legalherbalbud does not provide any directions for proper use which could be useful in preventing user overdoses.

Furthermore, many of Legalherbalbud’s customers may be adolescents and children. Several of Legalherbalbud’s products have names such as “Scooby Snax,” “Green Giant,” and “The Incredible Hulk,” and feature superheroes and cartoons on the front packaging. See, e.g., Kane Affidavit, Clark Affirmation, Exhibit B, at Exs. B-4, B-10, B-21. In fact, Legalherbalbud advertises a synthetic marijuana-type product called “OMG,” featuring “Dopey” from the Disney movie Snow White and the Seven Dwarves on its website. See Shelmidine Affidavit, Clark Affirmation, Exhibit A-9, p. 16.

⁷ Note, however, that “herbal incense” and “potpourri” are common slang terms for synthetic marijuana-type designer drugs.

Unsuspecting children may mistake these products for candy. Without proper health warnings, a child may reasonably be misled into thinking these products are safe for consumption.

POINT III

LEGALHERBALBUD VIOLATED NEW YORK GENERAL BUSINESS LAW § 350 BY FALSELY ADVERTISING ITS PRODUCTS

General Business Law § 350 states that “[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.” False advertising is defined as advertising that is “misleading in a material respect.” To determine whether an advertisement is misleading:

[T]here shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity. . . to which the advertising relates under the conditions prescribed in said advertisement, or other such conditions as are customary and usual.

General Business Law § 350(a).

To establish a violation of General Business Law § 350, the Attorney General need not show that the respondent intended to deceive the public or that the advertising in question actually deceived any consumer. In re People v. Wilco Energy, 284 A.D.2d 469, 470-71 (2d Dept. 2001); State v. Abandoned Funds Info. Center, Inc., 129 Misc.2d 614, 617 (N.Y. Sup. Ct.1985).

Further, it is well-settled that whether an advertisement or claim is deceptive depends on its overall or net impression. See Kraft, Inc. v. FTC, 970 F.2d 311, 314 (7th

Cir. 1992), cert. denied, 507 U.S. 909 (1993); In re Thompson Med. Co. v. FTC, 791 F.2d 189, 197 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987).⁸ “The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.” Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942); see also Guggenheimer v. Ginzburg, 43 N.Y.2d 268,t 273 (1977). Even advertisements or claims that are literally or technically true are considered deceptive if they create a false impression or if they are subject to more than one interpretation, one of which is false. E.F.G. Baby Prod., 40 A.D.2d at 368; Ciba-Geigy Corp. v. Thompson Med. Co., 672 F. Supp. 679 (S.D.N.Y. 1985); Am. Home Prod. Corp. v. FTC, 695 F.2d 681, 688 (3d Cir. 1982).

A. Legalherbalbud Falsely Advertised Synthetic Drugs as “Legal” Herbal Incense and Potpourri And Sold Them For Consumption Purposes

Legalherbalbud falsely advertises its synthetic marijuana products as herbal incense and potpourri on its product packaging, website and Facebook page. It also deceptively identifies them as “not for human consumption” when in truth, they are being marketed and sold for consumption and for their drug effects. As demonstrated below, these assertions are not only inaccurate, but contradicted by Legalherbalbud’s own statements located on its website, Facebook page, and e-mail advertisements.

⁸ The interpretation of deception under the Federal Trade Commission Act of 1914, 15 U.S.C. § 45 (“FTCA”), which is enforced by the Federal Trade Commission (“FTC”), has always been viewed as a guide to construing what is fraudulent and deceptive under Executive Law § 63(12) as well as GBL § 349. Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 26 (1995); People v. Applied Card Sys., Inc., 27 A.D.3d 104, 107 (3d Dept. 2005); State v. Feldman, 210 F. Supp.2d 294, 302 (S.D.N.Y. 2002); In re State v. Colorado State Christian Coll. of the Church of the Inner Power, Inc., 76 Misc.2d 50, 55 (N.Y. Sup. Ct. 1973).

1. Legalherbalbud Website

On the Legalherbalbud website, there is a statement that reads “Legal Herbal Spice for Sale K2 Alternative” under an image of each drug that it sells. See, e.g., Shelmidine Affidavit, Exhibit A, Ex. A-3, pp.1,2; A-6, p. 1, A-7, p.1. As stated previously, “K2” and “Spice” are synonymous with synthetic marijuana-type drugs. Thus, because synthetic marijuana needs to be ingested to achieve its effects, a product that is “Spice” or a “K2 alternative” cannot also be herbal incense or potpourri. Marketing its products as “Spice” and “K2 alternatives” reflects a tacit admission by Legalherbalbud that its products are being sold for their drug effects.

Second, the customer reviews Legalherbalbud posts on its website are not just testimonials, but business advertisements encouraging consumers to buy and smoke Legalherbalbud products. When a business chooses to publish customer reviews on its website, the reviews also become advertisements since they are being used to entice consumers into buying the business’s products. Legalherbalbud admits as much in a June 13, 2016 e-mail advertisement, where it states “[d]on’t forget to leave a positive feedback review so other Aroma lovers just like you can relate and be reassured that what they are purchasing is simply the best on the net from us!” See Shelmidine Affidavit, Clark Affirmation, Exhibit A at ¶ 17, Ex. A-31. Below is a sample of some of the customer reviews Legalherbalbud advertises on its website:

“I ordered 4 caution gold, and received Diablo 5G but let me tell you it only takes a whiff and reality fades quicker than a bleached shirt. This product is a one hit wonder.”

- *Andrew from Gadsen AL.,” September 24, 2014 (Referring to Diablo)*

Id. at Ex. A-9, p.1

“Hi peeps my name is john alanis [a]nd I would recommend ak-47 for everyone who loves to get up in the clouds without failing a DT [Drug Test].”

- “*John alanis from Utah USA,*” October 12, 2015 (Referring to AK47)

Id. at Ex. A-7, pp. 1, 2.

“Best K2 yet hands down. We toke on weekends and this is WICKED.”

- “*Big T from Hawaii,*” November 24, 2015 (Referring to “Scooby Snax”)

Id. at Ex. A-9, p.12.

“Best herb I have ever smoked[. I] just ordered more today can’t wait[. T]oo bad [the United States Postal Service] is slow as hell.”

- “*nate from usa,*” November 19, 2015 (Referring to AK47)

Id. at Exhibit A-7, p. 2.

“Awesome product one of the strongest k2 herbal incense out on the market right now, great buzz without that weird feeling you get with others. Enjoy this one.”

- “*Jimmy D from Brielle, New Jersey,*” March 4, 2016 (Referring to Psycho)

Id. at Ex. A-9, p.10.

In each of these reviews, the writer is clearly referencing Legalherbalbud’s products as street drug alternatives. Thus, based on these reviews, it would be reasonable for a consumer to conclude that despite the “not for human consumption” label, these are products being sold and consumed for drug purposes. It also follows that consumer may reasonably conclude that the products are safe for consumption because there are no significant health warnings.

2. Legalherbalbud Facebook Page

The Legalherbalbud Facebook page, located at www.facebook.com/LegalHerbalbud, also contains misleading statements which prove that its products are being sold for drug purposes. First, in the “About Us” section of the webpage, it states: “We provide only the best quality herbal incense and k2 alternative

spice. Please like our page if you feel marijuana and natural herbs should be legal. <http://www.LegalHerbaBud.com>.” Id. at ¶ 14, Ex. A-10, p. 1.

Second, on February 2, 2014, the administrator of the Facebook page, referred to by the pseudonym “Herbal Incense,” posted a video for the Legalherbalbud product “Scooby Snax.” In the video, Legalherbalbud describes Scooby Snax by saying “it’s the extra potent one, has better taste, texture, brings a lot more in a sense of smoking. You got a lot of joints here, about a hundred joints, who knows, depending how you smoke ‘em.” See id. at ¶ 16 (emphasis added). “Herbal Incense” also made the following posts to the Legalherbalbud Facebook page:

January 30, 2014:	“Rule #1: Don’t get high on your own supply... failed miserably lol. www.LegalherbalBud.com ”
February 1, 2014:	“100% Legal Potent Herbal Incense 2014 ‘Spice’ Available Now For Cheap With FREE SHIPPING to every state! Visit www.LegalHerbalBud.com to get top quality legal weed alternative. Roll one up now!”
May 14, 2014 :	“Lighting up a fatty.”

Id. at ¶ 15; Ex. A-10, pp. 3, 9.

Each of “Herbal Incense’s” posts further corroborates that Legalherbalbud’s products are being advertised and sold for drug consumption purposes. These posts contradict Legalherbalbud’s “not for human consumption” claims. They also mislead consumers into thinking that its products are safe for consumption because they do not mention any of the health risks.

3. Legalherbalbud E-mail Advertisements

The e-mail advertisements Legalherbalbud disseminates to its customers also establish that its products are synthetic marijuana and being sold for drug consumption purposes. For example, one of Legalherbalbud's products is AK47. The packaging for AK47 says, among other things "Use as directed only. Do not intentionally inhale, ingest or burn for any reason ... AK-47 is a [sic] aroma therapy product and is intended to create aroma only and is not intended for consumption." Kane Affidavit, Exhibit B, Ex. B-6. However, in a February 13, 2016 e-mail promoting AK47, it states "This little O.G. has been re-branded to be more potent than before. When our retailers told us this, we knew we had to market it right away...Keep in mind it's not the packaging but what is inside it :-)." Shelmidine Affidavit, Exhibit A-16, p. 2 (emphasis added). Legalherbalbud is clearly implying that while the packaging states that it's "not for human consumption," these products are being marketed for drug use.

Legalherbalbud also engages in false advertising by proclaiming that all its products are legal, even though it knows they are not. On Legalherbalbud's homepage it states:

Welcome to Legal Herbal Bud! We are rated #1 for the cheapest most potent Herbal Incense around! **100% legal popular Potpourri spice blends** with FREE SHIPPING and tracking to all 50 States! We hand pick all our products to ensure that we are sending you only the very best blends while having the CHEAPEST prices available!"
Id. Ex. A-6, p.2. (emphasis in original).

Subsequently, on June 13, 2016, Legalherbalbud sent the following e-mail promotion for the product "Red Giant:"

This product is now banned in NEW YORK, however it is still legal in all other states. Please note if you are from NEW YORK CITY please do not purchase this product as it may cause legal issues in your state. Due to high potency and recent chemical upgrades since it is brand new other states have not yet caught up.

Id. at ¶ 17.

Based on Legalherbalbud's e-mail to its customers, it seems that the chemical compound in Red Giant was added to a New York controlled substances list. Nevertheless, on June 14, 2016, Legalherbalbud willingly sold 14 packages of "Red Giant" to an undercover investigator in New York. See id. at ¶¶ 45, 46. If Investigator Shelmidine was a first time customer, he never would have received the June 13, 2016 e-mail. Furthermore, according to the Legalherbalbud website, all its products are legal. Therefore, a first time buyer from New York, who visits the Legalherbalbud website and then chooses to purchase Red Giant is unlikely to know that Red Giant is a controlled substance and an illegal drug. Additionally, given the lack of health warnings, it would be equally reasonable for the customer incorrectly believe that Legalherbalbud's product do not pose any significant health hazards. Neither assumption would be accurate.

By failing to clearly advertise its products as synthetic marijuana, or disclose the significant health risks synthetic marijuana poses, Legalherbalbud has and continues to engage in false advertising.

POINT IV

PETITIONER IS ENTITLED TO INJUNCTIVE RELIEF, BOND PROTECTION, PENALTIES, COSTS AND A TEMPORARY RESTRAINING ORDER AGAINST LEGALHERBALBUD

Executive Law § 63(12) affords the courts the authority to grant wide-ranging equitable relief to redress fraudulent and illegal conduct. See State v. Princess Prestige 42 N.Y.2d 104, 108 (1977); State v. Scottish-American Assn., 52 A.D.2d 528 (1st Dept. 1976), appeal dismissed, 39 N.Y.2d 1057 (1976); reported in full, 39 N.Y.2d 1033 (1976).

A. Legalherbalbud Should Be Enjoined From Selling Falsely Labeled and Misbranded Drugs

Courts have sound discretion to grant remedial relief for causes of action brought under Executive Law § 63(12). See Princess Prestige Co., 42 N.Y.2d at 108. Where the evidence supports the relief requested and there are no triable issues of fact, courts routinely grant requests for permanent injunctive relief in cases brought pursuant to Executive Law § 63(12). See State v. Mgmt. Transition Res., Inc., 115 Misc. 2d 489, 492 (1982); State v. Daro Chartours, Inc., 72 A.D.2d 872, 872 (3d Dept. 1979); Scottish-American Ass'n, 52 A.D.2d at 528; State v. Midland Equities, 117 Misc.2d at 207.

Here, there is ample justification to enjoin Legalherbalbud from engaging in the fraudulent and illegal practices set forth in the Verified Petition, and to compel an accounting of all commodities sold over the last three years. Courts regularly enjoin Executive Law § 63(12) offenders who sell misbranded and falsely labeled drugs. See, e.g., People v. Jamail, 51 Misc. 3d 940 (N.Y. Sup. Ct. 2016); People v. Tebbetts, No.

2012-1708, (N.Y. Sup. Ct.2013); People v. Brotherton, No. 12-0969 (N.Y. Sup. Ct., Oct. 23, 2012).

In People v. Jamail, the court permanently enjoined an online seller of mislabeled drugs. See 51 Misc. 3d 940. In that case, the court found that the respondent was engaged in fraudulent activity because he was selling commodities for their drug effects that lacked, inter alia, accurate ingredient, health risk and dosage information. Id. at 952-53. As a result, the Court granted the Attorney General's request for a permanent injunction enjoining the respondent from continuing to engage in "unlawful conduct," and ordered the respondent to produce an accounting of commodities sold over the last three years. Id. at 953.

The facts here are very similar. As was the case in Jamail, Legalherbalbud is an online business that sells falsely labeled and misbranded products for their drug effects. Also like Jamail, Legalherbalbud's products lack accurate labeling information. Legalherbalbud's labels mischaracterize its products as herbal incense and potpourri, and omit statutorily required information about the health risks and identity of the drug manufacturer. "[U]nlabeled, misbranded and misleadingly labeled designer drugs pose an unreasonable risk of physical harm to the consuming public, and create an extremely dangerous condition." Id. at 946. Therefore, Legalherbalbud should be enjoined from continuing to sell synthetic marijuana stylized drugs to the public.

B. Legalherbalbud Should Be Required to Pay Penalties & Costs

Penalties and costs are customarily assessed against violators of Executive Law § 63(12). When assessing an appropriate civil penalty, the court counts each violation as a

separation violation, thereby subjecting the respondent to a distinct penalty each time. Meyers Bros. Parking Sys. Inc. v. Sherman, 87 A.D.2d 562, 563, aff'd, 57 N.Y.2d 653 (1982). The court has broad discretion to determine the amount of a civil penalty so long as it explains how the penalty was calculated, and it is not disproportionate to the offense. People v. Applied Card Sys., Inc., 41 A.D.3d 4, 10 (3d Dept. 2007), aff'd, 11 N.Y.3d 105 (2008); Tatta v. State, 20 A.D.3d 825, 826 (3d Dept. 2005). The Court must also consider the public safety interest that the statute was enacted to address and impose a penalty that will adequately deter would-be violators of the prohibited act. Gift & Luggage Outlet, Inc. v. People, 194 Misc. 2d 582, 586 (N.Y. Sup. Ct., 2003) (holding that the court's penalty should "[satisfy] the legislative purpose or act as a warning to discourage the prohibited act. The public safety interest must be accommodated.").

1. Penalties

General Business Law § 350-d authorizes a civil penalty of up to \$5,000 for each deceptive act engaged in by the offender. In Meyers Bros. Parking Sys., Inc., the court held that the penalty should not be so small as to represent merely a cost of doing business, as well as large enough to serve as a warning to discourage the prohibited act. 87 A.D.2d at 563.

Given the paucity of the labeling, coupled with the extensiveness of the health risks Legalherbalbud's products pose, Petitioner is seeking the maximum penalty afforded for each indivisible violation.

2. Costs

Civil Practice Law & Rule § 8303(a)(6) states that a court may award the Attorney General “a sum not exceeding two thousand dollars against each defendant” for costs germane to commencing a special proceeding pursuant to Executive Law § 63(12). Courts have routinely granted these costs. See, e.g., Lefkowitz v. Daro Chartours, Inc., 72 A.D.2d 872, 873 (3d Dept. 1979); State v. Midland Equities of N.Y., Inc., 117 Misc.2d 203, 208 (N.Y. Sup. Ct. 1982); People v. Therapeutic Hypnosis, 83 Misc.2d 1068, 1071-72 N.Y. Sup. Ct. 1975); Lefkowitz v. Hotel Waldorf-Astoria Corp., 67 Misc.2d 90, 92 (N.Y. Sup. Ct. 1971). Accordingly, an award of additional costs in the amount of \$2,000 against each individual Respondent should also be granted.

C. The Court Should Grant Petitioner’s Request for a Temporary Restraining Order

Pursuant to Executive Law § 63(12), courts are empowered to grant wide-ranging equitable relief, including temporary restraining orders or preliminary injunctions, to cease fraudulent and illegal conduct. See, e.g., Apple Health & Sports Club, 80 N.Y.2d at 806-07. The power of the court to grant remedial relief is not only authorized by Executive Law § 63(12), but also 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. The court’s authority 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, 718-19 (5th Cir.), cert. denied, 456 U.S. 973 (1982) (“In the exercise of this inherent equitable jurisdiction, the . . . court may order temporary, ancillary relief . . .”).

A temporary restraining order is warranted here because it serves the public’s interest. Legalherbalbud is selling synthetic marijuana falsely labeled as herbal incense and potpourri. Moreover, even if many consumers are aware that Legalherbalbud’s products are really synthetic marijuana, its labels lack pertinent information about the potential health risks such as seizures, psychosis, renal failure and death. See Pellicone Affidavit, Clark Affirmation, Exhibit C, at ¶ 11; see also IN RE THE SALE AND DISTRIBUTION OF SYNTHETIC CANNABINOIDS, Order of Summary Action, New York State Department of Health, Clark Affirmation, Exhibit I at p. 5. These omissions represent an unreasonable risk of physical harm to the consuming public, and create extremely dangerous situations for consumers and first responders. See id. at ¶¶ 8, 10. Furthermore, many of Legalherbalbud’s products target adolescents and children. Products such as “Scooby Snax,” “Green Giant,” “Joker,” and “The Incredible Hulk,” have names and packaging that feature popular cartoons and superheroes. See Kane Affidavit, Clark Affirmation, Exhibit B, at Exs. B-4, B-10, B-21. Without a temporary restraining order, Legalherbalbud is free to continue selling falsely labeled and misbranded synthetic drugs, which may lead to more user overdoses.

D. The Court Should Grant Petitioner's Request to Temporarily Freeze Respondents' Bank Accounts

New York courts have routinely granted requests to temporarily restrain a respondent's access to financial assets in cases brought to pursuant to Executive Law § 63(12). See, e.g., Apple Health & Sports Clubs, 80 N.Y.2d 803; People v. Court Reporting Inst., 240 A.D.2d 413 (2d Dept. 1997); People v. 21st Century Leisure Spa Int'l Ltd., 153 Misc.2d 938, 943 (N.Y. Sup. Ct. 1991).

Here, it is critical that Respondents be temporarily restrained from managing their financial assets, as it is highly likely that they will dispose of, or otherwise attempt to conceal, their assets. If at the conclusion of this instant summary proceeding Respondents are found liable, this Court may choose to impose civil penalties. A temporary asset freeze would prevent Respondents from preemptively hiding their financial assets in order to evade responsibility.

To date, Legalherbalbud has already engaged in extreme conduct to perpetrate its scam and evade detection from law enforcement. For example, even though Legalherbalbud is an online business, it would not allow consumers to purchase products on its website. Instead, once a potential consumer added synthetic marijuana to the Legalherbalbud website checkout cart and attempted to complete the purchase, the consumer would receive a message indicating that the order was not completed. A Legalherbalbud representative would subsequently call the consumer and direct him or her to pay for the products via wire transfer. Then, the consumer would be instructed to wire payment not to "Legalherbalbud" directly, but rather to Aida Guach or Lisanka

Sanchez, who are both affiliated with the Legalherbalbud enterprise. Legalherbalbud would then instruct another person not directly identified as Legalherbalbud, to mail the drugs to the consumer. See Kane Affidavit, Clark Affirmation, Exhibit B, Ex. B-1, B-8, B-16, B-23.

Legalherbalbud also hired a third-party agency named Perfect Privacy LLC⁹ to mask the identities of Legalherbalbud's website operators. Prior to obtaining a domain name, in this case Legalherbalbud.com, a domain name purchaser is required to register its contact information with the "WHOIS" database.¹⁰ However, the WHOIS database lists "Perfect Privacy" as a domain owner for Legalherbalbud even though Perfect Privacy records reflect that Niaz Khan is the registrant for the public domain name Legalherbalbud.com. See Shutterly Affidavit, Clark Affirmation, Exhibit D, at ¶ 4. Upon information and belief, Legalherbalbud hired Perfect Privacy to shroud the identities of its principals so that any legal authorities attempting to investigate the company would not be able to identify its operators.

As a result, Petitioners believe that if Respondents are permitted to continue managing their assets, there is a strong likelihood that they will attempt to hide their financial assets thereby significantly prejudicing the People of the State of New York and dulling Petitioner's ability to effectively deter recidivism.

⁹ Perfect Privacy is a business that will populate a publicly searchable database named "WHOIS" with Perfect Privacy LLC's identification and contact information for a monthly fee. See Shelmidine Affidavit, Clark Affirmation, Exhibit A, at ¶ 4.

¹⁰ WHOIS provides the identification and contact information for the domain registration, such as the registrant's name, business address, email address, phone number, and various administrative and technical contacts.

CONCLUSION

For the reasons set forth in this memorandum of law, the Court should make a summary determination in Petitioner's favor on all causes of action and grant injunctive relief, a temporary restraining order, damages, civil penalties and costs, as requested in the Verified Petition.

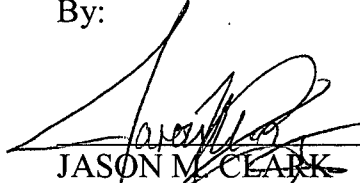
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Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New
York

Attorney for Petitioner

By:



JASON M. CLARK
Assistant Attorney General
Harlem Regional Office
163 West 125th Street
New York, New York, 10027
(212) 364-6010