

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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

Petitioner,

AFFIRMATION

-against-

Index No. 12-20554

GEORGE MOSS, doing business as
East Coast Psychedelics, and
EAST COAST PSYCHEDELICS, INC.,

Respondents.

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RACHAEL C. ANELLO, an attorney duly admitted to practice law in the State of
New York, affirms the following under the penalties of perjury:

1. I am an Assistant Attorney General in the office of Eric T. Schneiderman, Attorney General of the State of New York (OAG), assigned to the Suffolk Regional Office. I am fully familiar with the facts and circumstance of this proceeding, which are based on investigative materials contained in the files of the Attorney General's office.
2. I submit this Affirmation in support of Petitioner's application for an Order and Judgment permanently enjoining Respondents from engaging in deceptive, fraudulent and illegal business practices, requiring that Respondents produce an accounting of mislabeled and misbranded products sold and awarding and penalties and costs to the State of New York.
3. Unless otherwise indicated, I make this Affirmation upon information and belief, based upon my investigation, a review of documents and other evidence on file with the Department of Law.

INTRODUCTION

4. This case is brought in response to the proliferation of “designer drugs” that are being marketed and offered for sale to New York consumers. Designer drugs, referred to as “street drug alternatives” by the federal Food and Drug Administration (“FDA”), generally have one or more of the following characteristics. They typically 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) claim to have effects on the user that “mimic the effects of controlled substances.” See Exhibit I, pp. 1-4, annexed hereto (FDA Guidance for Industry Street Drug Alternatives).

5. It is indisputable that the growth in the market for designer drugs and other street drug alternatives poses a danger to the American population. See Affidavit of Maja Lundborg-Gray, M.D., FAAEM, FACEP, sworn to on July 5, 2012, (“Lundborg-Gray Aff.”), ¶ 3, annexed hereto as Exhibit II. Users of these products can experience severe health effects, some resulting in long-term disability or even death. See Lundborg-Gray Aff., ¶ 5. The FDA also considers any product that is promoted as a street drug alternative to be an unapproved new drug and a misbranded drug in violation of sections 505 and 502 of the Federal Food, Drug, and Cosmetic Act. See Exhibit I, pp. 1-4.

6. Selling products for human consumption that are insufficiently labeled or mislabeled is inherently dangerous. Consumers cannot make informed decisions about the safety of the products they purchase. And, without knowing what drugs or substances people have ingested, medical personnel are hindered in their ability to provide immediate and appropriate medical care. See Lundborg-Gray Aff., ¶¶ 2-3.

7. 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-methylenedioxypyrovalerone (MDPV) and Methyldone, chemicals that serve as the active ingredient in the substance popularly known as “bath salts.” See Exhibit I, pp. 5-6 (“DEA Moves to Emergency Control Synthetic Stimulants; Agency Will Study Whether To Permanently Control Three Substances,” September 7, 2011).

8. In March of 2011 and June of 2012, the DEA also implemented emergency bans on numerous formulas of synthetic cannabanoids, also known as “fake pot” products. See Exhibit I, pp. 7-8, (“Chemicals Used in ‘Spice’ and ‘K2’ Type Products Now Under Federal Control and Regulation DEA Will Study Whether To Permanently Control Five Substances,” March 1, 2011). See also Exhibit I, pp. 9-10 (“Congress Agrees to Add 26 Synthetic Drugs to Controlled Substances Act,” June 19, 2012).

9. 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 Exhibit I, pp. 11-14 (H.R. 1254: “Synthetic Drug Control Act of 2011, 112th Congress, 2011–2012. Text as of Dec 8, 2011). The bill is awaiting the President’s signature.

10. The New York legislature has also taken action to ban these substances. In 2011, the Public Health Law was amended to prohibit the sale of bath salts containing certain chemicals - - 4-Methylmethcathinone, also known as Mephedrone and

Methylenedioxypropylamphetamine, also known as MDPV - - which are known to have hallucinogenic effects. Public Health Law § 3306.

11. 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 head shops, 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 Exhibit I, pp. 15-22.

12. Nonetheless, the problem of designer drugs persists, because manufacturers have been misbranding products to disguise their intended use. In addition, manufacturers rapidly change the synthetic formulation of prohibited compounds without disclosing content, allowing them to circumvent lists of controlled substances. 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.

See Albert Hofmann, LSD: My Problem Child, p. 12 (1980), cited in Kau, Flashback to the Federal Analog Act of 1986, 156 U. Pa. L. Rev. 1078, 1084 (2008) See Exhibit I, pp. 23-47.

13. In response to this growing problem, the Attorney General commenced a statewide investigation focusing on deceptive and illegal labeling of designer drugs (“the Investigation”). As part of this Investigation, undercover investigators visited head shops in twelve counties and made purchases of these products. The Investigation revealed that there is widespread sale of designer drugs and street drug alternatives at these establishments, which are deceptively marketed 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 at retail to the public in New York State, was being offered for sale at nearly every location that was investigated.

14. The Attorney General’s Investigation revealed that (i) the labeling of these designer drugs is insufficient, often omitting manufacturer information, product content, and/or safety and health risks associated with product use, (ii) the labeling on these designer drugs falsely describes their intended uses, (iii) head shops sell products that are labeled “not for human consumption,” with accoutrement that can only be used for one purpose - human consumption, (iv) head shops promote and encourage the ingestion or inhalation of products that are labeled “not fit for human consumption,” and (iv) head shops are selling nitrous oxide in violation of New York State Law.

FACTS

15. Respondents own and operate East Coast Psychedelics, Inc., a retail outlet that is commonly known as “head shop.” Webster’s dictionary defines a head shop as “a shop specializing in articles (such as pipes and roach clips) of interest to drug users.” East Coast Psychedelics, Inc. operates two locations, one in Oceanside, NY and one in Commack, NY. As set forth below, East Coast Psychedelics offers for sale and sells designer drugs, drug paraphernalia used for consumption of cannabis and other recreational drugs, as well as accoutrements such as pipes and “crackers.” See Affidavit of Senior Investigator Chad Shelmidine (hereinafter “Shelmidine Aff.”), sworn to June 26, 2012, annexed hereto as Exhibit III; Affidavit of Investigator Trainee Ryan Fannon (hereinafter “Fannon Aff.”), sworn to June 27, 2012, annexed hereto as Exhibit IV.

16. On May 30, 2012, Investigator Shelmidine visited East Coast Psychedelics in Oceanside, NY, posing as a consumer interested in purchasing merchandise.

17. Investigator Shelmidine purchased three products: 1) Mr. Nice Guy - Panic, 2) Mr. Nice Guy - LMAO, and 3) nitrous oxide. See Shelmidine Aff., ¶¶ 16, 32, 39.

18. On June 15, 2012, Investigator Fannon visited East Coast Psychedelics in Commack, NY, posing as a consumer interested in purchasing merchandise.

19. Investigator Fannon purchased four products: 1) Mary Jane's Potpourri, 2) Maeng Da Kratom T, 3) Euphoric Bomb, and 4) whip-its nitrous oxide. See Fannon Aff., ¶¶ 10, 18, 21.

20. These products constitute drugs because they are “articles [other than food] intended to affect the structure or any function of the body of man or animals.” New York Education Law § 6802.

VIOLATION OF AGRICULTURE AND MARKETS LAW § 194

21. Agriculture and Markets Law Law (“Ag. & Mkts.”) § 194 proscribes false labels on commodities sold, offered or exposed for sale, or any false description respecting the number, quantity, weight, or measure. Commodities include non-prescription drugs. Ag. & Mkts. Law § 191(1)(b)(4).

22. Respondents repeatedly sell mislabeled commodities in violation of Ag. and Mkts. Law § 194. The following products are mislabeled because they fail to include the name and/or address of the manufacturer, packer or distributor:

- a. Mr. Nice Guy - Panic. See Shelmidine Aff., at ¶ 17, Exhibit 2.
- b. Mr. Nice Guy - LMAO. See Shelmidine Aff., at ¶ 18, Exhibit 3.
- c. Mary Jane's Potpourri. See Fannon Aff., at ¶ 11, Exhibit 4.
- d. Maeng Da Kratom T. See Fannon Aff., at ¶ 16, Exhibit 1.
- e. Euphoric Bomb. See Fannon Aff., at ¶ 17, Exhibit 1.
- f. Nitrous oxide chargers. See Shelmidine Aff., at ¶ 29, Exhibit 5 and Fannon Aff., at ¶ 21, Exhibit 3.

VIOLATION OF EDUCATION LAW § 6815

23. Educ. Law § 6815 proscribes misbranding of drugs. A drug is misbranded if the label contains false or misleading information about the product, fails to contain manufacturer information, fails to conspicuously place required information so that it is easily readable by ordinary individuals under customary conditions and purchase of use, fails to bear adequate directions for use; lacks adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, lacks warnings against unsafe dosage or methods of use, imitates another drug or the trademark, label, container or identifying name or design of another drug, or if the product is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended or suggested in the labeling. Educ. Law § 6815(2)(a)-(i).

24. Respondents have repeatedly sold misbranded drugs in violation of Education Law § 6815.

25. Mr. Nice Guy - Panic is misbranded because it fails to bear a label containing the name of and place of business of the manufacturer, packer or distributor. See Shelmidine Aff., Exhibit 2. Additionally, the label is misleading because it bears the warning “not for human consumption” when the product is customarily and usually promoted as one to be smoked for an intoxicating effect. See Shelmidine Aff., Exhibit 2.

26. Mr. Nice Guy - LMAO fails to bear a label containing the name of and place of business of the manufacturer, packer or distributor. See Shelmidine Aff., Exhibit 3. Additionally, the label is misleading because it bears the warning “not for consumption” when the product is customarily and usually promoted as one to be smoked for an intoxicating effect. See Shelmidine Aff., Exhibit 3. The label fails to identify potential health effects that may result from customary and usual use of this drug and is thus misbranded. See Shelmidine Aff., ¶ 17 and Exhibit 3.

27. Mary Jane's Potpourri is misbranded because the label fails to contain the name of and place of business of the manufacturer, packer or distributor. See Fannon Aff., Exhibit 4. Additionally, the label is misleading because it bears the warning “not for consumption” when the product is customarily and usually promoted as one to be smoked for an intoxicating effect. See Fannon Aff., Exhibit 4. The label fails to identify potential health effects that may result from customary and usual use of this drug. See Fannon Aff., Exhibit 4.

28. Maeng Da Kratom T and Euphoric Bomb are misbranded because their labels do 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. See Dr. Lundborg-Gray Aff., ¶ 10 and Exhibit C.

29. Nitrous oxide chargers are misbranded because the label fails to disclose an address for the manufacturer, distributor or packer. Fannon Aff., Exhibit 3; Shelmidine Aff., Exhibit 5. Furthermore, although the packages contain the warning "Do not inhale! Danger to health," the warning appears on the side of the boxes with other information regarding contents. Thus, the warning is not prominently and conspicuously placed and can be easily overlooked. Furthermore, the warning fails to clearly and conspicuously disclose that nitrous oxide can cause not only health problems, but also accidents and death. See Dr. Lundborg-Gray Aff., ¶ 15 and Exhibit G. Finally, the labels also state that nitrous oxide chargers may not be sold to persons under 18, when 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.

VIOLATION OF PUBLIC HEALTH LAW § 3380

30. Respondents have sold nitrous oxide to the public in violation of Public Health Law § 3380.

31. Respondents have nitrous oxide chargers and "crackers" on display at his establishment. See Shelmidine Aff., ¶ 28; Fannon Aff., ¶¶ 21, 24. Investigator Shelmidine purchased a box containing twenty-four nitrous oxide chargers and was offered a dispenser, but did not purchase it. Shelmidine Aff., ¶¶ 32, 35 and Exhibit 5. Investigator Fannon purchased a box containing twenty-four whip-its nitrous oxide chargers and a cracker, which is used to break the charger in order to inhale the drug. See Fannon Aff., ¶¶ 21, 24 and Exhibits 2-3. Respondents therefore had knowledge of Investigator Fannon's and

Investigator Shelmidine's intended use of the product, and proceeded to provide them the nitrous oxide and delivery devices.

DECEPTIVE ACTS AND PRACTICES

32. Respondents repeatedly offer for sale and sell products for consumer use that are, in fact, misbranded and mislabeled drugs. The products are marketed in misleading packaging that fails to disclose required information, including manufacturer and distributor information, product ingredients, and/or potential health risk with customary use. See Shelmidine Aff., Exhibits 2, 3, 5; Fannon Aff., Exhibits 1, 2.

33. Respondents repeatedly offer for sale and sell products for human consumption even though the labeling contradicts that use. See Shelmidine Aff., Exhibits 2, 3, 5; Fannon Aff., Exhibits 1, 2.

34. Respondents deceptively market and sell an illegal product as legal, e.g. the retail sale of nitrous oxide to the public. Shelmidine Aff., Exhibit 5; Fannon Aff., Exhibit 2.

NEED FOR TEMPORARY RESTRAINING ORDER

35. The evidence submitted by the Attorney General, including the Affidavit of Senior Investigator Chad Shelmidine dated June 26, 2012, with Exhibits, Affidavit of Investigator Trainee Ryan Fannon dated June 27, 2012, with Exhibits, and the Affidavit of Dr. Maja Lundborg-Gray, dated July 5, 2012, with Exhibits, clearly demonstrates that Respondents are fraudulently and illegally selling misbranded and mislabeled designer drugs and that these drugs present serious harm to the public.

36. Without a temporary restraining order prohibiting Respondents George Moss d/b/a East Coast Psychedelics and East Coast Psychedelics, Inc., from selling misbranded and mislabeled drugs, there is a great likelihood that Respondents will, in fact, continue to

sell these products and that these sales will result in irreparable injury to individuals who consume these products.

37. Petitioner has notified Respondents of its intent to seek this relief pursuant to Section 202.7(f) of the Uniform Rules of the Trial Courts. On July 9, 2012 at 9:00AM, I called Respondents' attorney, Thomas Hillgardner to notify him that Petitioner will be making this application for an Order to Show Cause with a temporary restraining order on July 10, 2012 at 10:00am at Special Term, Supreme Court, Suffolk County. On July 9, 2012 at 9:42 AM, I also emailed Mr. Hillgardner a letter informing him of same.

38. There has been no previous application for the relief requested herein.

CONCLUSION

39. Respondents continue to engage in deceptive, fraudulent and illegal acts set forth in this Affirmation and Verified Petition and unless enjoined, will continue to engage in those acts. The Attorney General is bringing this action to force compliance with State labeling and consumer protection laws. Transparency in the labeling and sale of these dangerous products will permit the appropriate regulating authorities to deal with the products for what they truly are: Drugs. With that transparency can be real debates as to the products' safety, risks, quality control, and until such time, these dangerous products must be removed from the shelves.

WHEREFORE, it is respectfully requested that the relief requested in Petitioner's Verified Petition be granted, together civil penalties and costs as set forth by statute, and with such other and further relief as this Court deems just and proper.

Dated: Hauppauge, New York
July 9, 2012


RACHAEL C. ANELLO