



Doc ID: *004395110009 Type: CIV
 Recorded: 10/24/2012 at 11:38:18 AM
 Fee Amt: \$0.00 Page 1 of 9
 Clinton, NY
 John H. Zurlo County Clerk

File **2012-00000969**

At a term of the Supreme Court of the State of New York, held in and for the County of Clinton, at the Clinton County Government Center in the City of Plattsburgh, on the 12th day of October, 2012.

P R E S E N T: HONORABLE KEVIN K. RYAN
 Acting Justice, Supreme Court

STATE OF NEW YORK
 SUPREME COURT COUNTY OF CLINTON

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

Petitioner,

-against-

CARLA BROTHERTON,
 d/b/a 20 Below and This and That,

Respondent.

DECISION AND ORDER
 Index No. 12-0969
 RJI #09-1-2012-0401

APPEARANCES: DEANNA R. NELSON and HILARY D. ROGERS,
 Assistant Attorneys General, for the
 Petitioner
 TIMOTHY DANDAR, Esq., Attorney for the
 Respondent

RYAN, A.J.:

Pending before this Court is the petition by the Attorney General, pursuant to Executive Law §63 and General Business Law (hereinafter "GBL") §349, for a permanent injunction preventing the respondent from selling certain items, as well as other relief. In connection with this matter, the Court has reviewed and considered the following: the petition,

verified on July 10, 2012, the affirmation of Assistant Attorney General Hilary D. Rogers, dated the same date, as well as attached exhibits A through G, and the U.S. Department of Health and Human Services publication entitled "Guidance for Industry - Street Drug Alternatives", the affidavit of Senior Investigator Chad Shelmidine, sworn to July 2, 2012, the petitioner's memorandum of law, the respondent's response to verified petition, filed September 26, 2012¹, the respondent's affidavit, sworn to September 25, 2012, the reply affirmation of Assistant Attorney General Deanna R. Nelson, dated October 3, 2012, the supplemental affidavit of Sr. Inv. Shelmidine, sworn to October 3, 2012, as well as attached exhibit A, and the petitioner's reply memorandum of law. On the return date of the petition, the Court heard argument from petitioner and respondent.

The facts underlying this matter are not in dispute. The respondent owns and operates two businesses in the City of Plattsburgh, Clinton County, 20 Below and This and That. On May 21, 2012, Sr. Inv. Shelmidine went into the 20 Below store and asked about buying nitrous oxide chargers, sold under the brand name whip-eez. The packaging for the chargers includes the warning, "Do not inhale contents." Sr. Inv. Shelmidine was

¹
The respondent did not file a verified answer. However, the Court granted the respondent permission to amend her papers to do so.

also able to purchase a device known as a "cracker", which is used to break the seal on the nitrous oxide chargers and a balloon, which attaches to the cracker and collects the released nitrous oxide. In order to sell nitrous oxide in New York State, a retailer must have an exemption to do so from the State Commissioner of Health. The respondent does not have such an exemption.

Because the credit card machine in 20 Below was not working, the clerk brought Sr. Inv. Shelmidine to the This and That store, which is located next door. The clerk in that store was the respondent herself. Sr. Inv. Shelmidine asked her about whether she had for sale anything similar to the smokable items that had just recently been banned in New York State, referring to synthetic marijuana. After telling Sr. Inv. Shelmidine that none of that, the synthetic marijuana, was intended for smoking, the respondent told him she had sachets for sale. She produced a three-ring binder from under the counter and showed him sealed, plastic packages. Sr. Inv. Shelmidine selected two such sachets, one called "Avalanche" and one called "Bizarro". Photographs of the front and back of each of these packages were submitted as exhibits D and E to the petition and color copies of these exhibits were provided to the Court, without objection, at oral argument.

Both these packages are labeled on the front "not for

human consumption" and, on the back, state that they do not contain certain things, being the recently banned synthetic marijuana.

Sr. Inv. Shelmidine then asked for a "new piece" and was shown several pipes by the respondent. He selected one and bought it, along with the sachets, the nitrous oxides chargers, the cracker and the balloon.

There is no disagreement between the parties that the consumption of these items, by inhalation or smoking, can have serious adverse health effects, including seizures, hallucinations, extreme paranoia and even suicidal or homicidal thoughts. First responders attempting to treat individuals who have ingested these sachets are hampered in their ability to do so by the complete lack of information as to what is actually contained in them.

This Court previously granted a preliminary injunction directing the respondent not to offer items such as those purchased by Sr. Inv. Shelmidine for sale, pending the return date of this petition.

Executive Law §63(12) states that the attorney general may apply to a court for an injunction whenever "any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate[s] persistent fraud or illegality in the carrying on, conducting or transaction of business". GBL 349

(b) states that the attorney general may bring an action against any business that engages in deceptive acts or practices. In this case, the Attorney General alleges the respondent has done so by selling items which are clearly not for human consumption in a manner so they can be consumed. Further, the items in question are all being promoted for their effect on the human body which makes them over the counter drugs, under Education Law §6802(7). As such, they are consumer commodities under the Agriculture and Markets Law (hereinafter "Ag & Mkts Law") §191 and are subject to requirements on labeling, providing information as to the identity and address for the manufacturer and distributor, among other things.

This Court finds the Attorney General has met his burden of proof to show this respondent has engaged in repeated fraudulent or illegal acts such that this Court may issue a permanent injunction. The respondent's answer, characterized by counsel as a motion to dismiss for failure to state a cause of action, raises a number of issues, none of which are persuasive.

Initially, the Court finds the Attorney General has authority to bring this action under Executive Law §63(12) and GBL 349(b). Under the authority of the prior law, the Attorney General need not conduct any public hearings in this

matter. Additionally, Executive Law §63(12) gives the Attorney General the authority to pursue the matter of the sale of nitrous oxide without requiring the respondent be arrested and charged with a crime under the Penal Law.

The sachets sold to Sr. Inv. Shelmidine clearly lack the required list of ingredients, as well as the names and addresses of the manufacturer and distributor. The nitrous oxide also lacks this information. Thus all the items sold violate Ag & Mkts Law 194.

Likewise, the petitioner has met its burden of showing these items are "consumer commodities", as that term is defined in Ag & Mkts Law 191. While all of the items were labeled "not for human consumption", it staggers the imagination to believe they were not intended to be consumed given the items offered to Sr. Inv. Shelmidine, the cracker and balloon and the pipe. As stated above, the nitrous oxide chargers and the sachets are consumed because they *do* have an effect on the human body and sold, not as an item to make whipped cream or as a room freshener, but as drugs.

Sr. Inv. Shelmidine has identified the respondent as the second clerk in This and That who sold him the sachets and pipe. There can be no question she was personally aware of what was being sold in her stores and for what purposes these items were being sold.

The Executive Law has its own definition of "fraud", separate from the CPLR. As the Attorney General stated in his papers, fraud, in this context, means "any device, scheme or artifice to defraud" (see Executive Law §63(12)). That section also defines "repeated" as repetition or "conduct which affects more than one person". From Sr. Inv. Shelmidine's affidavits, it is clear the respondent's actions meet this definition of "repeated fraudulent or illegal acts". Her comments to Sr. Inv. Shelmidine as well as the multiple sachets, pipes and nitrous oxide chargers all demonstrate this sale was not the first such sale.

Lastly, the respondent complains the petitioner did not conduct any chemical testing of the sachet contents, as required by Education Law §6825(1) to bring a cause of action for misbranding drugs. However, as the Assistant Attorney General pointed out at oral argument, the sachets could have contained sugar if they were offered for sale in the manner here. The point is that the sachets were offered for sale because they have an effect on the human body when consumed. The problem lies in what is on the outside of the package not the contents. Simply put, the respondent offered over the counter drugs for sale without providing the consumer with much of the information required by law.

The Court will grant the petitioner's request for relief

as follows:

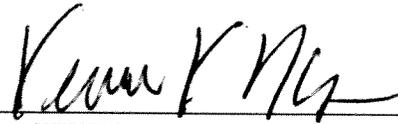
1. The respondent, and her agents and employees, is permanently enjoined from offering for sale and/or selling mislabeled drugs in violation of Ag & Mkts Law §194;
2. The respondent is permanently enjoined from offering for sale misbranded drugs in violation of Education Law §§6802 and 6815;
3. The respondent is permanently enjoined from misleadingly offering for sale and/or selling products as designer drugs or other street drug alternatives, including encouraging ingestion of products that are labeled or specifically designated "not for human consumption";
4. The respondent is permanently enjoined from offering for sale and selling nitrous oxide to the public in violation of Public Health Law §3380;
5. The respondent is permanently enjoined from engaging in fraudulent, deceptive and illegal practices alleged in the petition in violation of GBL 349;
6. The respondent is required to comply with any and all state, local and federal labeling requirements;
7. The respondent is required to prepare an accounting

of all commodities she sold, or offered for sale, from January 1, 2012 through July 10, 2012 including the (1) name of the product; (2) the manufacturer and/or distributor of the product; (3) the description of the product; (4) the retail price of the product; and (5) the number of units of the product sold;

8. The respondent is directed to pay a civil penalty, pursuant to GBL 350-d of \$15,000;
9. The respondent is directed to pay costs, pursuant to CPLR 8303(a)(6) of \$1,000 to the State of New York.

IT IS SO ORDERED.

E N T E R:



KEVIN K. RYAN
Acting Justice, Supreme Court

Dated: Plattsburgh, New York
October 23, 2012