

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BROOME

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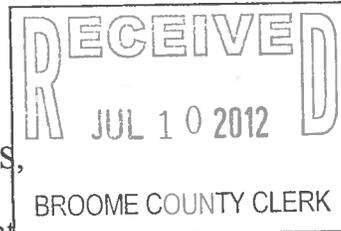
PEOPLE OF THE STATE OF NEW YORK, by  
ERIC T. SCHNEIDERMAN, Attorney General of the  
State of New York,

Petitioner,

-against-

THOMAS J. LYNCH,  
D/B/A ROLLING FIRE GLASSWORKS,

Respondent.



**VERIFIED  
PETITION**

*Index #2012-1631*

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

**PRELIMINARY STATEMENT**

1. Petitioner brings this special proceeding pursuant to New York Executive Law § 63(12), and New York General Business Law (“GBL”) § 349 to enjoin Respondent Thomas J. Lynch, doing business as Rolling Fire Glassworks, from engaging in deceptive, fraudulent and illegal practices in connection with his business (commonly known as a “head shop”). Respondent sells so-called “designer drugs,” which are synthetic versions of illegal drugs, as well as other street drug alternatives, which are products that are marketed with claims that use mimics the effect of controlled substances. Designer drugs and other street drug alternatives (hereinafter “designer drugs”) are marketed to avoid the provisions of existing drug laws; they are intended to stimulate, sedate or cause hallucinations or euphoria when ingested or inhaled. Petitioner also seeks civil penalties and costs, as authorized by statute, to be paid to the State of New York.

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

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

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

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

5. In addition, the New York State Police Health Law (herein after "Public Health Law") §3380 proscribes the retail sale of nitrous oxide to the public. Respondent offers for sale and sells nitrous oxide canisters to the public.

#### **PARTIES AND JURISDICTION**

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

7. Respondent Thomas J. Lynch ("Lynch" or "Respondent") is a resident of Broome County and does business as Rolling Fire Glassworks ("Rolling Fire"). Lynch operates retail locations for Rolling Fire now or formerly at 217 North Nanticoke Avenue and 300 North Nanticoke Avenue, Endicott, New York 13760.

8. Petitioner brings this proceeding pursuant to New York Executive Law § 63(12) which authorizes the Attorney General is to seek injunctive relief, restitution, damages and costs when any person or entity has engaged in repeated fraudulent or illegal acts or has otherwise engaged in persistent fraud or illegality in the conduct of its business, and pursuant to GBL Article 22-A, which authorizes the Attorney General is to seek injunctive relief, restitution and civil penalties against any person or business entity that has engaged in deceptive business practices.

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

### FACTS

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

11. The Office of the New York State Attorney General Eric T. Schneiderman ("OAG") conducted an undercover investigation that revealed extensive evidence that Respondent offers for sale and sells mislabeled and misbranded designer drugs and nitrous oxide to the public. Even as to products that may not be classified as designer drugs because their contents could not be identified, Respondent offers for sale and sells these products in such a manner as to either explicitly or implicitly misrepresent the products as designer drugs. The Food and Drug Administration (FDA) also considers any product that is promoted as a street drug alternative to be an unapproved new drug and misbranded drug in violation of sections 505 and 502 of the Federal Food, Drug, and Cosmetic Act. 21 U.S.C. §§ 321(p)(1), 352(f)(1).

12. Respondent offers for sale and sells these products in such a manner as to either explicitly or implicitly misrepresent the products as designer drugs.

13. As detailed below, Respondent offers for sale and sells the following designer drugs: green leafy substance resembling marijuana contained in clear plastic baggie, Blaze It, P.E.P. Fly Agaric Mushrooms, XXX Platinum Nitrous Oxide chargers and Kratom Zone.. Respondent also offers for sale and sells canisters of nitrous oxide, despite its lack of an

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

14. On May 15, 2012 at approximately 12:00 p.m. and on May 23, 2012 at approximately 11:00 a.m., Chad Shelmidine, a Senior Investigator employed by the OAG (“Inv. Shelmidine”), went to the Respondent's Rolling Fire store, located at 300 North Nanticoke Avenue, Endicott, New York.

15. Respondent offers for sale and sells a green leafy substance resembling marijuana in a clear plastic baggie, as a type of designer drug. In fact, Respondent's sales staff clearly offers for sale and sells the substance as a designer drug to be smoked by users.

16. The clear plastic baggie containing the green leafy substance does not contain any label identifying the product or the weight/quantity of the product, but is clearly sold by Respondent for the purpose of being smoked to get high.

17. Respondent offers for sale and sells "Blaze It," another type of designer drug.

18. According to its label, Blaze It is "**FOR USE AS AN AROMATHERAPY INCENSE ONLY.**" Despite the description on the product label, Respondent clearly offers for sale and sells Blaze It as a designer drug to be smoked by users.

19. Respondent also offers for sale and sells “Fly Agaric Mushrooms (Amanita Muscaria)”.

20. According to the packaging, the product contains “P.E.P. 100% Organic Mushrooms.” The label describes the product as - the “highly sought after” “Eastern European Mushrooms” that are “Popular in pop culture and forever ingrained in our minds through its classic portrayal in video games and in classic novels.” P.E.P mushrooms are described on the label as “grade A + + +, meaning they’re the finest grade mushrooms that were produced during

harvest season. Because of this high grade, we only source the mushroom caps, never the stems. When you buy from Pep, you're sure to get the highest quality product available."

21. The label also bears a warning that "THIS PRODUCTS [SIC] IS NOT INTENDED FOR HUMAN CONSUMPTION" and claims that the product is sold as a "botanical/horticultural/herbarium specimen only." Despite this description, Respondent's staff sells the product as a designer drug by explaining the effects of the mushrooms as follows: "Um, you gotta eat a lot of them but they do pretty nice."

22. According to the Food and Drug Administration, Fly Agaric (*Amanita muscaria*) mushrooms produce ibotenic acid and muscimol. Both substances produce the same effects, but muscimol is approximately five times more potent than ibotenic acid. Symptoms of poisoning generally occur within 1 to 2 hours after the mushrooms are ingested. Abdominal discomfort may be present or absent initially, but the chief symptoms are drowsiness and dizziness (sometimes accompanied by sleep), followed by a period of hyperactivity, excitability, derangement of the senses, manic behavior, and delirium. Periods of drowsiness may alternate with periods of excitement, but symptoms generally fade within a few hours. Fatalities rarely occur in adults, but in children, accidentally consuming large quantities of these mushrooms may result in convulsions, coma, or other neurologic problems for up to 12 hours.

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

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

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

25. According to the packaging, the box contains twenty-four 10 cm<sup>3</sup> cream chargers, each charger containing pure nitrous oxide (N<sub>2</sub>O). The label includes instructions that the chargers are specially made for food consumption and preparation only, and cautioned "do not inhale." The label misleadingly states that nitrous oxide canisters may not be sold to persons under the age of 18; in New York State such canisters may not be sold for any reason to persons under age 21 and can not be sold at retail. There is no address or contact information for the manufacturer, packer or distributor.

26. Respondent offers for sale and sells these chargers, which state on their packaging that they are not to be inhaled. Respondent sells these nitrous oxide chargers with accoutrements (crackers and balloons); these accoutrements can only be used for one purpose - the inhalation of the nitrous gas.

27. Respondent also offers for sale and sells "Kratom," another type of designer drug.

28. According to the product packaging, the product is "Kratom Zone." The label states that, "[h]istorically in Thailand, the ready-available fresh Kratom leaves were chewed. Nowadays, when dried leaves or extract are the norm, Kratom is usually taken as a tea. Other teas, sugar, or honey may be mixed with the Kratom tea to improve the flavor. The effects of Kratom last approximately 4-6 hours, but the residual lingering effects may last longer."

29. The directions printed on the package recommend a dosage of "5-30 Grams." It goes on to state, "Kratom is unique because it induces distinct effects depending upon the dosage level. At lower dosage, a stimulating effect is felt. An individual may feel more alert, talkative,

sociable, and energetic. In addition, sexual energy is also frequently increased. At higher dosage, Kratom can produce extremely pleasurable, euphoric effects that are often accompanied by closed-eye sensations."

30. The package contains the following warnings: "Never attempt to operate any form of heavy machinery or moving vehicle while using this product. Do not exceed recommended dosage. Improper excessive use may lead to a less than favorable experience. Prior to use, NAP strongly recommends that further research be completed to fully understand the traditional uses, preparations, benefits, and effects of Kratom."

31. According to the United States Department of Justice Department of Drug Enforcement, kratom is a tropical tree native to Southeast Asia. Like psychostimulant drugs, consumption of kratom leaves (or extract) produces both stimulant effects in low doses, and sedative effects in high doses and can lead to addiction. Several cases of psychosis resulting from use of kratom have been reported, where individuals addicted to kratom exhibited psychotic symptoms, including hallucinations, delusion, and confusion. Withdrawal effects include symptoms of hostility, aggression, mood swings, runny nose, achy muscles and bones, and jerky movement of the limbs. There is no legitimate medical use for kratom in the United States.

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

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

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

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

35. The following products sold by Respondent are intended to affect the function of the human body: unidentified green leafy substance in clear plastic baggie, Blaze It, P.E.P. Fly Agaric Mushrooms, XXX Platinum Nitrous Oxide chargers and Kratom Zone. They are thus, classifiable as non-prescription drugs and are commodities under New York State Ag. & Mkts. § 191(4).

36. The above labels do not satisfy the requirements for commodity labeling pursuant to the Ag. and Mkts. Law. The labels on each of these products fail to identify the name and/or address of the manufacturer, packer or distributor. In addition, the clear plastic baggie containing the green leafy substance fails to provide any information about the product’s identity (common or usual name, description, generic term) and, consequently, constitutes an additional infraction of the Ag & Mks. labeling requirements.

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

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

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

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

40. The following products sold by Respondent are drugs pursuant New York State Educ. Law § 6802 since they constitute articles (other than food) intended to affect the structure or any function of the body of man or animals: green leafy substance contained in clear plastic baggie, Blaze It, P.E.P. Fly Agaric Mushrooms, XXX Platinum Nitrous Oxide chargers and Kratom Zone.

41. A drug is deemed to be misbranded pursuant to Educ. Law § 6815(2)(a)-(i) if:
- a. its labeling is false or misleading in any particular or, if in package form, it fails to bear a label containing the name of and place of business of the manufacturer, packer or distributor and an accurate statement of the quantity of the of the contents in terms of weight, measure or numerical count;
  - b. required information is not prominently and conspicuously placed on the label in such terms to render it to be likely read and understood by ordinary individuals under customary conditions and purchase of use;
  - c. its label fails to bear adequate directions for use;

d. it lacks adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users;

e. it as an imitation of another drug, or offered for sale under the name of another drug; or bears a copy, counterfeit, or colorable imitation of the trademark, label, container or identifying name or design of another drug; or

f. it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended or suggested in the labeling thereof.

42. In considering whether a drug is misbranded because it is misleading, the court must consider (i) the representations made or suggested by the manufacturer, but also (ii) in view of those representations, the failure of the manufacturer to disclose material facts with respect to the consequences which may result from the customary or usual use of the drug. Education Law §6802(13).

43. The clear plastic baggie containing the green leafy substance resembling marijuana is misbranded for the following reasons:

- a. It fails to bear any label containing the name of and place of business of the manufacturer, packer or distributor.
- b. It fails to identify the product and the potential health effects that may result from customary and usual use of this drug.
- c. It fails to contain an accurate statement of quantity of the contents.
- d.. It fails to contain any directions for use, including dosage, frequency or duration.

44. The Blaze It is misbranded for the following reasons:

- a. It fails to disclose the name of and place of business of the manufacturer, packer or distributor.
- b. The label and directions for use are misleading because it bears the warning "**FOR USE AS AN AROMATHERAPY INCENSE ONLY**" when, in fact, this product is customarily and usually smoked by the user to produce an intoxicating effect.
- c. The label fails to identify potential health effects that may result from customary and usual use of this drug.

45. The P.E.P. Fly Agaric Mushrooms package is misbranded for the following reasons:

- a. The label fails to disclose the name of and place of business of the manufacturer, packer or distributor.
- b. The label and directions for use are misleading. Although the label states that the product is “not intended for human consumption,” this drug is customarily and usually promoted as one to be eaten to produce an intoxicating effect.
- c. The label fails to identify potential health effects that may result from customary and usual use of this drug.

46. The XXX Platinum Cream Chargers box is misbranded for the following reasons:

- a. The label fails to disclose the name and place of business of the manufacturer, packer or distributor.
- b. Although the label states that the product "should be used for the preparation of food only" and cautions to not inhale the contents, the warning appears on the side of the box with other information regarding contents and can be easily overlooked.
- c. The label fails to identify potential health effects that may result from customary and usual use of this drug, including accidents and death.
- d. The label also states that nitrous oxide chargers may not be sold to persons under 18. This statement is false and misleading because in New York nitrous oxide may not be sold at retail to anyone without an exemption, and under no circumstances to anyone under age 21.

47. The Kratom Zone is misbranded for the following reasons:

- a. The label does not identify the place of business of the manufacturer, packer or distributor.
- b. The label does not identify the potential health effects from customary and usual use of this drug, which may include anything from the sedation or stimulant effects to psychosis, hallucinations, delusion and confusion.

48. Educ. Law §§ 6811(9) and (11) makes it a misdemeanor to sell, or receive in commerce, a misbranded drug. The labels of the green leafy substance contained in clear plastic baggie, Blaze It, P.E.P. Fly Agaric Mushrooms, XXX Platinum Nitrous Oxide chargers and Kratom Zone are misbranded..

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

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

50. New York State PHL § 3380 proscribes selling nitrous oxide to the public for the purpose of intoxication.

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

52. Pursuant to the PHL § 3380(5)(d), there can be no exemptions for retail sale of nitrous oxide to the public.

53. Notwithstanding, to the extent that Pub. Health Law § 3380(5)(f) allows a seller to apply for an exemption to sell nitrous oxide to the public at retail, Respondent is not eligible for such an exemption since he sells drug-related paraphernalia and other items used for the inhalation of nitrous oxide in his retail store. Pub. Health Law § 3380(5)(f)(v).

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

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

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

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

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

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

59. By offering for sale and/or selling mislabeled and misbranded drugs, Respondent has repeatedly and persistently violated GBL § 349.

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

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

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

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

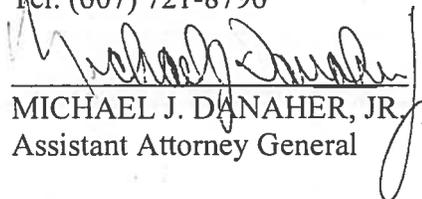
- a. permanently enjoining Respondent, and his agents, trustees, servants, employees, successors, heirs and assigns, or any other person under his direction and control, whether acting individually or in concert with others, or through any corporate or other entity or device through which he may now or hereafter act or conduct business, from offering for sale and/or selling mislabeled drugs in violation of Ag. and Mkts. Law § 194;
- b. permanently enjoining Respondent from offering for sale and/or selling misbranded drugs in violation of Educ. Law §§ 6802 and 6815;
- c. enjoining Respondent from offering for sale and/or selling products as designer drugs or other street drug alternatives that are not approved for human consumption, including products that are labeled "not for human consumption" or are labeled for a use that expressly excludes human consumption such as "for aromatherapy incense only";
- d. permanently enjoining Respondent from offering for sale and selling nitrous oxide to the public in violation of Public Health Law § 3380;
- e. permanently enjoining Respondent from engaging in the fraudulent, deceptive and illegal practices alleged in the petition in violation of GBL § 349;
- f. requiring that Respondent comply with any and all state, local or federal labeling requirements;

- g. requiring Respondent to prepare an accounting of all commodities he sold, or offered for sale, from January 1, 2012 to July 10, 2012 including the (i) name of the product, (ii) the manufacturer and/or distributor of the product, (iii) a description of the product, (iv) the retail price of the product, and (iv) the number units of the product sold.
- h. pursuant to GBL § 350-d, imposing a civil penalty of \$5,000 for each deceptive act committed by Respondent;
- i. pursuant to CPLR § 8303(a)(6), granting costs to the State of New York of \$2,000; and
- j. for such other and further relief as the court deems just and proper.

Dated: Binghamton, New York  
July 9, 2012

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