

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Petitioner,

-against-

DAN HEINS, doing business as
SHINING STAR ENTERPRISES,

Respondent.

Albany County Clerk
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**VERIFIED
PETITION**

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 Dan Heins, doing business as Shining Star Enterprises, 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 the effect of their use mimics 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 legal 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, 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 Public Health Law (hereinafter “Pub. Health Law”) § 3380 proscribes the retail sale of nitrous oxide to the public. Respondent offers for sale and sells nitrous oxide canisters to the public.

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 Dan Heins is a resident of Albany County. Respondent Heins does business as Shining Star Enterprises. Shining Star Enterprises is located at 244 Lark Street, Albany, New York. Dan Heins shall hereinafter be referred to as “Heins,” “Respondent” or “Shining Star.”

8. Petitioner brings this proceeding pursuant to New York Executive Law § 63(12) which authorizes the Attorney General 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 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 illegal 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 Shining Star offers for sale and sells mislabeled and misbranded designer drugs and nitrous oxide to the public. 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. Shining Star 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, Shining Star offers for sale and sells the following designer drugs, among others: Leaf Salvia; Lucky Kratom Liquid Alkaloid Suspension; Lucky Kratom Rx Strength Capsules; and Glide 150. Shining Star 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 22, 2012, Chad Shelmidine, a Senior Investigator employed by the OAG (“Inv. Shelmidine”), made two investigative visits to Shining Star, located at 244 Lark Street, Albany, New York: the first at 11:00 a.m. and the second at approximately 2:00 p.m.

15. Dan Heins was in the store during the investigative visits, and was working as the sales clerk. He displayed and discussed several products with Investigator Shelmidine, including but not limited to salvia, kratom, Glide 150, and nitrous oxide, as follows.

16. Shining Star offers for sale and sells an unlabeled leaf salvia, a type of designer drug. In fact, Dan Heins offered the leaf salvia as a hallucinogenic designer drug to be smoked by users.

17. According to the rudimentary product packaging, there were 5-grams of leaf salvia in the otherwise unmarked package. Shining Star clearly offers for sale and sells salvia as a designer drug. This product was sold together with a glass pipe.

18. According to the U.S. Department of Justice Drug Enforcement Administration, salvia divinorum is an herb in the mint family native to certain areas of the Sierra Mazateca region of Oaxaca, Mexico. Salvia divinorum products are “abused for their ability to evoke hallucinogenic effects, which, in general, are similar to those of other scheduled hallucinogenic substances.” Salvinorin-A is believed to be the active ingredient responsible for the hallucinogenic effects. Neither salvia divinorum nor Salvinorin-A, have any approved medical uses in the United States. Side effects also include losing coordination, dizziness and slurred speech.

19. Shining Star offers for sale and sells “Lucky Kratom ” in both liquid and encapsulated form, both types constituting designer drugs.

20. “Kratom” is another type of designer drug or street drug alternative.

20. According to the product packaging for the liquid, the product is Lucky Kratom Liquid Suspension. The kratom liquid was in a small dark vial inside a plastic sleeve. The vial itself had a label which stated as follows on the front panel: "100% NATURAL", "LUCKY KRATOM", "MAXIMUM POTENCY", "MAENG DA", "Pure Alkaloid Suspension", "225mg = 9 grams of liquid in each bottle", "12ml". The rear panel stated: "MFG. By Nuevotanicals", "Botanical Extract Specimen", "ALL NATURAL XTRACT'N- Alcohol, Acetone & Petroleum FREE", "NO SYNTHETIC INGREDIENTS". The clerk described the kratom as a "natural pain reliever" and noted that the liquid could be smoked on its own at high heat.

21. The Lucky Kratom capsules were labeled as follows on the front: "CHEMICAL FREE · ADVANCED EXTRACTION METHODS", "FIVE CAPSULES", "LUCKY KRATOM Maximum Potency", "Rx Strength KRATOM", "Natural", "USE WITH CAUTION: Do not use while operating a motor vehicle, machinery, if you are pregnant or nursing, or if you are taking any prescription or non-prescription medication or drugs. Keep out of reach of children. This product has not been evaluated by the FDA & is not intended to diagnose, treat or prevent any disease." By indicating that these were "Rx" strength and to avoid operation of a vehicle or machinery, the product was plainly offered as a drug.

22. 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.

23. Shining Star also offers for sale and sells "Glide 150." The Glide was in a short cylindrical container and had a handglider depicted on the top label. The top label also stated: "GLIDE 150", "Mindex", "1/2 Stregth", "SOLD AS: 1 tablet 50 mg.", "ALL ABOARD", "FOR ADULTS ONLY!" the bottom label of the Glide product had a smiley face surrounded by "NOT FOR HUMAN CONSUMPTION" written three times. It also states, "WARNING!! Always drink Lots of Water. Never use with alcohol. STRICTLY for SALE to ADULTS 18 years & over. Do not operate a motor vehicle or machinery. We promote moderation, safety & overall wellness. We oppose irresponsibility, indulgence and excess."

24. There was no indication as to what type of substance was inside the Glide 150 container, nor was there manufacturer information, directions, or specific warnings. By indicating that the user should drink lots of water, never use with alcohol, or operate a vehicle while using, it is plain that it is marketed for consumption as a drug alternative. As stated by the respondent while describing Flight 300, a stronger version of Glide 150, "It's like 300-minutes of feeling really good...and then it just stops like *that* (snapping fingers)." The respondent was clearly promoting this product as a street drug alternative.

25. Shining Star also offers for sale and sells a variety of nitrous oxide "cream" chargers. Nitrous oxide is also known by the slang term "laughing gas," and 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.'

26. 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 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.

27. According to the packaging purchased by Investigator Shelmidine, the box of "NITRO whip" contained twenty-four 8 gram cream chargers, each charger containing pure nitrous oxide (N₂O). The label included instructions that the chargers are specially made for making whipped cream in Cream Whippers and were not for use for any other purpose, and cautioned "do not inhale." The label misleadingly states that nitrous oxide chargers 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 was no address or contact information for the manufacturer or distributor.

28. Shining Star offers accoutrements (crackers and balloons) along with the nitrous oxide chargers. The use of these accoutrements is only for the inhalation of the nitrous gas, and was suggested by the respondent.

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

29. 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.

30. 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.

31. 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, identifying, or giving any information with respect to the commodity or to the contents of the package.” A label must identify 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.

32. The following products offered and sold by Respondent to the retail public are intended to affect the function of the human body: salvia, Lucky Kratom Liquid Suspension, Lucky Kratom capsules, Glide 150, and nitrous oxide. They are thus classifiable as non-prescription drugs and are commodities under New York State Ag. & Mkts. § 191(4).

33. The above product labels do not satisfy the requirements for commodity labeling pursuant to the Ag. and Mkts. Law. The labels on each of these products fails to identify the name and address of the manufacturer, packer or distributor. Further, the label on the Glide 150 fails to identify the product's identity (common or usual name, description, generic term), and consequently constitutes an additional infraction of the Ag & Markets labeling requirements.

34. 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)**

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

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

37. The following products sold by Respondent are drugs pursuant to 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: salvia, Lucky Kratom Liquid Suspension, Lucky Kratom Capsules, Glide 150 and nitrous oxide.

38. 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 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.

39. 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. Educ. Law § 6802(13).

40. The salvia product is misbranded for the following reasons:.

- a. It fails to bear a label containing the name of and place of business of the manufacturer, packer or distributor.
- b. The label fails to identify potential health effects that may result from customary and usual use of this drug.

41. Both Lucky Kratom products are misbranded for the following reasons:

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

42. Glide 150 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. Though the label states that the product is “not intended for human consumption,” this drug is customarily and usually ingested by the user to produce an intoxicating effect.
- c. The label does not identify potential health effects from customary and usual use of this drug.

43. "NITRO whip" Chargers are misbranded for the following reasons

- a. The label fails to disclose an address for the manufacturer, distributor or packer; only the brand “NITRO whip” is identified.
- b. Though the package contains the warning “Do not inhale! Misuse can be physically harmful and dangerous to your health,” the warning appears on

- the side of the box with other information regarding contents and can be easily overlooked. In addition, the warning fails to disclose that nitrous oxide can cause not only health problems, but also accidents and death.
- c. The label also states that nitrous oxide chargers may not be sold to persons under 18. This statement is false and misleading; in New York State, whip cream chargers can not be sold at retail without an exemption, and under no circumstances may a whip cream charger be sold to a person under age 21.

44. Educ. Law §§ 6811(9) and (11) makes it a misdemeanor to sell, or receive in commerce, a misbranded drug. The labels of the salvia, Lucky Kratom Liquid Suspension, Lucky Kratom Capsules, Glide 150 and "NITRO whip" nitrous oxide are misbranded.

45. 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)**

46. New York State Pub. Health Law § 3380 proscribes selling nitrous oxide to the public for the purpose of intoxication.

47. Pub. Health Law § 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.

48. Pursuant to the Pub. Health Law § 3380(5)(f), there can be no exemptions for retail sale of nitrous oxide to the public.

49. 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 stores. Pub. Health Law § 3380(5)(f)(v).

50. Respondent sells cases 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.

51. By offering for sale and/or selling nitrous oxide for the purpose of causing a condition of intoxication, inebriation, excitement, stupefaction, or dulling of the brain or nervous system, Respondent 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)**

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

53. 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) promoting the use of products that are specifically labeled “not for human consumption” for ingestion and/or inhalation by consumers.

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

55. By offering for sale and/or selling mislabeled and misbranded drugs, respondent has repeated and persistently violated GBL § 349.

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

56. 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.

57. 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).

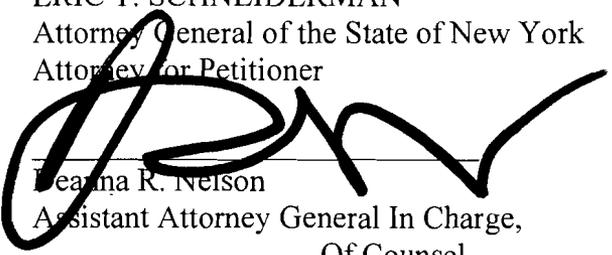
WHEREFORE, the People of the State of New York, pursuant to the powers vested by New York State Executive Law § 63(12) respectfully request judgment as follows:

- 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. permanently enjoining Respondent 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”;
- 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 (v) the number of 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 pursuant to CPLR § 8303(a)(6), granting costs to the State of New York of \$2,000; and
- i. for such other and further relief as the court deems just and proper.

Dated: Watertown, New York
July 6, 2012

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



Deanna R. Nelson
Assistant Attorney General In Charge,
Of Counsel
Dulles State Office Bldg., 10th Floor
317 Washington Street
Watertown, New York 13601
315-785-2444

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**ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL
Attorney for Petitioner**

**DEANNA R. NELSON
Assistant Attorney General
of Counsel
317 Washington Street
Watertown, New York 13601
Phone: (315) 785-2444**