

**People v Moss**

2013 NY Slip Op 33028(U)

November 12, 2013

Supreme Court, Suffolk County

Docket Number: 20556/12

Judge: Jr., Paul J. Baisley

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MEMORANDUM

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SUPREME COURT - SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

I.A.S. PART 36

By: Baisley, J.S.C.

Dated: November 6, 2013

INDEX NO.: 20556/12

MOT. NO.: 001 MOT D; 002 MD

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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,

-against-

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

Respondents.  
-----X

**PETITIONER'S ATTORNEY:**

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This summary proceeding was brought by petitioner People of the State of New York, by Eric Schneiderman, Attorney General of the State of New York, pursuant to Executive Law §63(12) and General Business Law §349, for, *inter alia*, a judgment enjoining respondents George Moss and East Coast Psychedelics, Inc., from engaging in deceptive, fraudulent and illegal business practices in connection with the operation of retail stores in Commack and Oceanside. The petition also seeks, pursuant to General Business Law §350 and CPLR §8303, a judgment awarding civil penalties and costs to the State of New York. By order to show cause dated June 10, 2012, this Court (MACKENZIE, J.) granted a temporary order restraining respondents from offering for sale and selling mislabeled or misbranded drugs, and "designer drugs or other street drug alternatives that are not approved for human consumption," and from selling nitrous oxide to the public.

The petition alleges that respondents operate two retail stores, one on Merrick Road in Oceanside and the other on Jericho Turnpike in Commack. According to the petition, an investigation conducted by the Attorney General's Office in 2012 revealed that East Coast Psychedelics markets and sells certain recreational synthetic drugs and nitrous oxide, as well as drug paraphernalia, at both the Oceanside and Commack locations. Synthetic drugs, also referred to as "designer drugs," are non-organic chemical compounds designed by manufacturers to mimic the effects of legal prescription drugs or illicit drugs, such as marijuana, cocaine, psilocybin, and methamphetamine, when ingested or inhaled. Like other psychoactive substances, synthetic drugs affect behavior by changing the chemistry of the brain and interfering with neurotransmitter activity. Although formulated by manufacturers to produce psychoactive effects, the "designer drugs" typically are not illegal, because they are made up of chemical compounds which are not classified as illicit drugs. Designed to evade restrictions governing psychoactive drugs, synthetic drugs often are marketed as innocuous household items like bath salts and



incense, though their use may lead to poisoning, addiction, and even death. Some synthetic drugs are packaged for sale without a listing of ingredients, and may be labeled as unfit for human consumption. Nitrous oxide, a chemical inhalant, can produce a psychoactive effect if inhaled, and users face risks that include irregular heart rhythms and death caused by cardiac arrest, asphyxiation or suffocation.

The petition alleges, among other things, that East Coast Psychedelics' Oceanside store sells synthetic drugs with the product names "Mr. Nice Guy Panic" and "Mr. Nice Guy LMAO" and that, while such products are labeled as incense and "not for human consumption," a store employee recommended to an undercover investigator that a pipe be used to smoke them. Similarly, it alleges that a synthetic drug with the product name "Mary Jane's Potpourri" is offered for sale at the Commack store, and that no ingredients are listed on the product label. The petition also alleges the Commack store offers kratom for sale in tea and capsule form. Derived from the leaves of a tree native to Southeast Asia known as *Mitragyna speciosa* korth, kratom produce a stimulant effect in low doses and a sedative effect in high doses. It is noted that, although it is listed by the Drug Enforcement Agency as a drug of concern, kratom presently is not scheduled under the Controlled Substances Act. The petition alleges that while the package for kratom tea provides detailed directions for brewing the leaves, it also states that the product has not been evaluated by the Food and Drug Administration, is not intended to cure, treat or prevent disease, and is not for human consumption. As to the package for kratom capsules, the petition alleges one line of the label was crossed out in black ink and could not be read, and that the listed ingredient was "100% Pure extracted *Mitragyna Speciosa* Leaf enhanced with a *Mitragyna Speciosa* 40 Alkaloid signature blend." It further alleges that both the Oceanside store and the Commack store offer "Whip-It" brand chargers of nitrous oxide for sale, that the Commack store sells devices called "crackers," which are used to break the seals on the chargers, and that respondents do not have the required authorization from the Commissioner of the State Health Department to sell nitrous oxide to the public.

The petition contains five causes of action. The first cause of action alleges respondents repeatedly violated Agriculture and Markets Law §194 by selling, offering for sale and exposing commodities classifiable as non-prescription drugs under Agriculture and Markets Law §191, namely the two Mr. Nice Guy products, the Mary Jane's Potpourri, the kratom tea and capsules, and the Whip-It brand canisters of nitrous oxide, that fail to meet New York State's labeling requirements. The second cause of action alleges the products at issue are drugs within the meaning of Education Law §6802, that such products are misbranded, and that respondents repeatedly violated Education Law §6815 by selling and offering for sale such misbranded products. In support of the allegation of misbranding, the petition asserts, in part, that the synthetic drugs and the kratom products fail to include a label identifying the name and place of business of the manufacturer, and that the labels on such products are misleading as to their use and fail to identify potential health effects caused by customary use. The third cause of action alleges respondents repeatedly violated Public Health Law §3380 by selling nitrous oxide at retail to the public for the purpose of causing intoxication. The fourth cause of action alleges that respondents engaged in deceptive acts and practices by, among other things, offering for sale and selling misbranded products, deceptively marketing and promoting illegal products as legal, and encouraging and promoting the ingestion or inhalation of products labeled not for human consumption, and that respondents violated General Business Law §349 by selling mislabeled and misbranded drugs. Lastly, the fifth cause of action asserts that respondents repeatedly engaged in fraud by offering for sale and selling mislabeled and misbranded drugs.



The petition seeks a judgment (1) permanently enjoining respondents, their agents, employees and other individuals or businesses under their direction and control from offering for sale and selling mislabeled drugs in violation of Agriculture and Markets Law §194; (2) permanently enjoining respondents from offering for sale and selling misbranded drugs in violation of Education Law §§6802 and 6815; (3) permanently enjoining respondents 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) permanently enjoining respondents from offering for sale and selling nitrous oxide to the public in violation of Public Health Law §3380; (5) permanently enjoining respondents from engaging in fraudulent, deceptive and illegal practices in violation of General Business Law §349; (6) requiring respondents to comply with all local, state and federal labeling requirements; (7) awarding a civil penalty in the amount of \$5,000 for each deceptive act committed by respondents; and (8) awarding costs under CPLR §8303 in the sum of \$2,000. In addition, the petition seeks an order requiring that respondents “prepare an accounting of all commodities they sold, or offered for sale, from January 1, 2012 to July 10, 2012,” so that the Court can determine an appropriate amount to impose as a civil penalty.

In support of the petition, the Attorney General submits, among other things, an affidavit of Chad Shelmidine, who is employed in the Attorney General’s office as a senior investigator and conducted an investigation of the Oceanside store, and an affidavit of Ryan Fannon, an investigator trainee who participated in the investigation of the Commack store. Shelmidine’s affidavit asserts, in relevant part, that in May 2012 he purchased packages of Mr. Nice Guy Panic and Mr. Nice Guy LMAO, a box of nitrous oxide chargers, and a pipe from the store. It states that after he spoke with a store employee about whether the store sold “spice,” a term commonly used to refer to a smokable substance, the employee showed him the Mr. Nice Guy products. It states that he then asked the employee whether he would need a “wet pipe” to smoke such products, and whether the store sold “crackers” for breaking the seal on nitrous oxide chargers. Fannon’s affidavit states that he also asked an employee at the Commack store if it sold “spice” and that, after responding affirmatively to an inquiry as to whether he meant herbal incense, the employee showed him a container of Mary Jane’s Potpourri. It states that the same employee showed him kratom tea, packaged with the label “Maeng Da Kratom T,” and kratom capsules, packaged with a label “Euphoric Bomb,” and that he purchased a package of each. In addition, Fannon’s affidavit states that he purchased a 24-count box of nitrous oxide charges and a “cracker.” Photographs of the products allegedly purchased by Shelmidine and Fannon are annexed to their respective affidavits. Also submitted in support of the petition are copies of published articles concerning synthetic drugs, kratom, and nitrous oxide, as well as an affidavit of Dr. Maja Lundborg-Gray, who is board certified in emergency medicine and oversees the emergency department of Samaritan Medical Center in Watertown, New York. Dr. Lundborg-Gray’s affidavit discusses various synthetic drugs and their effects on users, and the effects of inhalation of nitrous oxide.

Respondents’ answer to the petition admits that canisters of nitrous oxide were sold at the stores and that the sales were illegal. The answer admits that respondents sold packages of Mr. Nice Guy Panic and Mr. Nice Guy LMAO, and that the packages for such products do not list the ingredients and are labeled as not for human consumption. It also admits that respondents sold Mary Jane’s Potpourri and various brands of kratom. The answer concedes that after the commencement of this proceeding, it became illegal in New York to sell synthetic “cannabinoid receptor agonists,” sold under brand names including Mr. Nice Guy and Mary Jane’s Potpourri. In addition, it concedes that kratom contains the psychoactive compound mitragynine. The answer asserts four objections in point of law, including that



East Coast Psychedelics, not George Moss, operates the stores in Oceanside and Commack, and interposes a counterclaim for a declaration that kratom is a food and that East Coast Psychedelics' sale of kratom is not in violation of state or federal law.

Simultaneously with the filing and service of their answer, respondents moved for an order dismissing the petition and granting summary judgment in their favor on the counterclaim. In opposition to the petition, respondents' counsel concedes that East Coast Psychedelics sells the Mr. Nice Guy and Mary Jane's Potpourri products, kratom, and Whip-It brand chargers of nitrous oxide. He states that the Mr. Nice Guy and Mary Jane's Potpourri products are labeled as incense and not for human consumption, and that respondents market such products as incense. Further, counsel argues, among other things, that Dr. Lundborg-Gray is not an expert in the effects of synthetic drugs or kratom, that the frequency of incidents of teenage poisoning caused by synthetic cannabinoids is low, and that "[t]here is no solid evidence that synthetic cannabis has caused one problem in one person, ever." Respondents' counsel, relying on an article published in April 2011 by the Transnational Institute about the use of kratom in Thailand, asserts that kratom has various beneficial uses, including the treatment of opioid, methamphetamine and alcohol withdrawal and controlling stomach cramps, and that "the general consensus among community members and leaders, academics and policymakers, as well as public health and law enforcement representatives in southern Thailand is that kratom use and dependence carry very little, if any, health risks. In addition, he asserts that kratom is a food, that its effects on users is analogous to the effects of coffee and teas, and that the kratom distributor falsely labeled the packages as not for human consumption.

Respondents' submissions in opposition to the petition and in support of the motion for summary judgment include a copy of the April 2011 article published by the Transnational Institute, a statement printed by the American Association of Poison Control Centers regarding the number of calls to poison centers about exposure to synthetic marijuana, and an affidavit of George Moss. Moss avers, among other things, that the Oceanside and Commack stores are owned by East Coast Psychedelics, Inc., that he did not know it was unlawful to sell nitrous oxide canisters to the public, and that he stopped selling the Whip-It brand chargers when advised by his counsel that it was illegal to sell them. As to the Mr. Nice Guy and Mary Jane's Potpourri products, Moss states that they are labeled as herbal incense and not for human consumption, and that, knowing some people misuse such products, employees have been trained not to sell them to customers who express an intent "to use [them] in a manner inconsistent with [their] labeling." Moreover, he states that, despite the labeling on the packages, the stores intended to sell kratom for human consumption and that, because "it would be false to sell kratom as not intended for human consumption . . . it was our business practice to take a black magic marker and obliterate the distributor's warning from the packaging." Moss states that the package of kratom purchased by the investigator trainee from the Attorney General's office did not have the warning against human consumption obliterated, because an employee failed to follow store policy. The People have not served a reply to the counterclaim.

Executive Law §63(12) authorizes the Attorney General to institute a proceeding to enjoin the continuance of repeated fraudulent or illegal activity in the conduct of a business and to obtain restitution and damages. The word "fraudulent" is defined by the statute to include "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." Under this statute, "the test for fraud is whether the targeted act has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud" (*People v*



*General Elec. Co.*, 302 AD2d 314, 314, 756 NYS2d 520 [1st Dept 2003]; see *Matter of People v Imported Quality Guard Dogs, Inc.*, 88 AD3d 800, 930 NYS2d 906 [2d Dept 2011]). Executive Law §63(12) was designed to protect the average consumer, as well as “the ignorant, the unthinking and the credulous” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 273, 401 NYS2d 182 [1977]; accord *Matter of People v Applied Card Sys., Inc.*, 27 AD3d 104, 805 NYS2d 175 [3d Dept 2005], *lv dismissed* 7 NY3d 741, 819 NYS2d 875 [2006]).

General Business Law §349(a) provides that it is unlawful to perform “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.” The alleged deceptive act or practice must be “misleading in a material way” (*Stutman v Chemical Bank*, 95 NY2d 24, 29, 709 NYS2d 892 [2000]). And while the evidence must show a representation or omission by the offending party likely to mislead a reasonable consumer acting reasonably under the circumstances, the conduct need not rise to the level of common law fraud to be actionable (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 343, 704 NYS2d 177 [1999]; *Stutman v Chemical Bank*, 95 NY2d 24, 29, 709 NYS2d 892), and no proof of intent to defraud or justifiable reliance by a consumer is required (see *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 698 NYS2d 615 [1999]; *Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 623 NYS2d 529 [1995]). Further, General Business Law §349(b) authorizes the Attorney General to bring an action to enjoin deceptive acts or practices and to seek restitution of money and property obtained through such acts or practices. When a proceeding seeking injunctive relief and restitution is brought under General Business Law §349(b), the Attorney General must establish the respondent engaged in or is about to engage in unlawful deceptive acts or practices against the consuming public (see *Matter of People v Applied Card Sys., Inc.*, 27 AD3d 104, 805 NYS2d 175; see also *Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 704 NYS2d 177; *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 698 NYS2d 615; *Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 623 NYS2d 529; *Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 630 NYS2d 769 [2d Dept 1995]).

A special proceeding brought under CPLR Article 4 is subject to the same standard of proof as a motion for summary judgment made in an action (*Matter of Port of N.Y. Auth. [62 Cortlandt St. Realty Co.]*, 18 NY2d 250, 273 NYS2d 337 [1966], *cert denied sub nom. McInnes v Port of N.Y. Auth.*, 385 US 1006, 87 S Ct 712 [1967]; *Matter of People v Applied Card Sys.*, 27 AD3d 104, 805 NYS2d 175; *People v D.B.M. Intl. Photo Corp.*, 135 AD2d 353, 521 NYS2d 246 [1st Dept 1987]). To obtain summary judgment, a party must, through the tender of evidentiary proof in admissible form, establish its cause of action or defense “sufficiently to warrant the court as a matter of law in directing judgment” in its favor (CPLR R. 3212 [b]; see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790, 792 [1979]). If the moving party makes the requisite showing, the burden shifts to the party opposing summary judgment. To defeat summary judgment, the opposing party must demonstrate the existence of a material triable issue of fact through the submission of evidentiary proof in admissible form (CPLR R. 3212 [b]; see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595).

Initially, the Court notes that by correspondence to the Court dated September 26, 2012, the Attorney General states that as it appears East Coast Psychedelics was incorporated during the period relevant to this proceeding, the People “consent to the removal of Mr. George Moss from the caption of the petition.” Accordingly, this special proceeding is dismissed as against the individual respondent George Moss.



As to the first cause of action in the petition, Agriculture and Markets Law §194 provides that “[n]o individual, partnership, 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 . . . respecting the number, quantity weight or measure of such commodity . . . or sell or offer or expose for sale any commodity which is falsely described . . . in any of the particulars as specified in this article or rules or regulations promulgated hereunder.” Under the Agriculture and Markets Law, the term “consumer commodities” includes non-prescription drugs (Agriculture and Markets Law §191 [1][b][4]). As to the second cause of action, Education Law §6815 provides that a drug in package form is misbranded “unless it bears a label containing (1) the name and place of business of the manufacturer, packer or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight.” Under the Education Law, the definition of “drugs” includes “[a]rticles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or animals,” and “[a]rticles (other than food) intended to affect the structure or any function of the body of man or animals” (Education Law §6802 [7][b], [c]). The law further provides that it is a class A misdemeanor “to manufacture, sell, deliver for sale, hold for sale or offer for sale any drug, device or cosmetic that is adulterated or misbranded” (Education Law §6811[9]).

The People failed to make a *prima facie* showing of entitlement to judgment in their favor on the first three causes of action. The Attorney General “has no . . . general authority [to conduct prosecutions] and is ‘without any prosecutorial power except when specifically authorized by statute’” (*People v Gilmour*, 98 NY2d 126, 131, 746 NYS2d 114 [2002], quoting *People v Romero*, 91 NY2d 750, 754, 675 NYS2d 588 [1998]). Significantly, Article 16 of the Agriculture and Markets Law vests in the Commissioner of Agriculture and Markets the authority to administer and enforce the provisions of such article, which includes Agriculture and Markets Law §194 (*see* Agriculture and Markets Law §176). Pursuant to Agriculture and Markets Law §41, a defendant found guilty of violating the Agriculture and Markets Law is guilty of a misdemeanor and may be punished by a fine not exceeding \$200 or by imprisonment not exceeding six months for the first offense. While the statute also provides the Commissioner of Agriculture and Markets may report facts concerning a possible violation to the Attorney General (Agriculture and Markets Law §44), there is no indication that a such a referral concerning East Coast Psychedelics was made to the Attorney General (*see* Executive Law §63[3]; *People v Gilmour*, 98 NY2d 126, 746 NYS2d 114; *cf. Matter of Mann Judd Landau v Hynes*, 49 NY2d 128, 424 NYS2d 380 [1979]).

Similarly, the Education Law authorizes the Secretary of the State Board of Pharmacy to apply for an injunction restraining any person from “introducing or causing to be introduced into commerce any adulterated or misbranded drug” (Education Law §6824). Here, the petition offers no basis for the Attorney General’s claim of authority to seek injunctive relief enjoining East Coast Psychedelics from offering for sale and selling the alleged misbranded projects at issue in this action (Executive Law §63 [3]). Likewise, under Article 33 of the Public Health Law, known as the Controlled Substances Act, the power to enforce the provisions of such article, as well as the rules, regulations and determinations made thereunder, is delegated to the New York State Commissioner of Health (Public Health Law §3308 [4]). The Controlled Substances Act, like the Education Law, includes within the meaning of the word “drug” substances for the treatment of disease and “[a]rticles (other than food) intended to affect the structure or any function of the body” (Public Health Law §3302[13]b), [c]). While subdivision five of Public Health Law §3380 states “[n]o person shall sell any canister or other container of nitrous oxide unless granted an exemption pursuant to this subdivision,” and subdivision six of such statute makes violation



of subdivision five a class A misdemeanor, no basis for the Attorney General's authority to bring a civil enforcement proceeding against East Coast Psychedelics under such statute is set forth in the petition (see Executive Law §63[3]).

However, the People's submissions established a *prima facie* case that East Coast Psychedelics engaged in deceptive business practices harmful to the consuming public by offering for sale and selling misbranded products at its retail stores in Oceanside and Commack (see *Matter of People v Applied Card Sys., Inc.*, 27 AD3d 104, 805 NYS2d 175). Here, the evidence in support of the petition, particularly the affidavits of Chad Shelmidine and Ryan Fannon, demonstrated that the Mr. Nice Guy products, the Mary Jane's Potpourri product and the nitrous oxide canisters were packaged for retail sale, that the packages for such products were misbranded in that they failed to identify the name of the manufacturer, packer or distributor, and that East Coast Psychedelics offered for sale and sold such products to the public. The People's submissions demonstrated that the Maeng Da Kratom T product, sold in packages stating "not fit for human consumption," but with directions for preparing a tea from kratom leaves, was misbranded, as was the package of kratom capsules. Moreover, the evidence shows East Coast Psychedelics illegally sold canisters of nitrous oxide to the public. Further, the People established entitlement to summary judgment in their favor on the fifth cause of action for repeated fraudulent and illegal acts with evidence that East Coast Psychedelics illegally sold canisters of nitrous oxide without an exemption for the Commissioner of Health and repeatedly sold misbranded synthetic cannabinoid and kratom products (see *Matter of People v Veleanu*, 89 AD3d 950, 932 NYS2d 711 [2d Dept 2011], *lv denied* 19 NY3d 840, 946 NYS2d 96 [2012]; *Matter of People v Applied Card Sys., Inc.*, 27 AD3d 104, 805 NYS2d 175; *People v General Elec. Co.*, 302 AD2d 314, 314, 756 NYS2d 520; *Matter of People v Wilco Energy Co.*, 284 AD2d 469, 728 NYS2d 471 [2d Dept 2001]).

In opposition, East Coast Psychedelics failed to raise any triable issues of fact as to whether the products at issue were misbranded or illegally sold to the public. As discussed above, East Coast Psychedelics concedes in its answer and opposition papers that it sold products under the Mr. Nice Guy and Mary Jane's Potpourri brand names at its Oceanside and Commack stores, and that it was known some customers misused such products. It further admits that it sold canisters of nitrous oxide at its stores over a period of years, that it did not have an exemption from the Commissioner of the Department of Health to sell nitrous oxide, and that it was illegal to offer for sale and to sell nitrous oxide canisters to the public without having the required exemption from the Commissioner. Moreover, George Moss admits that the Maeng Da Kratom T product is misbranded, and that his employees are instructed to obliterate the warning on Euphoric Bomb packages that the product is not for human consumption. The argument by respondent's counsel that the Mr. Nice Guy and Mary Jane's Potpourri products were labeled as not for human consumption and, therefore, could not be classified as drugs is rejected, as a label indicating a product is not intended for human consumption is not dispositive evidence of the distributor's intent (see *United States v Sullivan*, 714 F3d 1104 [8th Cir 2013]; *United States v Undetermined Quantities of an Article of Drug Labeled as "Exachol"*, 716 F Supp 787 [SDNY 1989]; see also *United States v Johnson*, 471 F3d 764 [7th Cir 2006]). The argument by respondent's counsel that kratom is a food and, therefore, necessarily is exempt from the State's branding requirements for products classified as drugs also is rejected. The power to regulate a product which may be classified as a drug has been vested by Congress in the Food and Drug Administration. Whether a product is a drug depends on its intended application; hence, a product intended to be used as a drug may be regulated as a drug, and the classification of a product as a food does not preclude its classification as a drug (see *United States v Undetermined Quantities of an Article of Drug Labeled as "Exachol"*, 716 F Supp 787).



An application by the Attorney General for remedial relief under Executive Law §63(12) is addressed to the sound discretion of the Court (*State of New York v Princess Prestige Co.*, 42 NY2d 104, 108, 397 NYS2d 360 [1977]; *Matter of People v Applied Card Sys., Inc.*, 27 AD3d 104, 805 NYS2d 175). The fact that a respondent voluntarily discontinued its deceptive practices or illegal acts does not divest the court of its authority to grant injunctive relief (*see Matter of People v Applied Card Sys., Inc.*, 27 AD3d 104, 805 NYS2d 175; *People v General Elec. Co.*, 302 AD2d 314, 314, 756 NYS2d 520). The Attorney General, having established as a matter of law that East Coast Psychedelics repeatedly engaged in deceptive business practices by selling misbranded products and illegally sold nitrous oxide to the public at its retail stores, has shown injunctive relief is warranted (*id.*).

As to the motion for summary judgment in favor of East Coast Psychedelics on the counterclaim, declaratory judgment actions are a means for establishing the respective legal rights of the parties to a justiciable controversy (*see* CPLR 3001; *Rockland Light & Power Co. v City of New York*, 289 NY 45, 43 NE2d 803 [1942]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 890 NYS2d 16 [1st Dept 2009], *lv denied* 15 NY3d 703, 906 NYS2d 817 [2010]). The remedy of a declaratory judgment is appropriate “in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved” (*Dun & Bradstreet, Inc. v City of New York*, 276 NY 198, 206, 11 NE2d 728 [1937]). As a matter of law, a declaratory judgment may not be maintained if the issue presented for adjudication involves a future event beyond the control of the parties that might never occur (*see American Ins. Assn. v Chu*, 64 NY2d 379, 487 NYS2d 311 [1985]), and a court may, *sua sponte*, raise the issue of lack of a justiciable controversy (*Matter of Town of Islip v Cuomo*, 147 AD2d 56, 541 NYS2d 829 [2d Dept 1989]). Here, respondent was not charged with violating state or federal law for its sale of kratom as drug or controlled substance; rather, the Attorney General asserts it illegally sold packages of kratom that were misbranded. The counterclaim for a declaration that East Coast Psychedelics is not violating state or federal law by selling packages of kratom, therefore, improperly seeks an advisory opinion (*see New York Public Interest Research Group, Inc. v Carey*, 42 NY2d 527, 399 NYS2d 621 [1977]). Likewise, the request for a declaration that kratom is a food improperly seeks a finding of fact, rather than a resolution regarding a disputed legal right (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 890 NYS2d 16). Thus, absent a justiciable controversy as to the legality of the sale of kratom and its classification as a food, the counterclaim must be dismissed.

Accordingly, having determined as a matter of law that East Coast Psychedelics engaged in deceptive business practices in violation of General Business Law §349 and engaged in repeated fraudulent and illegal acts in conducting its retail business, the petition is granted to the extent that East Coast Psychedelics is permanently enjoined from selling and offering for sale (1) misbranded products, including the Mr. Nice Guy products, the Mary Jane’s Potpourri products, and the Maeng Da Kratom T and the Euphoric Bomb kratom products, and (2) canisters of nitrous oxide. It also is permanently enjoined from engaging in the deceptive, fraudulent and illegal acts that were the subject of this action. Further, as CPLR §8303(a)(6) provides that a court, in its discretion, may award the attorney general in a proceeding brought under Executive Law §63(12) costs not exceeding \$2,000 against a respondent, the Court hereby awards petitioner costs of \$2,000.00. As to the application to recover a civil penalty pursuant to General Business Law §350-d, a conference will be held before the undersigned to discuss the appropriate amount of such penalty and, if necessary, to schedule a hearing date.

It hereby is

**ORDERED** that the Court, *sua sponte*, dismisses the counterclaim for declaratory relief; and it is further

**ORDERED** that the parties shall appear at 11:00 a.m. on December 12, 2013 for a conference on the Attorney General's application for a civil penalty against East Coast Psychedelics.

DATED: November 12, 2013

**PAUL J. BAISLEY, JR.**

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J.S.C.