

I. DISCOVERY

1. Plaintiffs intend to conduct discovery under Level 2 of Texas Rule of Civil Procedure 190.3 and affirmatively plead that this case is not governed by the expedited-actions process in Texas Rule of Civil Procedure 169 for the following reasons:

- (a) The relief sought includes non-monetary injunctive relief.
- (b) The claim for monetary relief—including penalties, costs, expenses, consumer redress, and attorney fees—is in excess of \$100,000.

II. JURISDICTION AND STATUTORY AUTHORITY

2. This enforcement action is brought by Attorney General Ken Paxton, through his Consumer Protection Division, in the name of the STATE OF TEXAS and in the public interest pursuant to the authority granted by § 17.47 and § 17.48 of the Texas Deceptive Trade Practices—Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41–17.63 (“DTPA”), upon the ground that Defendants have engaged in false, deceptive and misleading acts and practices in the course of trade and commerce as defined in, and declared unlawful by, § 17.46(a) and (b) of the DTPA. In enforcement suits filed pursuant to § 17.47 of the DTPA, the Attorney General is further authorized to seek civil penalties, redress for consumers, and injunctive relief. This action is brought jointly by the Consumer Protection Division of the Office of Attorney General and the Harris County Attorney’s Office pursuant to § 17.48 of the DTPA.

3. In addition, this suit is brought by the Office of Attorney General, the Harris County Attorney’s Office, and the City of Houston against Defendants to enjoin and abate a common nuisance pursuant to Texas Civil Practice & Remedies Code §§ 125.001–125.047. Verification of the petition or proof of personal injury need not be shown by the State under Texas Civil Practice & Remedies Code § 125.002(a).

III. PUBLIC INTEREST AND NOTICE

4. Plaintiffs have reason to believe that Defendants have engaged in, and will continue to engage in the unlawful practices set forth in this petition. Plaintiffs have reason to believe Defendants have caused and will cause immediate, irreparable injury, loss and damage to the State of Texas by selling synthetic cannabinoids to consumers without disclosing that these substances are illegal and potentially dangerous to their health. Therefore, these proceedings are in the public interest. *See* DTPA § 17.47(a).

5. The conduct of Defendants in selling controlled substances to consumers from retail stores in violation of Chapter 481 of the Texas Health & Safety Code and constitutes a common nuisance as defined by Texas Civil Practice & Remedies Code § 125.0015(4). Therefore, Defendants' conduct is subject to abatement under Texas Civil Practice & Remedies Code § 125.002.

6. Prior to hearing on the Plaintiffs' Application for Temporary Restraining Order, Defendants were provided with written notice of the hearing with a copy of the Plaintiffs' Petition. In the event Defendants do not appear for the hearing on the Plaintiffs' Application for Temporary Restraining Order, the Court is statutorily authorized to issue the Temporary Restraining Order *ex parte*. Pre-suit notice is not required under DTPA § 17.47(a) because there is good cause to believe that such an emergency exists—due to the seriousness of the allegations and the danger to public health—that immediate and irreparable injury, loss, or damage would occur as a result of delay. *Id.*

IV. VENUE

7. Venue of this suit lies in Harris County, Texas, under the DTPA § 17.47(b), for the following reasons:

- (a) The transactions forming the basis of this suit occurred in Harris County, Texas.
- (b) Defendants have done business in Harris County, Texas.

(c) Defendants' principal places of business are in Harris County, Texas.

8. In addition, venue is mandatory in Harris County under Texas Civil Practice & Remedies Code § 125.002 because the nuisance to be enjoined is maintained by Defendants in Harris County, Texas.

V. TRADE AND COMMERCE

9. At all times described below, Defendants and their agents have engaged in conduct constituting "trade" and "commerce," defined in § 17.45(6) of the DTPA, as follows:

"Trade" and "commerce" mean the advertising, offering for sale, sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this state.

VI. CLAIM FOR RELIEF

10. Plaintiffs seek monetary relief—including penalties, costs, expenses, consumer redress, and attorney fees—in excess of \$100,000 and could exceed \$1,000,000. Plaintiffs also seek nonmonetary, injunctive relief.

VII. DEFENDANTS

11. Defendant **Fantasy Smoking and Accessories a/k/a Sheer Insanity, Inc.**, also doing business as "**Sheer Insanity Gifts**," "**Fantasy**," and "**Fantasy Gifts and Toys**," ("Fantasy Smoking and Accessories") is a Texas corporation that maintains a place of business at 1340 Westheimer Rd., Houston, Texas 77006. Defendant may be served with process by serving its registered agent and director, Glen Cohen at 1340 Westheimer Rd., Houston, Texas 77006.

12. Defendant **The Real Property Known as 1340 Westheimer, Houston, Texas 77006** is sued *in rem*. This property is owned by Defendant **Sidlak Corporation** doing business as

Cherryhurst Center, Ltd., who may be served with process by serving its registered agent and president, Andrew Kaldis at 805 Rhode Place, Ste 300, Houston, Texas 77019.

13. Defendant **Sidlak Corporation** is a Texas corporation doing business as “**Cherryhurst Center, Ltd.**” having its principal place of business in Harris County, Texas, at 805 Rhode Place, Ste 300, Houston, Texas 77019. It may be served by serving its registered agent and president, Andrew Kaldis at 805 Rhode Place, Ste 300, Houston, Texas 77019.

14. Defendant **Glen Cohen** is an individual residing in Harris County. Defendant may be served at his place of residence at 3945 Roseland St., Houston, Texas 77006, Harris County, or wherever he may be found.

15. Defendant **Judy Cohen** is an individual residing in Harris County. Defendant may be served at her place of residence at 3945 Roseland St., Houston, Texas 77006, Harris County, or wherever he may be found.

16. For purposes of this petition, the following definitions apply:

- (a) “**Individual Defendants**” means Glen Cohen and Judy Cohen.
- (b) “**In Rem Defendant**” means the real property sued as an *in rem* defendant in this lawsuit.
- (c) “**Landlord Defendant**” means Sildlack Corporation.
- (d) “**Entity Defendant**” means Fantasy Smoking and Accessories.

VIII. ACTS OF AGENTS

17. Whenever in this petition it is alleged that Defendants did any act, it is meant that

- (a) the named Defendants performed or participated in the act, or

- (b) the named Defendants’ officers, successors in interest, agents, partners, trustees or employees performed or participated in the act on behalf of and under the authority of one or more of the Defendants.

IX. FACTUAL BACKGROUND

A. *Overview of the Synthetic Marijuana Problem.*

18. Since 2010, the United States has experienced an epidemic of so-called designer drugs. Designer drugs are substances that mimic the effects of controlled substances such as marijuana, cocaine, and amphetamines, but their chemical structure has been modified so that their actual chemical composition is not banned as a controlled substance. The chemical structure of the designer drug is purposefully altered by designer drug manufacturers (often overseas) in order to circumvent controlled substance drug laws. As the legislature passes new laws to ban these newly created substances, the manufacturers simply tweak the chemical structure again so that they are no longer a controlled substance and can be marketed legally.

19. Synthetic marijuana is a designer drug, often manufactured overseas, that is marketed as a “safe” and “legal” alternative to marijuana.¹ Synthetic marijuana is not marijuana at all but a dried leafy substance that is sprayed with powerful, added-in hallucinogenic chemicals that are dangerous and highly addictive to the user.² Synthetic marijuana has no medical use.³ It is consumed like marijuana in that the user generally smokes it in a bowl, bong, water pipe, or by

¹ Ex. 1, *DrugFacts: K2/Spice (“Synthetic Marijuana”)*, NATIONAL INSTITUTE ON DRUG ABUSE (lasted updated Dec. 2012), <http://www.drugabuse.gov/publications/drugfacts/k2spice-synthetic-marijuana>; Ex. 2, 80 Fed. Reg. 5042 (Jan. 30, 2015) (temporary placement of three synthetic cannabinoids, including AB-CHMINACA, into schedule I); Ex. 2A, 78 Fed. Reg. 28735 (May 16, 2013) (temporary placement of three synthetic cannabinoids, including XLR11, into schedule I); Ex. 2B, 80 Fed. Reg. 27854 (May 15, 2015) (extension of temporary scheduling of XLR11).

² Ex. 1, p.1; Ex. 2, 80 Fed. Reg. at 5043; Ex. 2A, 78 Fed. Reg. at 28,736.

³ Ex. 2, 80 Fed. Reg. at at 5043; Ex. 2A, 78 Fed. Reg. at 28,736.

rolling it into a cigarette.⁴ The added chemicals are intended to mimic the biological effects of delta-9-tetrahydrocannabinol (THC), the main psychoactive ingredient in marijuana.⁵

20. Synthetic marijuana is often labeled innocently as “incense” and “potpourri” and the packaging may contain the statement “not for human consumption” although the intended purpose is in fact for the product to be consumed by a human.⁶ Typically, it is sold in retail smoke shops or head shops in small colorful packets with names such as “Kush” or “spice” or “K2” or “Scooby Snax” and costs between \$20 and \$25 per packet.⁷ The packaging is intended to target young people, who may be afraid of the legal consequences and/or association with illegal drugs but want a “legal” high.⁸ According to the federal Drug Enforcement Agency, synthetic marijuana is the second most abused substance by high school seniors after marijuana itself.⁹

21. Poison control centers report¹⁰ that users of synthetic marijuana report symptoms such as:

- Severe paranoia, agitation and anxiety;
- Psychotic episodes;
- Racing heartbeat and high blood pressure (in a few cases associated with heart attacks);
- Nausea and vomiting;

⁴ Ex. 1, p. 3.

⁵ *Id.*; Ex. 1, p. 3; Ex. 2, 80 Fed. Reg. at 5043; Ex. 2A, 78 Fed. Reg. at 28,736.

⁶ Ex. 3, *Synthetic Drugs (a.k.a K2, Spice, Bath Salts, etc.)*, THE WHITE HOUSE: OFFICE OF NATIONAL DRUG CONTROL POLICY, <http://www.whitehouse.gov/ondcp/ondcp-fact-sheets/synthetic-drugs-k2-spice-bath-salts> (last visited May 21, 2015).

⁷ Ex. 2, 80 Fed. Reg. at 5043; Ex. 2A, 78 Fed. Reg. at 28,736; Ex. 4, *Alerts: Synthetic Marijuana*, AMERICAN ASSOCIATION OF POISON CONTROL CENTERS, <http://www.aapc.org/alerts/synthetic-marijuana> (last visited May 21, 2015).

⁸ Ex.1, p. 2; Ex. 3, p. 1.

⁹ Ex. 1.

¹⁰ Ex. 4; Ex. 5, *The Dangers of Synthetic Marijuana*, TEXAS POISON CENTER NETWORK, <http://www.poisoncontrol.org/news/topics/synthetic-marijuana.cfm> (last visited May 21, 2015).

- Muscle spasms, seizures and tremors;
- Intense hallucinations and psychotic episodes;
- Suicidal thoughts and other harmful thoughts and actions.

22. The American Association of Poison Control Centers has reported thousands of instances of exposure to synthetic marijuana each year.¹¹ In Texas, there has been an uptick in reported overdoses on synthetic marijuana.¹² Throughout the United States, including Texas, reports of synthetic marijuana use have been linked to overdoses and other serious injuries, including bizarre and violent self-mutilations, and deaths:

- 17-year old girl became paralyzed and permanently brain damaged from suffering multiple strokes and violent hallucinations after smoking synthetic marijuana;¹³
- A 22-year Houston man reported being heavily addicted to synthetic marijuana, which damaged his kidneys and caused severe memory loss.¹⁴
- Three Dallas teenagers experienced heart attacks after smoking synthetic marijuana in 2011;¹⁵

¹¹ Ex. 4.

¹² Ex. 6, David Winograd, *Nearly 120 People Overdose on Synthetic Marijuana in 5-Day Period*, TIME (May 6, 2014), <http://time.com/89835/synthetic-marijuana-overdoses-k2/>; see also Ex. 7, Kirstin Tate, *Synthetic Marijuana Hospitalizes 45 In Texas*, BREITBART (May 5, 2014), <http://www.breitbart.com/texas/2014/05/05/synthetic-marijuana-hospitalizes-45-smokers-in-texas/>; Ex. 12, Sara Thomas, *East Texas Police Seek Solution to Synthetic Marijuana Problem*, LONGVIEW NEWS JOURNAL (May 8, 2014), <http://www.news-journal.com/news/2014/mar/08/east-texas-police-seek-solution-to-synthetic-marijuana>. See also Ex. 9, Ashley Johnson, *Synthetic Marijuana Becomes Growing Concern in Houston Area*, FOX 26 HOUSTON (March 12, 2015), <http://www.myfoxboston.com/story/28416320/synthetic-marijuana-becomes-growing-concern-in-houston-area>.

¹³ Ex. 8, *Teenage Girl Suffered Strokes, Brain Damage After Smoking Synthetic Marijuana*, FOX NEWS (Feb. 5, 2013), <http://www.foxnews.com/health/2013/02/05/teenage-girl-suffered-strokes-brain-damage-after-smoking-synthetic-marijuana>.

¹⁴ Ex. 9.

¹⁵ Ex. 10, *Texas Teens Had Heart Attacks After Smoking Synthetic Marijuana*, FOX NEWS (Nov. 8, 2011), <http://www.foxnews.com/health/2011/11/08/texas-teens-had-heart-attacks-after-smoking-k2/>.

- An 18-year old Amarillo man died after smoking synthetic marijuana;¹⁶
- Police have received multiple reports of users high on synthetic marijuana standing in the middle of the street, disoriented, and with no recollection how they got there;¹⁷
- Synthetic marijuana is also blamed for the death of a soldier from Fort Hood;¹⁸
- Over 120 people in the Dallas area were reported to have overdosed on synthetic marijuana in a 5-day period;¹⁹
- A patient presented at an emergency room with self-inflicted fourth-degree burns to his hands and forearms, leading to amputation, due to synthetic marijuana known as Black Diamond;²⁰
- A 30-year old man was found dead in his car, due to poisoning from synthetic marijuana;²¹
- More than 60 people in Austin, Texas were recently reported to have been sickened by a synthetic drug, known as K-2, including reports of seizures, convulsions and extremely violent behavior;²² and

¹⁶ Ex. 11, Abby Haglage, *When Synthetic Pot Kills*, THE DAILY BEAST (Nov. 21, 2013), <http://www.thedailybeast.com/articles/2013/11/21/when-synthetic-pot-kills.html>.

¹⁷ Ex. 12.

¹⁸ Ex. 13, *Synthetic Pot Blamed for Death of U.S. Soldier Deployed to Ebola Zone*, CBS NEWS (Apr. 17, 2015), <http://www.cbsnews.com/news/synthetic-pot-blamed-for-death-of-fort-hood-soldier-deployed-to-ebola-zone/>.

¹⁹ Ex. 6.

²⁰ Ex. 15, K.A. Meijer et al., *Abstract: Smoking Synthetic Marijuana Leads to Self-Mutilation Requiring Bilateral Amputations*, ORTHOPEDICS, 2014 Apr. 37(4):e391-4, available at <http://www.ncbi.nlm.nih.gov/pubmed/24762846>.

²¹ Ex. 14, Koutaro Hasegawa et al., *Abstract: Postmortem Distribution of AB-CHMINACA, 5-fluoro-AMB, and Diphenidine in Body Fluids and Solid Tissues in Fatal Poisoning Case*, 33 FORENSIC TOXICOLOGY 45 (2015), available at <http://link.springer.com/article/10.1007%2Fs11419-014-0245-6>.

²² Ex. 15A, *More than 60 Sickened in Austin by K-2: Media Reports*, TEXOMA'S HOMEPAGE.COM (June 5, 2015), <http://www.texomashomepage.com/story/d/story/more-than-60-sickened-in-austin-by-k2-media-report/25480/qZ6kxnvJaU2GTJjx5L7g9g>.

- A man in Houston had a psychotic break on a “bad batch” of synthetic marijuana and stabbed, beat, and fatally choked his girlfriend.²³

B. Defendants Package and Sell Synthetic Marijuana at Fantasy Smoking and Accessories, 1340 Westheimer Rd., Houston, Texas in Harris County.

23. The Individual Defendants own and operate Fantasy Smoking and Accessories a/k/a Sheer Insanity, Inc., also doing business as “Sheer Insanity Gifts,” “Fantasy,” and “Fantasy Gifts and Toys. Based on Texas Comptroller records and Secretary of State filings, the Individual and Entity Defendants are currently doing business at the location 1340 Westheimer Rd., Houston, Texas, in Harris County.²⁴ The Landlord Defendant owns and controls the real property at 1340 Westheimer Rd., Houston, Texas.²⁵

C. Undercover Buys of Synthetic Marijuana at Defendants’ Business

24. On October 22, 2015, two undercover officers from the Houston Police Department Narcotics Division conducted a narcotics investigation that resulted in a controlled buy of approximately 1 gram of synthetic marijuana from Fantasy Smoking and Accessories, located at 1340 Westheimer Rd., Houston, Texas.²⁶ Officer M. R. and Officer K. E. entered the business in plain clothes, walked up to one of the shelves and asked about “Diablo,” which is a brand name for synthetic marijuana being sold.²⁷ A female clerk approached and indicated they did not have

²³ Ex. 15B, Brian Rodgers, “*Synthetic Marijuana*” is Blamed in Death, HOUSTON CHRONICLE, July 9, 2015, at B2.

²⁴ Ex. 16, Texas Secretary of State Record Certified Filings, Sheer Insanity, Inc.; Ex. 17, Texas Comptroller of Public Account Franchise Tax Account Status for Sheer Insanity, Inc.

²⁵ Ex. 18, Texas Secretary of State Record Certified Filings, Sidlak Corporation; Ex. 19, Texas Secretary of State Record Certified Filings, Cherryhurst Center, Ltd.; Ex. 20, Harris County Appraisal District, Real Property Account Information, 1340 Westheimer Rd., Houston, TX 77006.

²⁶ Ex. 21, Houston Police Department Incident Report #1363618-15 for October 22, 2015, Undercover buy of Kush at 1340 Westheimer Rd.

²⁷ *Id.*

“Diablo,” but mentioned a display case and pointed to it.²⁸ Officer K. E. noticed there were various packages of synthetic marijuana marked with weights and prices.²⁹ Officer K. E. mentioned that he was going to buy the smaller weight package labeled “SPONGEBOB” to see if he liked it.³⁰ The female clerk then directed Officer K. E. to another brand in the display case.³¹ Officer K. E. picked up a small package with a picture and the words “Zilla 1 gram 2.0 \$14.99 Blueberry.”³² The female clerk stated the price was \$16.23.³³ The officer paid for the purchase and left the location.³⁴ Officer K. E. turned over the bag to Officer J. G., who tagged it into evidence.³⁵ The bag was sent to the Houston Forensic Science Center Controlled Substance Section for testing.³⁶ The Houston Forensic Science Center determined the net weight of the drugs in the package was 1.0727 grams, and found that the substance in the bag contained AB-CHMINACA and XLR11—both synthetic cannabinoids.³⁷ Both are Texas Schedule I Substances. 40 Tex. Reg. 2007 (April 3, 2015) (AB-CHMINACA scheduling effective as of April 24, 2015); 38 Tex. Reg. 4928 (Aug. 2, 2013) (XLR11 scheduling effective as of August 23, 2013). As synthetic cannabinoids, AB-CHMINACA, also known as N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(cyclohexylmethyl)-11H-

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Ex. 22, Houston Forensic Science Center Lab Report for Houston Police Department Incident Report #1363618-15 and Affidavit.

indazole-3-carboxamide, and XLR11, also known as [1-(5-fluoro-pentyl)-1H-indol-3-yl](2,2,3,3-tetramethylcyclopropyl)methanone, are also both Penalty Group 2-A drugs under Texas law. *See* Texas Health & Safety Code § 481.1031(b)(5).

25. On November 2, 2015, Officer K.E. conducted a narcotics investigation that resulted in a controlled buy of approximately 6 grams of synthetic marijuana from Fantasy Smoking and Accessories, located at 1340 Westheimer Rd., Houston, Texas.³⁸ Officer K.E. entered the business and conversed with a male clerk.³⁹ Officer K.E. asked about an older woman who had helped him on an earlier date and was told the woman's name was "Judy."⁴⁰ Officer K.E. went to the display case, which was located to the right of the register, and again noticed multiple bags of synthetic marijuana of various weights.⁴¹ Officer K.E. picked a bag labeled "2014 Zilla 2.0."⁴² The bag gave the weight as 6 grams, the price as \$54.99, and the flavor as Blueberry.⁴³ The bag also had a picture of "Godzilla."⁴⁴ Officer K.E. paid \$59.53 and continued talking to the clerk, who told Officer K.E. his name was "Darrel."⁴⁵ Officer K.E. left the location.⁴⁶ Officer K. E. turned over the bag to Officer J. G., who tagged it into evidence.⁴⁷ The bag was sent to the Houston Forensic

³⁸ Ex. 23, Houston Police Department Incident Report #1413348-15 for November 2, 2015, Undercover buy of Kush at 1340 Westheimer Rd.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

Science Center Controlled Substance Section for testing.⁴⁸ The Houston Forensic Science Center determined the net weight of the drugs in the package was 6.02 grams, and found that the substance in the bag contained XLR11, a synthetic cannabinoid listed as a Texas Schedule I Substance and a Penalty Group 2-A drug.⁴⁹ 38 Tex. Reg. 4928 (Aug. 2, 2013); Texas Health & Safety Code § 481.1031(b)(5).

26. On November 9, 2015, Officer K.E. and Officer J.G. conducted a narcotics investigation that resulted in a controlled buy of approximately 3 grams of synthetic marijuana from Fantasy Smoking and Accessories, located at 1340 Westheimer Rd., Houston, Texas.⁵⁰ Officer K.E. entered the business and spoke with the clerk, Darrel. Officer K.E. went to the display case and selected a bag marked “Zilla 2.0.”⁵¹ The bag stated the weight was 2 grams, the price was \$29.99, and the flavor was blueberry.⁵² The bag also had a picture of “Godzilla.”⁵³ Officer K. E. turned over the bag to Officer J. G., who tagged it into evidence.⁵⁴ The bag was sent to the Houston Forensic Science Center Controlled Substance Section for testing.⁵⁵ The Houston Forensic Science Center determined the net weight of the drugs in the package was 3.08 grams and contained XLR11, a synthetic cannabinoid listed as a Texas Schedule I Substance and a Penalty

⁴⁸ *Id.*

⁴⁹ Ex. 24, Houston Forensic Science Center Lab Report for Houston Police Department Incident Report #1413348-15 and Affidavit (with photos).

⁵⁰ Ex. 25, Houston Police Department Incident Report #144265-15 for November 9, 2015, Undercover buy of Kush at 1340 Westheimer Rd.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

Group 2-A drug.⁵⁶ 38 Tex. Reg. 4928 (Aug. 2, 2013); Texas Health & Safety Code § 481.1031(b)(5).

27. On November 13, 2015, officers with the Houston Police Department Narcotics Division executed a narcotics search and arrest warrant at Fantasy Smoking and Accessories, located at 1340 Westheimer Rd., Houston, Texas.⁵⁷ Officers seized approximately seventy-seven pounds of synthetic marijuana plus large amounts of other substances such as “kratom,”⁵⁸ Xanax, and Salvia divinorum.⁵⁹ The synthetic substances seized from the front display case had similar (if not the same) packaging as the synthetic cannabinoids purchased by HPD undercover officers.⁶⁰ In the back storage room, officers found packaging and labeling materials, including boxes of laser cut labels with the name “Zilla.”⁶¹ Officers also found packages of pills shaped in the likeness of and labeled as Xanax.⁶² They also found Salvia divinorum, kratom, and packages of sildenafil citrate (Viagra).⁶³ All items seized were tagged into evidence and sent to the Houston Forensic Science Center Controlled Substance Section for testing.⁶⁴ The Houston Forensic Science Center tested

⁵⁶ Ex. 26, Houston Forensic Science Center Lab Report for Houston Police Department Incident Report #144265-15 and Affidavit (with photos).

⁵⁷ Ex. 27, Houston Police Department Incident Report #1460814-15 for November 13, 2015, Search and seizure at 1340 Westheimer Rd.

⁵⁸ Otherwise known as *Mitragyna speciosa*, a narcotic. The FDA issued an import alert in June 2015 stating “[C]onsumption of kratom can lead to a number of health impacts, including respiratory depression, nervousness, agitation, aggression, sleeplessness, hallucinations, delusions, tremors, loss of libido, constipation, skin hyperpigmentation, nausea, vomiting, and severe withdrawal signs and symptoms.”

⁵⁹ Ex. 27. Salvia divinorum is a Penalty Group 3 drug. Tex. Health & Safety Code § 481.104(10).

⁶⁰ Ex. 27.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

two jars that contained suspected synthetic marijuana and determined the net weight of the drugs was 1.28 pounds and contained XLR11, a synthetic cannabinoid listed as a Texas Schedule I Substance and a Penalty Group 2-A drug.⁶⁵ 38 Tex. Reg. 4928 (Aug. 2, 2013); Texas Health & Safety Code § 481.1031(b)(5).

28. When officers interviewed the store clerk, Darrel McCabe, who was present at the time of the search warrant, he informed them that the owner, Glen Cohen, was the one who brought in the synthetic cannabinoids and made the decision to sell them and made the decisions regarding pricing.⁶⁶ McCabe also told HPD that they had been selling “Zilla” and “Spongebob” since 2014, and that they make approximately 15 to 25 sales of synthetic cannabinoids a day.⁶⁷ He also informed officers that Fantasy Smoking and Accessories makes many sales of “kratom” and of Xanax (which he told officers was actually blue lotus, an herbal supplement).⁶⁸ He told officers that the synthetic cannabinoids would be delivered in a trash bag (after being ordered by Glen Cohen) and that the employees would then individually package the synthetic cannabinoids in the back room of the store.⁶⁹ McCabe said this was common for the industry.⁷⁰

29. Under Texas law, it is a crime to deliver or possess a synthetic cannabinoid, and synthetic cannabinoids are classified as Penalty Group 2-A drugs. Tex. Health & Safety Code §§ 481.1031, 481.113, 481.1161. XLR11 and AB-CHMINACA, the synthetic cannabinoids found by HPD at

⁶⁵ Ex. 28, Houston Forensic Science Center Lab Report for Houston Police Department Incident Report #1460814-15 and Affidavit (with photos).

⁶⁶ Ex. 27.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

Fantasy Smoking and Accessories, have also been identified by Texas Department of Health & Human Services and the federal Drug Enforcement Administration (DEA) as a Schedule I controlled substance (the most dangerous). 38 Tex. Reg. 4928 (Aug. 2, 2013); 40 Tex. Reg. 2007 (April 3, 2015); 21 CFR part 1308.⁷¹ A Schedule I drug is a drug or substance that i) has a high potential for abuse; ii) has no currently accepted medical use in treatment; and iii) there is a lack of accepted safety for use of the drug or other substance under medical supervision. Tex. Health & Safety Code § 481.035; 21 U.S.C § 812. Other Schedule I drugs include heroin, LSD, MDMA (ecstasy), and marijuana. Under Texas and federal law, it is a crime to manufacture, distribute, dispense or possess a Schedule I drug or synthetic cannabinoid. Tex. Health & Safety Code §§ 481.1031, 481.1161, 481.113, 481.119; 21 U.S.C. §§ 841, 844.

30. In addition, in 2014, the City of Houston passed Ordinance § 28-572 outlawing synthetic marijuana, including the product labeled as “Kush.”⁷² Violation of the ordinance carries a criminal penalty of up to \$2000 per violation.

31. The Texas Legislature has recently amended the Penalty Group 2-A definition of the Texas Controlled Substances Act such that AB-CHMINACA and XLR11 are now more specifically defined as Penalty Group 2-A drugs.⁷³

⁷¹ See Ex. 2–2B (DEA placement of XLR11 and AB-CHMINACA into the temporary schedules); Ex. 30, 38 Tex. Reg. 4928 (Aug. 2, 2013) (Texas DSHS placement of XLR11 into Schedule I); Ex. 31, 40 Tex. Reg. 2007 (April 3, 2015) (Texas DSHS placement of AB-CHMINACA into Schedule I).

⁷² Ex. 29, City of Houston Kush Ordinance.

⁷³ Tex. Health & Safety Code § 481.1031(b)(5):

(b) Penalty Group 2-A consists of any material, compound, mixture, or preparation that contains any quantity of a natural or synthetic chemical substance, including its salts, isomers, and salts of isomers, listed by name in this subsection or contained within one of the structural classes defined in this subsection:

....

(5) any compound containing a core component substituted at the 1-position to any extent, and substituted at the 3-position with a link component attached to a group A component, whether or not the core component or group A component are further substituted to any extent, including”

32. The Texas Legislature has also recently amended the DPTA to make it a per se DTPA laundry list violation to make a deceptive representation or designation about synthetic marijuana or cause confusion or misunderstanding as to the effects of synthetic marijuana when consumed or ingested. DTPA § 17.46(b)(30).

D. Defendants Have Engaged In False, Misleading and Deceptive Trade Practices And Maintain A Common Nuisance.

33. By selling, offering for sale, and distributing synthetic marijuana, including “Kush”, the Individual and Entity Defendants and their agents have, in the conduct of trade and commerce, engaged in false, misleading and deceptive acts and practices declared unlawful under the DTPA.

34. By packaging and selling synthetic marijuana at their store, the Individual and Entity Defendants deliberately misled consumers into believing that these products are legal and safe. Defendants knew or should have known that the substances they were packaging and selling to retail customers were illegal. Defendants did nothing to warn consumers that the synthetic marijuana products were illegal and dangerous. The packaging contains no ingredient lists or warnings of any kind. There is no mention that the key ingredients, XLR11 and AB-CHMINACA, are highly addictive and dangerous chemicals, Schedule I drugs, and Penalty Group 2-A drugs. The lack of identifying packaging is itself misleading due to its failure to disclose the dangers of the substance.

35. The Individual and Entity Defendants know or should know the actual content of the products they are selling to consumers is illegal and dangerous, and they deliberately fail to disclose this information in order to induce consumers to buy the products. The suspicious

XLR11 is a compound having the following components: indole (core), methanone (link), and tetramethylcyclopropane (group A) in accordance with Tex. Health & Safety Code § 481.1031(b)(5). Ex. 22, 24, and 26. AB-CHMINACA is a compound having the following components: indazole (core), carboxamide (link), and amino oxobutane (group A) in accordance with Tex. Health & Safety Code § 481.1031(b)(5). Ex. 22.

circumstances of i) the delivery of an unlabeled trash bag full of a leafy substance, ii) which was delivered by an unidentified man, and iii) which was then packaged by Defendants and their agents into small packets in the store's backroom points to Defendants' awareness that the substance was illegal or at best their conscious indifference to whether the substance was legal. Further, the suspicious circumstances of keeping the synthetic marijuana in the back store room, requiring customers to ask for it by name, providing no identifying markings on the packaging, and charging an inflated price⁷⁴—also confirm that the Individual and Entity Defendants and their agents knew or should have known that the product being sold is illegal and harmful to consumers. Unsuspecting consumers who purchase these products from the Individual and Entity Defendants are exposed to the physical dangers of XLR11 and AB-CHMINACA, as well as serious potential criminal liabilities.

36. The Individual, Entity, Landlord, and In Rem Defendants knowingly participated in and tolerated the illegal activity of selling, delivering, and possessing controlled substances at Fantasy Smoking and Accessories, located at 1340 Westheimer Rd., Houston, Texas. Defendants Glen Cohen and Judy Cohen have at all relevant times been involved in the day to day operations and management of the 1340 Westheimer store and on information and belief knowingly participated in and/or tolerated the illegal activities described herein.

X. COMMON NUISANCE: TEX. CIV. PRAC. & REM. CODE §§ 125.001–125.047

37. The Plaintiff State of Texas incorporates and adopts by reference the allegations contained in each and every preceding paragraph of this petition.

⁷⁴ The cost of the leafy substances listed as ingredients in a single packet of Kush is approximately 77 cents. The average retail priced charged by Defendants is \$29.99 for 3 grams. (Ex. 21, 23, 25, 27)

38. Chapter 125 of the Texas Civil Practice & Remedies Code defines a common nuisance. Section 125.0015(a) states “[a] person who maintains a property to which persons habitually go for [certain] purposes and who knowingly tolerates the activity and furthermore fails to make reasonable attempts to abate the activity maintains a common nuisance.” The purposes that give rise to a common nuisance include “delivery, possession, manufacture or use of a controlled substance in violation of Chapter 481 of the [Texas] Health & Safety Code.” Tex. Civ. Prac. & Rem. Code § 125.0015(a)(4).

39. The Fantasy Smoking and Accessories store at 1340 Westheimer, Houston, Texas constitutes a common nuisance under Tex. Civ. Prac. & Rem. Code § 125.0015(a)(4) because persons habitually go to this store to purchase and possess a controlled substance in violation of Chapter 481 of the Texas Health & Safety Code. Defendants own, maintain, operate, or use the stores and knowingly tolerate the nuisance activity and further fail to make reasonable attempts to abate the nuisance activity. Tex. Civ. Prac. & Rem. Code §§ 125.002(b), 125.0015(a)(4). This action is brought by the State to request injunctive relief to abate this nuisance and enjoin Defendants from maintaining or participating in the nuisance and for any other reasonable requirements to prevent the use of these stores as a common nuisance. Tex. Civ. Prac. & Rem. Code § 125.002(b),(e). Plaintiff requests that upon issuance of injunctive relief each of Defendants be ordered to post a bond in the name of the State to be forfeited to the State in the event of a violation by Defendants of the injunction. Tex. Civ. Prac. & Rem. Code § 125.003. The bond must be payable to the State of Texas, be in the amount set by the Court, but no less than \$5000 nor more than \$10,000, have sufficient sureties approved by the Court, and be conditioned that the Defendants will not knowingly allow a common nuisance to exist at the 1340 Westheimer, location. *Id.*

40. Based upon § 125.002 of the Texas Civil Practice & Remedies Code, if the judgment is in favor of the Plaintiff, the Court shall grant an injunction ordering Defendants to abate the nuisance and be enjoined from maintaining or participating in the common nuisance. The Court may include in the order reasonable requirements to prevent the use or maintenance of the place as a nuisance. The judgment must order that the location where the nuisance was found is closed for one year.

41. Pursuant to § 125.003(a) of the Texas Civil Practice & Remedies Code, should any condition of the bond or any injunctive order by this Court be violated, the State may sue upon the bond and upon showing a violation of any condition of the bond or injunctive order, the whole sum of the bond should be ordered forfeited to the State and the location where the nuisance was found should be closed for one year. In addition, in accordance with § 125.002(d) of the Texas Civil Practice & Remedies Code, a person who violates a temporary or permanent injunctive order is subject to the following sentences for civil contempt: a) a fine of not less than \$1000 nor more than \$10,000; b) confinement in jail for a term of not less than 10 nor more than 30 days; and c) both a fine and confinement. If a Defendant violates the temporary or permanent injunction, under § 125.045(b), the Court may make additional orders to abate the nuisance.

42. On violation of the bond or injunction, the place where the nuisance exists shall be ordered closed for one year from the date of the order of bond forfeiture. *Id.*

XI. VIOLATIONS OF THE DTPA: TEX. BUS. & COM. CODE §§ 17.41–17.63

43. The Plaintiff State of Texas incorporates and adopts by reference the allegations contained in each and every preceding paragraph of this petition.

44. As alleged and detailed above Defendants have, in the conduct of trade and commerce, engaged in false, misleading, or deceptive acts or practices in violation of DTPA § 17.46(a)

45. Defendants, in the course and conduct of trade and commerce, have directly or indirectly engaged in false, misleading, and deceptive acts and practices declared to be unlawful by the DTPA by:

- (a) Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services, in violation of DTPA, § 17.46(b)(2);
- (b) Causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another, in violation of DTPA, § 17.46(b)(3);
- (c) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection which he does not have, in violation of DTPA, § 17.46(b)(5);
- (d) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another, in violation of the DTPA, § 17.46(b)(7);
- (e) Failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction which the consumer would not have entered had the information been disclosed, in violation of the DTPA, § 17.46(b)(24); and
- (f) In the production, sale, distribution, or promotion of a synthetic substance that produces and is intended to produce an effect when consumed or ingested similar to, or in excess of, the effect of a controlled substance or controlled substance analogue, as those terms are defined by Section 481.002, Health and Safety Code:

- i) Making a deceptive representation or designation about the synthetic substance, in violation of the DTPA, § 17.46(b)(30)(A), and
- ii) Causing confusion or misunderstanding as to the effects the synthetic substance causes when consumed or ingested, in violation of the DTPA, § 17.46(b)(30)(B).

XII. APPLICATION FOR TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION AND PERMANENT INJUNCTION

46. Plaintiffs have reason to believe that the Defendants are engaging in, have engaged in, or are about to engage in acts and practices declared to be unlawful under the DTPA. Plaintiffs believes these proceedings to be in the public interest. Therefore, pursuant to DTPA § 17.47(a) and § 17.60(4), Plaintiffs request relief by way of a Temporary Restraining Order, Temporary Injunction, and Permanent Injunction as set forth in the Prayer.

47. Further, pursuant to Chapter 125 of the Texas Civil Practice & Remedies Code, Plaintiffs request the Court enjoin Defendants from maintaining or participating in the common nuisance described herein, *i.e.*, delivery and possession of controlled substances in violation of Chapter 481 of the Texas Health & Safety Code at the Fantasy Smoking and Accessories store located at 1340 Westheimer Rd., Houston, Texas, and order such requirements as to prevent the ongoing nuisance activity in Harris County, Texas. Tex. Civ. Prac. & Rem. § 125.002(b)(e). Plaintiffs are not required to verify facts in support of injunctive relief to abate the nuisance activity. Tex. Civ. Prac. & Rem. § 125.002(a).

48. Plaintiffs believe immediate injunctive relief by way of Temporary Restraining Order and Temporary Injunction is necessary to prevent continuing harm prior to trial.

49. The Court shall issue such injunctive relief without requiring a bond from the Plaintiffs. DTPA § 17.47(b); Tex. Civ. Prac. & Rem. Code § 6.001(a).

50. Plaintiffs further request the Court find Plaintiffs are likely to succeed on the merits on its claim for common nuisance and include in the Court's temporary injunction order (i) reasonable requirements to prevent the use or maintenance of the Fantasy Smoking and Accessories store as a nuisance, and (ii) require that Defendants execute a bond of not less than \$5,000 nor more than \$10,000, payable to the State, with sufficient sureties and conditioned that Defendants will not maintain a common nuisance. Tex. Civ. Prac. & Rem. Code § 125.045(a).

XIII. REQUEST TO CONDUCT DISCOVERY PRIOR TO TEMPORARY INJUNCTION HEARING

51. Plaintiffs request leave of this Court to conduct depositions of witnesses and parties prior to any scheduled Temporary Injunction Hearing and prior to Defendants' answer date. There are a number of victims and other witnesses who may need to be deposed prior to any scheduled injunction hearing. Any depositions, telephonic or otherwise, would be conducted with reasonable, shortened notice to Defendants and their attorneys. Also, Plaintiffs request that the filing requirements for business records and the associated custodial affidavits be waived for purposes of all temporary injunction hearings.

~~52. Plaintiffs request that the Court find that Defendants' conduct is likely to cause irreparable harm to Plaintiffs and that the balance of equities tips in favor of Plaintiffs. Plaintiffs request that the Court find that the public interest is best served by granting the requested injunctive relief.~~

XIV. TRIAL BY JURY

53. Plaintiffs herein request a jury trial and tender the jury fee to the Harris County District Clerk's office pursuant to Texas Rule of Civil Procedure 216 and the Texas Government Code § 51.604.

XV. CONDITIONS PRECEDENT

54. All conditions precedent to Plaintiffs' claims for relief have been performed or have occurred.

XVI. REQUEST FOR DISCLOSURE

55. Under Texas Rule of Civil Procedure 194, Plaintiffs request that Defendants disclose, within 50 days of the service of this request, the information or material described in Rule 194.2.

XVII. PRAYER

56. Plaintiffs pray that Defendants be cited according to law to appear and answer herein.

57. Plaintiffs pray that the TEMPORARY RESTRAINING ORDER be issued, and that after due notice and hearing, a TEMPORARY INJUNCTION be issued, and upon final hearing a PERMANENT INJUNCTION be issued, restraining, and enjoining Defendants, Defendants' officers, agents, servants, employees, attorneys—and any other person in active concert or participation with any or all Defendants—from engaging in the following acts or practices without further order of the Court:

- (a) Transferring, concealing, destroying, or removing from the jurisdiction of this Court any books, records, documents, invoices or other written materials—including electronic documents—relating to the purchase and sale of synthetic cannabinoids, including Kush, that are currently or hereafter in any of the Defendants' possession, custody or control except in response to further orders or subpoenas in this cause;

- (b) Selling or offering for sale controlled substances on Defendants' premises, including but not limited to synthetic substances containing AB-CHMINACA and XLR11;
- (c) Manufacturing, purchasing, delivering, offering for sale, holding, selling, or giving away any products containing controlled substances or synthetic cannabinoids, including but not limited to synthetic substances containing AB-CHMINACA and XLR 11;
- (d) Manufacturing, purchasing, delivering, offering for sale, holding, selling, or giving away any product that is labeled "not for human consumption" or words to that effect when the purpose of the product is for consumers to inhale, ingest, or introduce the product into the human body to mimic the effects of controlled substances;
- (e) Manufacturing, purchasing, delivering, offering for sale, holding, selling, or giving away any product that is intended for human consumption and contains deceptive labeling that falsely implies the product is legal when it is not;
- (f) Representing, directly or indirectly, that goods have characteristics, ingredients, uses, or benefits, which they do not have by advertising, offering to sell, or selling any products labeled household products, such as potpourri, incense, or bath salts, when the products contain synthetic substances that mimic the effects of drugs and/or controlled substances;
- (g) Offering for sale or selling products intended to serve as alternatives to controlled substances to stimulate, sedate, or cause hallucinations or euphoria when introduced into the body, such as through inhalation or ingestion;

- (h) Offering for sale or selling products that are false, misleading, or deceptive because the labeling lacks the name and address of the manufacturer, packer or distributor, the ingredients, the net quantity of contents in terms of weight or mass in both pound and metric units; and a statement of the identity of the commodity;
- (i) Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods by advertising, offering to sell, or selling any products with synthetic substances that mimic the effects of controlled substances;
- (j) Failing to disclose information regarding possible side-effects, such as paranoia, hallucinations, pains like a heart attack or rapid heartbeat, seizures, panic, passing out, and suicidal thoughts, from using products with synthetic substances that mimic the effects of drugs and/or controlled substances, which information was known at the time of the transaction, if such failure to disclose was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;
- (k) Failing to cooperate with authorized representatives of the State and Harris County, including law enforcement representatives, in locating and impounding all synthetic marijuana products in Defendants' custody, care and control or located on Defendants' premises and preserving all documents related to purchase and sale of synthetic marijuana products in Defendants' custody, care or control; and
- (l) Failing to preserve video surveillance of the Defendants' store premises and to maintain and operate video surveillance of the premises and provide copies of the video surveillance to Plaintiff's counsel upon request.

58. Plaintiff, the State of Texas, further prays that this Court award judgment for the Plaintiff ordering Defendants to pay civil penalties to the State of Texas for each violation of the DTPA up to a total of \$20,000 per each violation;

59. Plaintiffs further pray that upon final hearing that this Court order each Defendant to pay the Plaintiffs' attorney fees and costs of court pursuant to the Tex. Gov't. Code § 402.006(c). Plaintiffs further prays for recovery of reasonable attorneys' fees, investigative costs, court costs, witness fees, and deposition fees pursuant to Texas Civil Practice & Remedies Code § 125.003(b),(d).

60. Plaintiffs further pray that this Court grant all other relief to which the Plaintiffs, the State of Texas and City of Houston, are entitled.

Respectfully submitted,

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