

STATE OF NEW YORK  
OFFICE OF CANNABIS MANAGEMENT  
OFFICE OF ADMINISTRATIVE HEARINGS

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**OFFICE OF CANNABIS MANAGEMENT,**

Petitioner,

-against-

**DECISION**  
**Inspection No.: 204202408200002**

**ALL SMILES 2 LLC**

Respondent.

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Respondent requested an emergency hearing on August 26, 2024, which was made within seven (7) calendar days of the date of the inspection which occurred on August 20, 2024.

The emergency hearing began on September 4, 2024, after having been adjourned on consent of the parties from August 30, 2024, which was within three (3) business days of the Respondent's request.

The Respondent was represented by Phil Modrzynski, Esq.

The Office of Cannabis Management (hereinafter "OCM") was represented by Ruben Espinosa, Esq.

Investigative Specialist Andrew Gerken testified on behalf of OCM.

**ISSUE**

The allegations set forth in the Notice of Violation indicate that the Respondent was offering cannabis products, as defined by Cannabis Law Article 3, for sale without an appropriate registration, license, or permit. This allegation was based upon observations made during a regulatory inspection which was conducted at 3811 Harlem Rd. Buffalo, NY 14215.

The scope of the emergency hearing was limited solely to the issue as to whether or not the padlocking provisions Cannabis Law Article 6 § 138-b of have been met by a preponderance of the evidence.

There were no allegations of improper service raised during this hearing by Respondent's attorney.

### APPLICABLE LAW

Cannabis Law Article 6 §138(a) provides that “The board or the Office of Cannabis Management shall, in accordance with the authority otherwise conferred in this chapter, have the authority to: 1. order any person who is unlawfully cultivating, processing, distributing or selling cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such in this state without obtaining the appropriate registration, license, or permit therefor, or engaging in an indirect retail sale to cease such prohibited conduct. 2. seize any cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such, found in the possession of a person engaged in the conduct described in subdivision one of this section.”

Cannabis Law Article 6 § 138-b(1) provides that orders to seal: In addition to any other authority conferred in this chapter, pursuant to the provisions of this section, the board or the office shall have the authority to issue an order to seal the building or premises of any business engaged in unlicensed activity, when such activity is conducted, maintained, or permitted in such building or premises, occupied as a place of business as described in subdivision eight of section ten of this chapter, in violation of subdivision one or one-a of section one hundred twenty-five or subdivision one or eight or section one hundred thirty-two of this article.

Cannabis Law Article 6 §138-b(6) provides that an order to seal may be issued by the office or the board pursuant to subdivision three of this section only if:

- (a) no part of the premises to be sealed is used in part as a residence and pursuant to local law or ordinance is zoned and lawfully occupied as a residence; and
- (b) the unlicensed activity as described in this section is more than a de minimis part of the business activity on the premises or in the building to be sealed pursuant to this subdivision, the office shall issue a notice of violation and order to cease the unlicensed conduct, which shall constitute notice that such activity must cease immediately. (See Regulations at 9 NYCRR 133.25(f)(2-3)).

Cannabis Law Article 6 §138-b(7) provides that in assessing whether unlicensed activity within a building is more than de minimis, the office or board, as relevant, shall consider factors such as any one or more of the following:

- (a) the presence of signs or symbols, indoors or out, advertising the sale of cannabis or otherwise indicating that cannabis is sold on the premises;

- (b) information shared in any advertisements or other marketing content in connection with the unlicensed business activity and any direct or indirect sales of cannabis or other conduct in violation of this chapter;
- (c) the volume of illicit cannabis products on site; and
- (d) the variety of illicit cannabis products on site. (See Regulations at 9 NYCRR 133.25(f)(3)(i-iv)).

Cannabis Law Article 6 §138-b (3) provides that the office may issue an order to seal with an immediate effective date if such order is based upon a finding by the office of an imminent threat to the public health, safety and welfare. (See Regulations at 9 NYCRR 133.25(f)(1)).

Cannabis Law Article 6 §138-b(4) sets forth the factors that determine an imminent threat to public health, safety, and welfare shall be limited to:

- (a) documented sales to minors;
- (b) unlicensed processing of cannabis products at the building or premises;
- (c) orders issued following an inspection wherein the person engaged in the unlicensed activity engaged in violent, tumultuous, or other behaviors indicating expressed intent to not comply with the office's order to cease the unlicensed activity;
- (d) documented presence of unlawful firearms at the building or premises;
- (e) proximity of the building or premises to schools, houses of worship, or public youth facilities;
- (f) presence of products deemed unsafe based on reports of illness or hospitalization; or
- (g) sales of, or offers to sell, cannabis products not tested or labeled lawfully in accordance with this chapter. (See Regulations at 9 NYCRR 133.25(f)(1)(i-vii)).

### **FINDINGS OF FACT**

1. Respondent was offering cannabis products for sale without a license issued by OCM. During the course of the hearing, Investigator Andrew Gerken testified that he has training and experience in conducting regulatory inspections, including in his role as an investigator for OCM. He explained that when conducting regulatory inspections, he looks at the ingredients and labels on packaging at the premises. He also looks more holistically at the store to determine if cannabis is being illicitly sold, observing the signage as well as any online advertisements. Investigator Gerken testified that prior to his inspection of All Smiles 2 LLC, he conducted online research of their website. (Exhibit B2). The website contained the same branding seen on the exterior of the premises. (Exhibit B2 and Exhibit B3-4). The website showed that edibles,

flower, and concentrates were offered for sale on the premises. Investigator Gerken testified that upon entering the front door of the building, there was a foyer and then an area with a seat for an employee behind plexiglass. There also was a locked door that required an individual to be “buzzed” through to a main area. Once through, one found oneself in a room with glass counters, and a separate office and back room. (Exhibit B1-2). There was at least one iPad located in the front room on the glass counter which contained a menu of cannabis and non-cannabis products, edibles, flower, concentrates, vape cartridges, beverages, disposables. The majority of the products were stored in the back room or office. The iPad also listed a few products by brands including some such as Whole Melt or Choiceslab which have cannabis symbols or verbiage in their icon. (Exhibit B5-6) Exhibit D features many photographs of copious amounts of bulk and packaged cannabis flower as well as vape cartridges and edibles that were present at the premises.

Respondent’s attorney argued that there is no way of knowing, without testing, whether the flower observed at the location was cannabis or hemp. Investigator Gerkin concurred that it is not possible to tell loose cannabis flower apart from hemp by look alone. Respondent’s attorney also asserted that the Cannabis Law Article 6 §138-b did not allow the products to be inferred to be cannabis based solely on the label or marketing as such. However, Cannabis Law Article 6 §138-b (1) specifically refers back to Cannabis Law Article 6 §125 which states that no unlicensed person shall sell at retail products marketed or labeled as cannabis. It also refers to Cannabis Law Article 6 §132 which prescribes penalties for those offering to sell cannabis and cannabis products or products marketed or labeled as such. Thus, it is evident that any failure of the section to directly mention “offers to sell” or “labeled or marketed as cannabis” does not prohibit a finding that offering to sell products labeled or marketed as cannabis is in contravention of Cannabis Law Article 6 §138-b.

The totality of the circumstances makes it far more likely than not, that the flower present at the location was in fact cannabis. The location included a highly secured sales room, which required key fob, passcode, or fingerprint for entry, if one was not being “buzzed” in by an employee. Multiple additional branded items offered for sale at the premises were clearly marked as cannabis products. (Exhibit D11, D13, D15, and D17). Additionally, some flower was packed in jars with medical labels stating that they contained high percentages of THC and low or non-existent percentages of CBD. (Exhibit D7-9). The level of security on the premises including the need for fingerprint entry into the sales room itself, indicates a consciousness of guilt and an intention to evade law enforcement. The security coupled with the presence of multiple other non-flower cannabis products, in conjunction with the fact that the location did not have a hemp license and only had a few hemp products, indicates that the flower present at the location, was most likely cannabis flower. Additionally, even if there were a finding that Cannabis Law Article 6 §138-b, did not apply to products marketed or labeled as cannabis, the product and warning labels on the items at hand, in conjunction with the secretive manner and method in which the products were sold and stored, leads me to find that the products were in fact cannabis.

2. Investigator Gerkin testified that no part of the premises to be sealed was used in part as a residence and pursuant to local law or ordinance no part was zoned and lawfully occupied as a

“residence.” He stated that he did not observe any of the hallmarks of a residence on the premises, including but not limited to, showers, kitchens, clothing, or dressers.

3. The unlicensed activity which warrants an order to seal, constitutes more than a “de minimis” part the business activity. The Cannabis Law outlines four non-exclusive factors to be considered when determining whether business activity should be considered as de minimis. Of those four factors, at least two were present at All Smiles 2 LLC during the inspection; a relevant volume of cannabis and a variety of cannabis products. The volume of cannabis flower alone, was significant. Exhibit D3 depicts six or more very large bags of cannabis flower. Exhibit D6 depicts five sizeable clear tubs containing many bags of pre-packaged cannabis flower. Exhibit D16 shows a number of different types of vape cartridges that vary by both brand and varietal. The variety of product types is further shown by Exhibit D17, which contains a wide assortment of cannabis edibles. Finally, the large array of products being offered by All Smiles 2 LLC, is most clearly seen in Exhibit B5, B6, and B8, which contains a menu of available products and includes the price points for each item.

4. The unlicensed activity constituted an imminent threat to public health, safety, and welfare in that: there were sales of, or offers to sell, cannabis products that were not tested or labeled lawfully in accordance with Cannabis Law Article 6. Multiple products observed in Exhibit D were not labeled in accordance with New York Law. The large bags of flower, in addition to the smaller jars and prepackaged bags of flower, did not have the New York State cannabis warning label. Additionally, products featured in Exhibit D10-17 contain out of state or fictitious cannabis warning labels. There was also evidence of unlicensed processing of cannabis occurring on the premises. Exhibit C1 shows a bump box, which Investigator Gerkin testified was used to create cannabis products. Additionally, there is empty tubular packaging seen in Exhibit C2 and C3 as well as pre-rolls (Exhibit C5) that are in containers matching the empty packaging seen in C2 and C3, save for added labels. There is also a scale by Truweigh present in Exhibit C. For all of those reasons it is evident that All Smiles 2 LLC’s conduct met the threshold for a finding that it presents an imminent threat to the public health, safety, and welfare.

**WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON AUGUST 20, 2024, IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.**

Dated: September 10, 2024

*Laurie Cartwright*  
Administrative Law Judge

PLEASE BE ADVISED: Either party may appeal this decision within 30 calendar days of receipt, according to the specific manner described in Regulations at 9 NYCRR 133.25(k).

This decision was sent via email on September 10, 2024, to the following:

Nickolas Perry  
Sheila Wagner  
Ruben Espinosa, Esq.  
Phil Modrzynski, Esq.