

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. 205202405210001**

**Alter Native Retail LLC**

Respondent.

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Respondent requested an emergency hearing on May 28, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on May 21, 2024.

A conference was held on June 5, 2024 for the purpose of discussing the timeliness and proper completion of the hearing request. A hearing was scheduled for June 10, 2024, which was agreed to by all parties. The emergency hearing was commenced on June 10, 2024, continued on June 13, 2024, and concluded on June 18, 2024.

The Respondent was represented by Joshua Bauchner, Esq.

Carlos Sanchez testified on behalf of the Respondent.

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

Investigative Specialist Lisa Warner 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 790 8<sup>th</sup> Ave, New York, NY.

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 off the evidence.

### **CONCLUSIONS OF 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. Investigator Warner testified that Respondent was offering cannabis products for sale without a license issued by OCM. In support of that position, the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal indicated that she observed cannabis, cannabinoid hemp, cannabinoid hemp extract products, and products marked/labeled as containing cannabis and/or cannabinoid hemp being offered/stored/provided/cultivated/processed which required licensure, to include THCA pre-rolls, THCA flower, THCA concentrate, THCA edibles, HHC edibles, THCP pre-rolls, THC edibles CA logo, THCP and Delta 8 edibles with CA logo, Delta edibles, and HHC concentrate (Exh A). At the hearing, images of five products were shown, one of which, in accordance with Investigator's Warner's own testimony, was not regulated by

OCM, therefore will not be considered in this decision (Mushrooms depicted in Exh C, c-3). The photographs of the four products which OCM presented as evidence included Indica Rope THC Kief Joints (Exh C, c-1), Rope 40's shorties which the label identified as THC pre-rolls packed with THCA flower with approximately 0.7 grams/joint (Exh C, c-2), Jelly D9 Live Resin Mystery Fruit Edibles labeled with 1000 mg pure THC (Exh C, c-3), and Psychedelic Gummies THC Liquid Diamonds 1000 mg (Exh C, c-4). As such, the products depicted in the photographs consisted of edibles and pre-rolls. It is significant that Respondent is in possession of a Cannabinoid Hemp Retail License, issued by OCM, which expires May of 2025 (Exh 8) however is not in possession of an Adult Use License issued by OCM which authorizes Respondent to sell cannabis. While Respondent's attorney contends that the pre-roll products were permissible hemp authorized for sale under Respondent's Hemp License, Investigator Warner credibly testified that smokeable hemp products are prohibited to be sold or offered for sale in New York State irrespective of Respondent's Hemp License and both were labeled as containing THC (Exh C, c-1, c-2). As to the two types of edibles depicted in the photographic evidence, I note that the label on both products indicate that they contain 1000 mg of THC (Exh C, c-3 and c-4). Furthermore, Investigator Warner testified that none of the products were labeled with the NYS brand and therefore were not legal to be sold or offered for sale in New York State. Respondent's attorney argues that Investigator Warner's determination of illicit cannabis is based solely upon the labeling and absent testing as to what is actually contained in the package, is insufficient to make a determination of products containing cannabis. I reject this argument based upon Cannabis Law Article 6 §138(a)(2) which authorizes representatives of OCM to "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." As such, the labeling of a product as containing cannabis is sufficient to establish the presence of cannabis and no testing is required by the statute. I find that there were cannabis products being offered for sale at this location without a license.

2. Investigator Warner testified that 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." Respondent offered no testimony to refute this and thus it is accepted as credible.

3. The unlicensed activity which warrants an order to seal does not constitute more than a "de minimis" part the business activity. Cannabis Law Article 6 § 138-b(7) and OCM Regulations part 133.25(f)(3) enumerate the factors to consider when determining if unlicensed activity occurring within a business is more than de minimis. One such factor is the presence of signs and symbols inside or outside the subject premises indicating that cannabis is being sold. I note the presence of both signs containing the cannabis leaf as well as apparel offered for sale also branded with the cannabis leaf (Exh B, b-1, b-2, Exh D, d-3). While Investigator Warner testified that she could not distinguish between a cannabis leaf and what Respondent's attorney argued was a hemp leaf, Respondent's witness testified that it was a cannabis leaf however indicated that there was no way to visually discern whether it was hemp or what he referred to as "marijuana." In addition, on the inside the location was a sandwich board style sign on which was written "Join Our Loyalty Program for Rewards 4 20" (Exh D, d-4). Investigator Warner credibly testified that 4 20 refers to a nationally celebrated day of cannabis consumption and not a celebration of CBD products. Variety and volume of cannabis products offered for sale are

also factors to be considered when determining if unlicensed activity is more than de minimis. I note that despite the variety of products denoted on the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal in two locations on the document, only four photographs depicting four products consisting of two varieties of cannabis products which Investigator Warner testified constituted unauthorized cannabis products offered for sale at the shop were offered into evidence. The four pictures failed to represent more than a de minimis volume and variety offered for sale at this location. I note the significant variety of products documented on the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal were not established by photographic evidence and testimony of the OCM Investigator. Furthermore, when asked what percentage of products which she deemed to be illicit were removed from the shop, Investigator Warner could not provide an estimate. While she testified that “at least eight to ten big clear trash bags” of product were removed, Investigator Warner further testified that after removal of the products which she deemed to be illicit, “they still had a good amount of product when we left because he did have a lot of hemp products in his location.” Also, Investigator Warner testified that no pictures were taken of the inside of the location after the products were seized which might have provided some indication as to the volume of products left so as to conclude whether the products seized were more than de minimis. I find that given the size of the store and the volume of products depicted in the photographs in evidence (Exh B, b-1, b-2, b-3, Exh D, d-2), OCM has not proven by a preponderance of the evidence that the products seized were more than de minimis. The Investigator’s failure to provide any evidence concerning the comparative value of the illicit products seized versus the value of the licensed products remaining, makes a de minimis calculation impossible.

Therefore, even assuming everything taken out by OCM was cannabis product, it does not reach the de minimis threshold set by the statute and is exempted from padlock pending the outcome of the final hearing disposition.

**WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON MAY 21, 2024, IS HEREBY VACATED AND THE PADLOCK SHALL BE REMOVED IMMEDIATELY.**

Dated: June 24, 2024

Karen Lavery  
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 June 24, 2024 to the following:

Nickolas Perry  
Sheila Wagner  
Ruben Esposito, Esq.  
Joshua Bauchner, Esq.