

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 104202409250063

WICKED GLASS LLC

Respondent.

Respondent requested a hearing to vacate an Order to Seal.

The hearing was conducted via WebEx on October 25, 2024, at 10 a.m. and on November 7, 2024, at 10 a.m. The inspection was conducted on September 25, 2024 and an Order to Seal was issued the same day. OPP Ex. A.

On October 25, 2024, Adam Cyphers and Lisa Chank appeared for Respondent at the WebEx hearing. Mr. Cyphers is the owner of Respondent and Ms. Chank is the wife of Mr. Cyphers. They indicated that their attorney, Daniel DuBois, could not attend that day because he was in court representing a murder defendant. The undersigned asked whether they would like to adjourn so that their attorney could appear and they indicated that they would request an adjournment for that purpose.

The hearing was adjourned until November 7, 2024, at 10 a.m.

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

OCM Sr. Investigative Specialist Sarah Tagliaferro testified on behalf of OCM.

The Respondent was represented on November 7, 2024, by Daniel J, DuBois, Esq. (ddubois@ddlawpc.esq). Mr. Cyphers and Ms. Chank did not attend the November 7, 2024 hearing.

The Respondent did not call any witnesses or offer any exhibits.

ISSUE

The allegations set forth in the Notice of Violation (OPP Ex. A) assert that the Respondent was selling and offering for sale 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 on September 25, 2024 at Wicked Glass, 3107 Delaware Avenue, Kenmore, New York 14217 (OCM Ex. A, D1). The NYS Department of Taxation and Finance also entered the premises at the same time.

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

APPLICABLE LAW

Cannabis Law §138-a provides, in relevant part, 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 § 138-b (1) provides for 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 §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 §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 §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 §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. The premises at 3107 Delaware Avenue, Kenmore, NY is rented or owned by Wicked Glass LLC, the owner of which is Adam Cyphers, and does business as Wicked Glass. See OCM Exs. A, B1, B3. Mr. Cyphers' home address is 850 Ohio Street, North Tonawanda, NY 14120.
2. The premises is not being used as a residence. At the time of the inspection, Investigative Specialist Tagliaferro did not observe any beds, showers, dressers, kitchens, or other signs indicating that someone lived in the premises. This is a commercial property. This testimony was not challenged.
3. Investigative Specialist Tagliaferro testified that Respondent was not licensed to sell adult-use cannabis or hemp. This testimony was not challenged.
4. Investigative Specialist Tagliaferro received training related to the identification of cannabis products.
5. The unlicensed activity which warrants an order to seal constitutes more than a "*de minimis*" part of the business activity at the premises. Cannabis Law § 138-b (7) and OCM Regulations 133.25(f)(3) identify the factors that may be considered in determining if unlicensed activity occurring within a respondent's premises is more than *de minimis*. The factors for determining whether the unlicensed activity is *de minimis* are set forth above.

During the inspection of the Respondent's premises, Investigative Specialist Tagliaferro found a large volume and a large variety of cannabis products. These products included various forms and flavors of cannabis flower, cannabis edibles, and cannabis concentrate. Among the items found were cannabis edibles (OCM Exs. B7, B8, B18¹, B19², B27, B28, B30, C2, C3, C12, C17), concentrate (B12, B15, B21, B23[jars on bottom shelf], B24, C16), pre-rolls (B13B, C11), cannabis flower (B25, C4, C5, C6, C7, C8, C26, C28, C30, C32, C33, C34), and cannabis concentrate vape product (B32, C1).

The sale of cannabis products by Respondent is directly established by an account book located in the store during the inspection. (OCM Exs. C18-25). The account book clearly shows dates of sales, together with the amount of product and the price. Other portions of the account book appear to show inventory of cannabis product (e.g. C22). A price list was found near the cash register (B4).

The sale of cannabis in the Wicked Glass store is also signaled by the combination of the presence of an ATM on-site (B2), various smoking-related products (e.g. B1), posters of a marijuana leaf (B 10), and rolling papers (B1). While none of these items are illegal to sell and while these items would not by themselves conclusively establish that the store sells cannabis,

¹ OCM Ex. B18 is a photograph of boxes of Treese's medicated cannabis cups (a play on Reese's chocolate peanut butter cups). Investigative Specialist Tagliaferro testified that Respondent did not have a license to sell medical cannabis products.

² OCM Ex. B19 is a photograph of a bottle of Peach Mango Lemonade cannabis edible juice.

the combination of them is evidence that the store does sell cannabis. In this case, this circumstantial proof is unnecessary because there is strong direct proof of sales and offers to sell.

Based on the totality of this testimony and the exhibits, I find that OCM met its burden of establishing that the sales of cannabis and offers to sell cannabis products were more than a *de minimis* part of the business activity on the premises.

6. OCM has established that the Respondent's store poses an imminent threat to public health, safety, and welfare. Numerous products identified by Investigative Specialist Tagliaferro as cannabis were not properly labelled. Several of the products in the premises had California—and not New York—labels (e.g., B13B, B17, B21, B32, C11, C16) and were therefore not legal to sell in New York State. Some products had “fraudulent” New York labels and were therefore not legal to sell in New York State (e.g., B13A, B20, B27). Some products lacked proper New York State labeling and/or lacked necessary New York State warnings and were therefore illegal to sell in New York State (e.g., B8, B18, B23[jars on bottom shelf], B24, B25, B28, C1, C2, C3, C4, C5, C6, C7, C8, C10, C12, C15, C17, C26, C28, C29, C30, C32, C33). Some pre-packaged cannabis was packaged in packages with bright colors and bubble letters that were likely to appeal to persons under the age of 21 (OCM Exs. B13B, B28, C16). One cannabis edible product even bore a “Sour Patch Kids” label in bright colors to appeal to customers under the age of 21 (B30). Investigative Specialist Tagliaferro credibly testified that this type of packaging is not legal in New York State.

There was unlicensed processing of cannabis at the premises. Investigative Specialist Tagliaferro testified that Respondent was not licensed to process cannabis at the premises. The presence of a scale (Ex. B7), a marijuana grow tent and lights (B5), and empty jars (C6, C9, C13) are evidence of processing, as are unmarked tubes of flower (OCM Ex. C30) and bags or containers of unpackaged cannabis flower (OCM Exs. B6, C6, C28, C30, C33). The NYS Department of Taxation and Finance, which participated in searching the store, seized 20 pounds of loose cannabis flower from the premises. In a cabinet in the back room where processing supplies were located, a sign was posted, stating: “Extra gram in black bag 30g's for an oz, 2 extra for each gram of dab. Unless they are a dick. Then they get a pube.” OCM Ex. B23.

7. The Respondent's owner, Adam Cyphers, a person of suitable age and discretion, was provided with a copy of the Notice of Violation and Sealing Order by mail sent October 23, 2024 (OCM Ex. E).³ Investigative Specialist Tagliaferro conspicuously posted a copy of the Notice of

³ During his closing statement, Respondent's counsel stated that there was no credible proof that Respondent's owner, Adam Cyphers, received a timely notice of the Notice of Violation. Mr. Cyphers was not present during the inspection as he was being questioned by non-OCM officers who had obtained a search warrant to search the premises. Thus, Mr. Cyphers was not available at the time that the Notice of Violation was posted on the store's door. There is strong evidence, however, that Mr. Cyphers had actual notice of the Notice of Violation. On October 4, 2024, OCM emailed a Notice of Hearing to Lisa Chank, among others. Ms. Chank is married to Mr. Cyphers. OCM's counsel represented that Mr. Cyphers requested the hearing—the request for a hearing necessarily preceded OCM's October 4, 2024 email attaching the Notice of Hearing. And both Mr. Cyphers and Ms. Chank attended the beginning of the WebEx hearing on October 25, 2024. They obviously had notice of the Notice of Violation.

Violation and Sealing Order on the front door of the premises (OCM Ex. D2). At the hearing on October 25, 2024, Mr. Cyphers identified himself as the owner of Respondent. Investigative Specialist Tagliaferro confirmed that Mr. Cyphers was the owner.

WHEREFORE, PURSUANT TO CANNABIS LAW §138-b (9), THE ORDER TO SEAL, ISSUED ON SEPTEMBER 25, 2024, IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: November 12, 2024

Paul Perlman

Paul Perlman
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 November 12, 2024, to the following:

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