

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

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OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

BMILLZZ LLC

Respondent.

DECISION

Complaint No. 001 2023 0621 0031

Complaint No. 117 2023 0718 0054

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CONSOLIDATION

Pursuant to Regulations at § 133.16 (4) (b) (1) which provide “in proceedings which involve common questions of law, fact, or parties, the administrative law judge, upon their own initiative or upon motion of any party, may order a consolidation of actions or a joint hearing of any or all issues to avoid unnecessary delay and cost,” Complaint Nos. 001 2023 0621 0031 and 117 2023 0718 0054 were heard together for judicial economy as they both involve common questions of law, fact, and common parties.

Complaint No. 001 2023 0621 0031

ISSUE AND PROCEDURAL HISTORY

The allegations set forth in the Notice of Violation and Order to Cease Unlicensed Activity and Notice of Hearing (hereinafter “NOV”) indicate that the Respondent was offering cannabis products, as defined by Cannabis Law § 3, for sale without an appropriate registration, license, or permit issued by the Office of Cannabis Management (hereinafter “OCM”). This allegation was based upon observations made during a regulatory inspection which was conducted at 1110 Conklin Road, Conklin, New York, on June 21, 2023. A virtual hearing began on August 4, 2023 and concluded on August 8, 2023, from the Albany Office of Cannabis Management before Administrative Law Judge Karen Lavery. Jasmine Norman, Esq. appeared on behalf of OCM and Paula Collins, Esq. appeared on behalf of the Respondent. OCM Director of Enforcement Daniel Haughney (hereinafter “Director Haughney”) testified on behalf of OCM. Adam Allen, Paul Anderson, and Bartholomew Miller Jr. testified on behalf of the Respondent.

FINDINGS OF FACT

On June 21, 2023, members of the OCM Enforcement Division, including Director Haughney, as well as members of the Enforcement Unit of the New York State Department of Taxation and Finance (hereinafter “DTF”) conducted a regulatory inspection of BMillzz LLC (hereinafter “BMillzz”), located at 1110 Conklin Road, Conklin, New York (State’s Exh 1). Director Haughney testified that the regulatory inspection occurred at that location because the Enforcement Divisions were conducting inspections in the Binghamton area which was in the proximity of the Respondent’s shop. Furthermore, Director Haughney testified that the Enforcement Division had received a number of complaints regarding the Respondent operating as an unlicensed cannabis dispensary. In addition, he was familiar with BMillzz as Cease and Desist letters were issued to some BMillzz locations in early 2022. When they realized that the Respondent’s shop was nearby, the Enforcement Divisions added BMillzz to the list of shops to inspect. According to the testimony of Director Haughney, during a regulatory inspection, it is customary for the DTF Investigators to accompany OCM Investigators as they have concurrent regulatory authority to conduct regulatory inspections of premises believed to be operating as an unlicensed illegal cannabis dispensary. Director Haughney described that during a regulatory inspection, the Investigators look for products labeled, marketed and set forth as cannabis products.

Director Haughney testified that prior to the inspection, he had personally conducted an inspection of the internal OCM system and determined that no licenses from OCM had been issued to this entity. Furthermore, an affidavit of the OCM Deputy Director for Licensing and Operations was introduced as evidence which reaffirmed that no licenses from OCM had been issued to the Respondent (State’s Exh 2).

The regulatory inspection of BMillzz located in Conklin, New York, which occurred on June 21, 2023, occurred during the hours in which the store was open to the public. Director Haughney testified that the inspection was conducted by Investigators from both OCM and DTF. He testified that the layout suggested that the store operated as a retail dispensary based upon his observations of both cannabis product and equipment which were documented in both the Notice of Violation (hereinafter “NOV”) and the OCM and DTF Evidence Vouchers (State’s Exhs 1 and 3 respectively). The NOV documented the products observed by OCM and was personally served on Bartholomew Miller who signed the document and identified himself as the owner of the shop. Director Haughney testified that upon entering the shop, he observed a rectangular display case which was within view of anyone entering the store, which contained numerous cannabis products offered for sale (State’s Exhs 6 and 9). The glass front of the display case listed the type of cannabis product with a specific price assigned to it (State’s Exh 9). The cannabis products on display were pre-packaged and the labeling of the products indicated that they did in fact contain cannabis (State’s Exhs 6 and 9). Director Haughney also identified photographic evidence of a sign located on the premises which listed categories entitled “F Series, D Series, C Series, E Series and Quickzips” and under each category was a description of a number of cannabis products (State’s Exh 10). Director Haughney testified that it was his opinion that this was indicative of an indirect sale scheme with which he was familiar which entailed a purchase of a sticker, a patch or an item of nominal value from one of the “Series” which would then entitle the purchaser to one

of the cannabis products listed below it. Photographic evidence of another price list located on the counter was entered into evidence entitled "Patch Prices" which had seven underlined categories specifically: "Flower, Edibles, Dabs, Quick Zip, Carts, Pre-Rolls, and Disposables" (State's Exh 11). Under "Flower" there was listed "3.5 - \$25, 7.0 - \$40, 14.0 - \$75, and 28.0 - \$150" (State's Exh 11). Under the heading of "Edibles" was documented "\$25 each," under the heading of "Dabs" it stated "1.0-\$25," under "Quick Zip" it indicated "\$50," under "Carts" it stated "1.0 - \$25," under "Pre-Rolls" was documented "5pk \$20, 1 for \$5," and under "Disposables" it stated "1.0 \$30 and 2.0 \$45" (State's Exh 11). Director Haughney also observed cannabis flower on the display counter in the back of the shop (State's Exhs 7 and 8). The aforementioned cannabis products seized were inventoried on the DTF voucher which Director Haughney testified he verified the cannabis products before they were taken out of the shop and correlated them to those documented in the voucher (State's Exh 3). Director Haughney also testified to observing a cash register and an ATM at the shop (State's Exh 1).

At the conclusion of the regulatory inspection, Bartholomew Miller Jr. signed the NOV which indicated the cannabis products seized by OCM and Director Haughney affixed the NOV and a Warning Sticker (hereinafter "WS") to the store front (State's Exh 12). The WS advised the public that illicit cannabis had been seized from that location and ordered the business to stop illegal activity.

BMillzz employee Adam Allen testified that he had worked at the Conklin BMillzz shop for just over one year, primarily in the role of security, specifically to ensure that no one under 21 years of age entered the shop. He explained that the reason for that restriction was because when legally gifting cannabis, according to New York law, that age group was specifically excluded from the gifting practice. Mr. Allen testified that BMillzz was legally gifting cannabis until the time of the June 21, 2023 inspection at which time he then believed that such practice may have become illegal however "they could not give a definite that day if we should stop." He testified that there was nothing sent to the store directing them to stop gifting. According to Mr. Allen, he worked at the shop five days per week however the shop was open all seven days of the week. Mr. Allen testified that he was initially the only employee present at the time of the regulatory inspection however his girlfriend Emily, who was not an employee of BMillzz, was present but left the shop shortly after it began. He testified that when the OCM/DTF Investigators arrived, they identified themselves but did not display any badges. He testified that he was not detained and could walk out but did not feel that he could leave until the owner, Bartholomew Miller Jr., arrived on the scene. According to Mr. Allen, there were approximately 14 people in the shop to conduct the inspection, and he believes that they were all were armed, with possibly the exception of one person, and also carried handcuffs. He testified that the Investigators seized 15-20 immature plants located at the shop which Mr. Allen stated were handed out for free for entertainment purposes to "get people in New York to start growing their own medicine." Mr. Allen also provided advice to the recipients of these plants as to how to care for them. Mr. Allen confirmed the cannabis products displayed in the store at the time of the regulatory inspection and indicated that they were seized as well as the plants which were housed in a back room accessed through an unlocked door (State's Exh 6). Mr. Allen testified that his girlfriend Emily, contacted Bartholomew Miller Jr. by phone immediately when the inspection began because she had Mr. Miller's phone number which Mr.

Allen did not have. Mr. Allen left when Bartholomew Miller arrived at the shop approximately two and one half to three hours after the commencement of the regulatory inspection.

Paul Anderson testified on behalf of the Respondent stating that he was present at the BMillzz Conklin at the time of the regulatory inspection on June 21, 2023. Mr. Anderson testified that he was not an employee of BMillzz but was there on that day “just hanging out” with Adam Allen and Mr. Allen’s girlfriend Emily. Mr. Anderson identified himself as a friend of Bartholomew Miller Jr. and testified that he often “hangs out” at BMillzz with Mr. Allen and Emily. He testified that he was in the Conklin shop at the time the regulatory inspection commenced. Mr. Anderson testified that he did not hear anyone refuse the Investigators’ entry into the shop. According to Mr. Anderson, approximately 15 Investigators were present with each one carrying a weapon. Mr. Anderson testified that upon commencement of the inspection, he did not feel like he could leave because the Investigators were standing in front of the door. Mr. Anderson testified that he did not talk to the Investigators because he has a hearing impairment therefore let the store employee talk to them. He testified that the Investigators seized the cannabis product, documented the product seized, bagged it, and removed it from the premises. He also testified that they seized the plants as well. Mr. Anderson stated that he was on the phone with Mr. Miller therefore could not leave. One of the Investigators asked Mr. Anderson to ask Mr. Allen and Emily to leave the location because he believed that they were going to cause problems. He testified that Mr. Allen and Emily left approximately 20 minutes into the regulatory inspection and Mr. Anderson continued to be on the phone with Mr. Miller. When presented with the forms from the Investigators, Mr. Anderson testified that he refused to sign them because he was not an employee. According to Mr. Anderson, he was at the shop alone between an hour and an hour twenty minutes before Mr. Miller arrived.

Bartholomew Miller Jr. appeared on behalf of the Respondent and testified that he owned the Conklin BMillzz shop since April 7, 2021. Mr. Miller testified that he was not present at the shop at the time of the June 21, 2023 regulatory inspection nor did he arrive at any time during the inspection as he was in South Carolina. He testified that he became aware of the inspection when he received a call from a former employee who he identified as Emily Smith. According to Mr. Miller, upon receiving the call from Ms. Smith, he contacted his friend Paul Anderson to go to the shop and be present while the inspection was occurring. Mr. Miller testified that Mr. Anderson arrived at the shop approximately five minutes after the Investigators arrived and they remained on the phone during the time of the inspection with Mr. Anderson providing information as to what was occurring. Mr. Miller stated that the officers did not identify themselves as police officers however according to his employees, the clothing that they wore indicated that they were in fact police officers. Mr. Miller testified that he spoke to one of the police officers by phone and made it clear that he refused the inspection and that they had no rights, no warrant, that they were not legally allowed in his shop, and that he was not physically able to be present “in that moment” however was told that this was not a topic that they could debate and that the Investigators’ actions were within their rights and regulations. Mr. Miller testified that he contacted Mr. Anderson to go to the shop because they had been friends for several years and he trusted him despite the shop having a designated manager. Mr. Miller further testified that he instructed Mr. Anderson to direct Ms. Smith to leave the premises because she was being rude to the police officers. Mr. Miller

testified that he never received a Cease and Desist Letter for the Conklin shop however did receive a Cease and Desist Letter in reference to his Waverly store in February of 2022. Mr. Miller testified that receipt of that letter was prior to “the new laws they came out with” and it was his understanding that “gifting marijuana was one hundred percent legal.” Mr. Miller testified that he was aware of the NOV and WS affixed to the storefront (State’s Exh 12). He indicated that one of the documents was blank and that the WS stated illicit cannabis was found. He testified that there was no illicit cannabis found at the time of the regulatory inspection and believed that this issue would be determined at the time of the hearing. He testified that he believed that until such time of a finding of illicit cannabis was proven at a hearing, he could continue operating “as normal.” According to Mr. Miller, the cannabis products seized were not “products” but rather were “gifts” which were neither sold nor advertised so therefore could not be considered products. In support of this position, Mr. Miller presented the analogy that the toy included with the purchase of a McDonald’s Happy Meal is a gift, not a product. He testified that no cannabis products were seized during the inspection however they stole \$20,000 worth of his gifts. Mr. Miller testified that despite the language on the WS, the legality of the business had not yet been determined at a hearing therefore he did not stop the gifting operation. Mr. Miller testified that his store was still operating and that if someone went there today to buy a sticker, they could be gifted with a cannabis product provided that they had a valid driver’s license because it is his opinion that the store was operating within all legal guidelines.

CONCLUSIONS OF LAW

Cannabis Law Article 1 § 3 (46) defines a “retail sale” as “to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell, made by any licensed person, whether principal, proprietor, agent, or employee, of any cannabis, cannabis product, cannabinoid hemp or hemp extract product to a cannabis consumer for any purpose other than resale.”

Cannabis Law Article 1 § 3 (46-a) defines an “indirect retail sale” as “to give any cannabis, cannabis product, cannabinoid hemp, hemp extract product, or any product marketed or labeled as such by any person engaging in a commercial business venture or otherwise providing or offering goods or services to the general public for remuneration for such goods and/or services, where any such cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such, accompanies (a) the sale of any tangible or intangible property; or (b) the provision of any service, including but not limited to entry to a venue or event, or a benefit of a membership to a club, association, or other organization.”

Cannabis Law Article 6 §125(1) provides that: “No person shall cultivate, process, distribute for sale or sell at wholesale or retail or deliver to consumers any cannabis, cannabis product, medical cannabis or cannabinoid hemp or hemp extract product within the state without obtaining the appropriate registration, license, or permit therefore required by this chapter unless otherwise authorized by law.”

Cannabis Law Article 6 §125(1-a) provides that: “No person shall engage in an indirect retail sale irrespective of whether such person has obtained a registration, license, or permit issued under this chapter.”

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.”

Cannabis Law Article 6 §132(1)(a) provides that any person who sells cannabis, or cannabis products, or any product marketed or labeled as such, without having an appropriate registration, license or permit therefor, may be subject to a civil penalty of not more than ten thousand dollars for each day during which such violation continues.

Cannabis Law Article 6 §132(1)(c) (1-a) provides that “Any person found to have engaged in indirect retail sale in violation of subdivision one-a of section one hundred twenty-five of this chapter, shall be subject to a civil penalty in an amount equaling the lesser of three times the revenue for such indirect retail sales or up to two thousand five hundred dollars for each such sale, provided, however, that where such conduct also constitutes a violation of subdivision one of this section, such person may only be subject to the civil penalties under one such subdivision, and provided, further, that where such person has been ordered to cease such conduct pursuant to subdivision one of section one hundred thirty-eight-a of this article, such person may be assessed a civil penalty of up to five thousand dollars for each day during which such violation continues in addition to any civil penalties set forth above.”

Regulations at § 133.16 (b)(1) provide that “in proceedings which involve common questions of law, fact, or parties, the administrative law judge, upon their own initiative or upon motion of any party, may order a consolidation of actions or a joint hearing of any or all issues to avoid unnecessary delay and cost.”

Regulations at § 133.23 (a) “provide that The Office may issue a notice of violation and order to cease unlicensed activity to any person, as defined in section 40-a of the Cannabis Law, who is 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, or engaging in an indirect retail sale, without obtaining the appropriate registration, license, or permit therefor.”

Regulations at § 133.23 (b) provide that “In the event that the Office issues a notice of violation and order to cease unlicensed activity to a person:

- (1) that person must cease all cannabis or cannabinoid hemp related activity as described in subdivision (a) of this section;
- (2) the Office may 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 (a) of this section.”

SUMMARY

The June 21, 2023 regulatory inspection of the BMillzz shop located at 1110 Conklin Road, Conklin, New York occurred during hours that the store was open to the public. The inspection was conducted by Investigators from the Enforcement Unit of both OCM and DTF. The Respondent's witness Paul Anderson testified that he did not hear anyone in the shop refuse the Investigators' entrance into the premises.

Director Haughney credibly testified that prior to the regulatory inspection, he had personally conducted a search of the internal OCM system and determined that the BMillzz Conklin shop had not been issued any licenses by OCM. This was further corroborated by an affidavit issued by the OCM Deputy Director for Licensing and Operations which was introduced as evidence which also indicated that no licenses from OCM had been issued to the Respondent. Therefore, based upon both the testimony and evidence, I find that the Respondent was not in possession of a license issued by OCM which authorized the Respondent to offer cannabis products for sale to the public.

The testimony of Director Haughney as well as the photographic evidence admitted at the hearing, clearly establishes that upon entering the premises, there were display cases filled with cannabis products as well as cannabis flower and live cannabis plants located in a back area of the shop (State's Exhs 5-9). The testimony of BMillzz owner Mr. Miller confirmed that cannabis products were located at the shop however refers to them as "gifts" which are provided for free upon the purchase of another product in the store such as a sticker or a patch. This practice is referred to as an indirect sale which is defined by Cannabis Law Article 1 § 3 (46-a) and prohibited by Cannabis Law Article 6 §125 (1-a). I find it significant that Mr. Miller testified that no cannabis products were seized during the inspection however testified that "they stole \$20,000 worth" of his gifts. His attempt to distinguish between cannabis products and gifts is self-serving as regardless of what he refers to them as, he is offering cannabis products for sale without a license issued by OCM. While he admits to gifting cannabis products, an analysis is required to determine if his operation constitutes direct or indirect retail sales.

In making my decision, I also considered the credibility of the Respondent's witnesses and found that the testimony of all three were inconsistent and lacking credibility. Director Haughney credibly testified that he served the NOV upon Mr. Miller however Mr. Miller testified that he was not present at the shop at any time during the inspection as he was in South Carolina however Mr. Miller's signature is on the NOV. According to Mr. Miller, he contacted Paul Anderson to go to the shop and be present during the inspection and that Mr. Anderson arrived within five minutes of receiving Mr. Miller's call. Mr. Allen testified that he was present at the shop during the regulatory inspection and left when Bartholomew Miller arrived at the location approximately two and one half to three hours after the commencement of the regulatory inspection. Lastly, Mr. Anderson testified that he was already at the shop "hanging out" with Mr. Allen and Mr. Allen's girlfriend Emily when the Investigators arrived. He testified that Mr. Allen and Emily left approximately 20 minutes after the commencement of the regulatory inspection and that he was at the shop alone between an hour and an hour twenty minutes before Mr. Miller arrived. Both Mr. Allen and Mr. Anderson testified that they waited at the shop until Mr. Miller arrived however Mr.

Miller testified he was not present at the Conklin BMillzz at any time on June 21, 2023 despite Director Haughney's testimony that the NOV was served upon Mr. Miller and the signed NOV.

Director Haughney testified that he believed that the Respondent was conducting indirect sales. His testimony to that effect was largely based upon a chalkboard sign located on the wall at the Respondent's shop, photographic evidence of which was introduced at the hearing (State's Exh 10). The sign is broken into categories entitled "F-Series, D-Series, C-Series and E-Series" all of which have specific cannabis products listed under each category. According to Director Haughney, this is indicative of an indirect sales scheme with the different "Series" reflecting a product of a specific price such as a sticker or patch, which must be purchased so as to obtain the cannabis product listed below the designated "Series" category. As a result of his training and experience, I accept Director Haughney's conclusion that the Respondent is engaging in the practice of indirect sales. I also note that Mr. Miller's description of cannabis provided with the purchase of another item such as a sticker or a patch is consistent with the definition of an indirect sale. Therefore, I find that the Respondent was engaging in the practice of indirect sales in violation of Cannabis Law Article 6 §138(a).

I also find that the Respondent was engaging in the retail sale of illicit cannabis products. Such determination is based upon the writing on the glass case, in public view, which contained large amounts of varying cannabis products and provided prices for the products contained therein (State's Exh 9). I note that the prices are straightforward and do not indicate that purchase of any other item is a condition precedent to purchasing the cannabis products offered for sale (State's Exh 9). In further support of a finding that the Respondent engaged in the retail sales of cannabis, I note the sign on the display counter which is entitled "Patch Prices." The sign consisted of seven forms of cannabis products and under each category was listed specific product(s) with a price next to them. Therefore, irrespective of the title of the sign, the cannabis product(s) were listed under each heading with a price associated with it and no indication that any other product was required to purchase so as to purchase the cannabis products listed. Therefore, based upon both the prices written on the display case as well as the aforementioned sign, I find that the Respondent was also engaging in retail sale of cannabis products in violation of Cannabis Law Article 6 § 125(1), §138(a), and § 132(1) (a) by selling cannabis or products marketed and labeled as cannabis, on June 21, 2023. Cannabis Law Article 6 §132(1)(c) (1-a) provides that in the event that a Respondent is engaging in both indirect retail sales as well as retail sales, the Respondent must only be subject to the civil penalties under one such subdivision.

I find it notable that the Respondent acknowledged the NOV and WS were affixed to the storefront of the BMillzz Conklin at the conclusion of the regulatory inspection. I reject Mr. Miller's assertion that the NOV is blank given Director Haughney's explanation that it is a carbon copy of the original one signed by Mr. Miller and the writing, although faint, is clearly visible on the NOV affixed to the storefront. Furthermore, Mr. Miller testified that at the time of the hearing, he was still conducting business at the shop, regardless of the language on the WS which ordered the business to stop illegal activity. I reject his argument that he could continue operating until such time as he had his hearing as the language of the WS is not ambiguous as to the directive for the business to immediately stop selling illicit cannabis. I also reject Mr. Miller's argument that a

hearing was required to determine if the cannabis was illicit, as self-serving and lacking any merit or credibility.

Therefore, based upon the totality of the evidence which includes the amount of cannabis products on display which were assigned with a specific price, as well as the sign indicating prices for straightforward purchase of cannabis products, I find that the Respondent was engaged in retail sale of cannabis products in violation of Cannabis Law Article 6 § 125(1), §138(a), and § 132(1) (a) for selling cannabis without a license issued by OCM on June 21, 2023.

WHEREFORE, RESPONDENT IS HEREBY ORDERED:

To pay a **\$10,000** fine for the sale of illicit cannabis and cannabis products without a license on June 21, 2023, pursuant to Cannabis Law Article 6 §132(1)(a).

Complaint No. 117 2023 0718 0054

ISSUE AND PROCEDURAL HISTORY

The allegations set forth in the Notice of Violation and Order to Cease Unlicensed Activity (hereinafter “NOV”) indicate that the Respondent was offering cannabis products, as defined by Cannabis Law § 3, for sale without an appropriate registration, license, or permit issued by the Office of Cannabis Management (hereinafter “OCM”). This allegation was based upon observations made during a regulatory inspection which was conducted at 1110 Conklin Road, Conklin, New York, on July 18, 2023.

A virtual hearing was held on August 8, 2023 from the Albany Office of Cannabis Management before Administrative Law Judge Karen Lavery. Jasmine Norman, Esq. appeared on behalf of OCM and Paula Collins, Esq. appeared on behalf of the Respondent. OCM Investigative Specialist James Schlipmann (hereinafter “Inspector Schlipmann”) testified on behalf of OCM. Adam Allen, Paul Anderson, and Bartholomew Miller Jr. testified on behalf of the Respondent.

FINDINGS OF FACT

On July 18, 2023, members of the OCM Enforcement Division, including Inspector Schlipmann, as well as members of the Enforcement Unit of the New York State Department of Taxation and Finance (hereinafter “DTF”) conducted a regulatory inspection of BMillzz LLC (hereinafter “BMillzz”), located at 1110 Conklin Road, Conklin, New York (State’s Exh 1). Inspector Schlipmann testified that the regulatory inspection which occurred at the Conklin BMillzz on July 18, 2023 was for the purpose of ensuring that no cannabis was being sold since the prior regulatory inspection which occurred on June 21, 2023 as well as to ensure that the NOV and WS from the prior inspection were still affixed to the store front.

Inspector Schlipmann and the Enforcement team entered the shop through an unlocked door during hours which the shop was open to the public. Adam Allen was sitting behind the counter when they entered the store. According to Inspector Schlipmann, a female was also present, and Paul Anderson arrived after the regulatory inspection had commenced. Inspector Schlipmann credibly testified that he introduced himself to Mr. Allen, identified himself as an OCM Inspector, and stated that the purpose of their visit was to search for cannabis products. Mr. Allen advised Inspector Schlipmann that there were no cannabis products on the premises. The Enforcement teams began searching the location and Inspector Schlipmann opened three unlocked drawers in the proximity of where Mr. Allen was sitting and observed cannabis products located in each of the three drawers (State’s Exhs 4-6, 9, 11-12). The cannabis products observed were pre-packaged bags of cannabis flower labeled with the names of the particular strain of flower, pre-packaged and labeled cannabis concentrates and cannabis edibles (State’s Exhs 4-6, 9, 11-12). Located within the shop was a plexi-glass partition which indicated the shop’s “No Return Policy” “unless

we give out the wrong flower stain, no one can switch” (State’s Exh 10). Inspector Schlipmann testified that he did not observe a license, permit, or registration issued by OCM, did not believe that the shop was licensed by OCM, and did not observe a QR code which is on display in licensed cannabis retail shops. Inspector Schlipmann recorded his observations on the NOV and served it on Mr. Allen who identified him as an employee of the shop but refused to sign the document (State’s Exh 1). The DTF Investigators inventoried the cannabis products which were seized from the premises and recorded that information on an eight-page voucher which Inspector Schlipmann testified that he witnessed both the process and the information contained therein (State’s Exh 2).

At the time of the inspection, Inspector Schlipmann observed four index cards on the counter, three of which appeared to be customer orders for cannabis products (State’s Exh 15). One card had a name on it and above the name was written “flower – 3.5 & Oz, carts” and “edibles,” a second card with a name and phone number with a notation “looking for 50 pre-rolls for a wedding Oct 28th,” and third card with a name and a phone number under which was written “Looking for a pound” (State’s Exh 15).

At the conclusion of the inspection, Inspector Schlipmann or the other OCM Investigator placed an NOV and WS on the front of the shop (State’s Exh 8). The photographic evidence presented at the hearing depicted the NOV and WS from the June 21, 2023 inspection on the left and the newly affixed NOV and WS from the July 18, 2023 inspection affixed to the right side of the store front (State’s Exh 8). Inspector Schlipmann noted that the NOV from the June 21, 2023 inspection appeared to be faded from the sun.

Adam Allen testified on behalf of the Respondent. He has been an employee of the Conklin BMillzz for just over one year and his duties include both security and retail work. He was working in the shop at the time of the July 18, 2023 regulatory inspection and was asked to stay because no other employees were present in the store. Mr. Allen testified that he told Inspector Schlipmann that there was no cannabis products in the store because none were on display however testified that there was in fact cannabis products in the store at the time of the inspection. Mr. Allen testified that he was present throughout the entire inspection. He further testified that Paul Anderson arrived as the Investigators began seizing the evidence because he was a “better link” to Mr. Miller.

Paul Anderson testified that he arrived approximately 30 minutes after the regulatory investigation began and was on the phone with Mr. Miller and Mr. Miller’s attorney Paula Collins before he arrived at the Conklin BMillzz. He testified that Mr. Allen had contacted him and he had contacted Mr. Miller who asked him to go to the shop. Mr. Anderson testified that he stayed until the end of the regulatory inspection.

BMillzz Conklin owner Bartholomew Miller Jr. testified on behalf of the Respondent. He testified that he was made aware of the inspection when Mr. Anderson called him and they had a three-way

call between he, Mr. Anderson, and Attorney Paula Collins. According to Mr. Miller, Mr. Anderson was approximately 15 minutes away and when Mr. Anderson arrived at the shop he put his phone on speaker and both Mr. Miller and Attorney Collins refused the inspection however the Investigators continued. Mr. Miller testified it was his belief that the NOV did not order him to stop his gifting practice but rather provided a time and date for a hearing. When questioned as to the language on the NOV directing him to cease unlicensed activity, Mr. Miller testified that he did not conduct unlicensed activity but rather conducts a legal business, therefore is not required to be licensed because he does not classify as a dispensary. According to Mr. Miller, he identified his business as a retail clothing store which gives away cannabis products as a gift for promotional reasons. Mr. Miller testified that he was ultimately present at the July 18, 2023 regulatory inspection however contacted Mr. Anderson because he was closer to the shop. He testified that the Investigators ripped up his plants at the time of the July 18, 2023 regulatory inspection. He testified that he asked why he could not sign the NOV and was told by the Investigators that he refused which he contends he did not do. Mr. Miller was not sure if the cannabis products were seized by the time that he arrived because he was busy telling the Investigators that they should not be there. The Respondent's attorney presented four DTF voucher documents which were left at the shop at the time of the July 18, 2023 regulatory inspection which she contends are different than the ones which were entered into evidence at the hearing (Respondent's Exhs A-D and State's Exh 2 respectively). Both Mr. Miller and Attorney Collins indicated that the NOV which was issued June 21, 2023 and affixed to the store front was blank pursuant to the picture Mr. Miller took on July 20, 2023 (Respondent's Exh E). Attorney Collins stated that Mr. Miller was expecting his day in court prior to having a second inspection. She also indicated that the warrantless inspection was a violation of the Respondent's constitutional rights.

CONCLUSIONS OF LAW

Cannabis Law Article 1 § 3 (46) defines a "retail sale" as "to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell, made by any licensed person, whether principal, proprietor, agent, or employee, of any cannabis, cannabis product, cannabinoid hemp or hemp extract product to a cannabis consumer for any purpose other than resale."

Cannabis Law Article 1 § 3 (46-a) defines an "indirect retail sale" as "to give any cannabis, cannabis product, cannabinoid hemp, hemp extract product, or any product marketed or labeled as such by any person engaging in a commercial business venture or otherwise providing or offering goods or services to the general public for remuneration for such goods and/or services, where any such cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such, accompanies (a) the sale of any tangible or intangible property; or (b) the provision of any service, including but not limited to entry to a venue or event, or a benefit of a membership to a club, association, or other organization."

Cannabis Law Article 6 §125(1) provides that: “No person shall cultivate, process, distribute for sale or sell at wholesale or retail or deliver to consumers any cannabis, cannabis product, medical cannabis or cannabinoid hemp or hemp extract product within the state without obtaining the appropriate registration, license, or permit therefore required by this chapter unless otherwise authorized by 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.”

Cannabis Law Article 6 §132(1)(a) provides that any person who sells cannabis, or cannabis products, or any product marketed or labeled as such, without having an appropriate registration, license or permit therefor, may be subject to a civil penalty of not more than ten thousand dollars for each day during which such violation continues.

Cannabis Law Article 6 §132(1)(a) provides that “where such person has been ordered to cease such conduct pursuant to subdivision one of section one hundred thirty-eight-a of this chapter, such person may be assessed a civil penalty of no more than twenty thousand dollars per day for each day during which such violation continues after receiving such order in addition to the additional civil penalties set forth above...”

Regulations at § 133.16 (b) (1) provide that “in proceedings which involve common questions of law, fact, or parties, the administrative law judge, upon their own initiative or upon motion of any party, may order a consolidation of actions or a joint hearing of any or all issues to avoid unnecessary delay and cost.”

Regulations at § 133.23 (a)” provide that The Office may issue a notice of violation and order to cease unlicensed activity to any person, as defined in section 40-a of the Cannabis Law, who is 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, or engaging in an indirect retail sale, without obtaining the appropriate registration, license, or permit therefor.”

Regulations at § 133.23 (b) provide that “In the event that the Office issues a notice of violation and order to cease unlicensed activity to a person:

- (1) that person must cease all cannabis or cannabinoid hemp related activity as described in subdivision (a) of this section;

(2) the Office may 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 (a) of this section.”

SUMMARY

Inspector Schlipmann testified that BMillzz did not possess a license issued by OCM to sell cannabis at the time of the regulatory inspection which occurred on July 18, 2023. He testified that during the inspection, he did not see a license authorizing the Respondent to sell cannabis, nor did he observe a QR code which is visible in licensed cannabis retail shops. Therefore, based upon the testimony of Inspector Schlipmann, and the prior testimony of Director Haughney regarding the June 21, 2023 inspection, I find that the Respondent was not in possession of a registration, license, or permit issued by OCM on July 18, 2023, which authorized the Respondent to offer cannabis products for sale to the public at the BMillzz shop located in Conklin, New York.

Inspector Schlipmann credibly testified that he and the other member of the OCM and DTF Enforcement Unit entered the shop through an unlocked door during the hours which the shop was open to the public. He testified that upon entering the premises, he saw Mr. Adams behind the counter and identified himself and stated that the Enforcement Unit was there to conduct an inspection to ensure that BMillzz was not selling cannabis products after having been previously the subject of a regulatory inspection on June 21, 2023. Mr. Adams advised Inspector Schlipmann that there were no cannabis products in the store however Inspector Schlipmann opened three drawers in the proximity of where Mr. Adams was sitting and each of the three drawers was filled with cannabis products (State’s Exhs 4-6, 9, 11-12). The cannabis products observed were pre-packaged bags of cannabis flower labeled with the names of the particular strain of flower, pre-packaged and labeled cannabis concentrates and cannabis edibles. I find it significant that when questioned why he stated that there were no cannabis products at the premises, Mr. Adams testified that he did so because no cannabis products were on display. The finding regarding the regulatory inspection which occurred on June 21, 2023 established that BMillzz was engaging in both indirect and direct retail sales. Cannabis Law Article 6 §132(1)(c) (1-a) provides that in the event that a Respondent is engaging in both indirect retail sales as well as retail sales, the Respondent must only be subject to the civil penalties under one such subdivision. The decision held that at the time of the June 21, 2023 regulatory inspection, the Respondent was engaging in retail sales.

The sign on the plexi-glass in the store stating a “No Return Policy unless we give out the wrong flower/strain no one can switch” (State’s Exh 10) clearly indicates that cannabis is being sold at the location. Despite Mr. Miller’s testimony of his practice of gifting cannabis, no evidence was presented to establish that any item was required to purchase so as to receive the cannabis product. In further support of a retail sale operation are the index cards, photographic evidence of which was entered into the record at the hearing (State’s Exh 15). Three index cards appeared to be customer orders for products. The cards provided names, two of which provided phone numbers, and the orders consisted of requests to order “carts,” edibles, flower, and also a request for 50 pre-

rolls for an October 28th wedding (State's Exh 15). Furthermore, Mr. Miller admitted to giving away cannabis as a gift for promotional reasons. Therefore, Mr. Miller admitted that cannabis was still in his store and that his practice of what he refers to as "gifting" was still occurring as he testified that he did not need a license. The testimony and evidence establish that the Respondent was engaging in retail sales between the time of the June 21, 2023 and July 18, 2023 regulatory inspections. I reject the assertion that the re-inspection was unlawful as Mr. Miller had not yet "had his day in court." In so finding, I note the title of the NOV which Mr. Miller acknowledges receipt of, specifically that of a "Notice of Violation and Order to Cease Unlicensed Activity" which was affixed to his storefront, in addition to the WS, at the time of the June 21, 2023 regulatory inspection (State's Exh 1). Therefore I find that he was put on notice on June 21, 2023 that he was directed to cease unlicensed activity and had no reasonable expectation that a hearing would occur prior to a re-inspection. I further reject Mr. Miller's contention that the NOV from the June 21, 2023 was blank as writing was visible on the document find credible Inspector Schlipmann's testimony that the NOV appeared to be faded from the sun (Respondent's Exhibit E). Upon close review of the four pages of DTF vouchers which Mr. Miller testified are different than the ones entered into the record by OCM, I find that in part to be true (Respondent's Exhs A-D, State's Exh 2). Respondent's Exh A is the same as page two of the DTF voucher submitted by OCM and Respondent's Exh B is the same as page three of the DTF voucher submitted by OCM, the only difference being that the weight calculations are not present on the documents submitted on behalf of the Respondent. It is significant that the description and quantity of products seized at the time of the July 18, 2023 regulatory inspection are consistent between both sets of documents. Respondent's Exhs C and D are identical to each other however pertain to the BMillzz Endicott shop, not the BMillzz Conklin shop. Therefore, I find that the difference between the two documents is not substantially significant.

The Respondent's attorney also raises allegations of constitutional violations which occurred during the course of the regulatory inspections. Such assertion is rejected based upon the long-established precedent that Administrative Law Judges lack the jurisdiction to determine the constitutionality of statutes. See *Wang v. Department of State Division of Licensing Services*, 1 DOS APP. 01, 23 DOS 00, (2000); as well as *Cherry v. Brumbaugh*, 7 NYS 2d 956 (2nd Dept., 1938). Therefore, there is no authority available in this administrative proceeding to contemplate the constitutionality of the Cannabis Law which governs regulatory inspections (Cannabis Law Article 2, §10 (8), §11 (2)).

I also reject the assertion of both Mr. Miller and Attorney Collins that the inspection should have been stopped as they contend that they refused the inspection. I note that the testimony of all parties is that the regulatory inspection was already in progress by the time any such assertion might have been made as Mr. Anderson did not arrive at the shop until after the inspection had commenced.

Therefore, based upon the totality of testimony and evidence, I find that the Respondent continued to engage in the retail sale of cannabis without a registration, license or permit issued by OCM for the period between June 22, 2023 up to and including July 18, 2023, after being ordered to cease such activity on June 21, 2023, in violation of Cannabis Law Article 6 § 125(1), and §138(a).

WHEREFORE, RESPONDENT IS HEREBY ORDERED:

To pay a **\$540,000** fine in accordance with Cannabis Law Article 6 §132(1)(a), for the continued sale of illicit cannabis and cannabis products without a license for the 27 days beginning June 22, 2023 through July 18, 2023.

Karen Lavery
Administrative Law Judge

DATED: December 4, 2023

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 133.23(g)(5).

This decision was sent via email on December 4, 2023 to the following:

Nickolas Perry
Sheila Wagner
Jasmine Norman, Esq.
Paula Collins, Esq