

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.

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DECISION

Complaint No. 117 2023 0621 0026

Complaint No. 112 2023 0718 0055

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. 117 2023 0621 0026 and 112 2023 0718 0055 were heard together for judicial economy as they both involve common questions of law, fact, and common parties.

Complaint No. 117 2023 0621 0026

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 122 Washington Ave, Endicott, NY, on June 21, 2023.

A virtual hearing was held on August 4, 2023 from the Albany Office of Cannabis Management before Administrative Law Judge Karen Lavery. Jasmine Norman, Esq. appeared on behalf of the OCM and Paula Collins, Esq. appeared on behalf of the Respondent. OCM Investigative Specialist

James Schlipmann (hereinafter “Inspector Schlipmann”) testified on behalf of OCM. Eboni Bryant and Bartholomew Miller Jr. testified on behalf of the Respondent.

FINDINGS OF FACT

On June 21, 2023, two 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 122 Washington Avenue, Endicott, New York (State’s Exh 1). Inspector Schlipmann testified that a regulatory inspection in this capacity entails going into a retail establishment and conducting an inspection to ensure that the business is in compliance with the Cannabis Law. Inspector Schlipmann testified that it is customary for the DTF Investigators to accompany the OCM Enforcement Division and explained that their role in the regulatory inspection is to inventory any cannabis products found, seize the cannabis products, and ultimately weigh those products. At the time of the inspection, OCM and DTF Investigators, were also accompanied by one or two members of the Endicott Police Department. Inspector Schlipmann testified that regulatory inspections are typically conducted as a result of identification of a social media presence of a location as well as OCM’s use of a complaint tracker which logs complaints from citizens regarding a particular establishment. According to the testimony of Inspector Schlipmann, he was familiar with BMillzz based upon prior interactions with other BMillzz sites at which Cease and Desist Letters had been issued by OCM, therefore was aware that the name “BMillzz” was associated with a chain of retail dispensaries. Inspector Schlipmann testified that prior to conducting a regulatory inspection, the OCM Enforcement Division conducts a diligent search of the records contained in their licensing database and that no such records were found which indicated that the Respondent was in possession of a registration, license or permit issued by OCM to sell or store cannabis. An affidavit signed by OCM’s Deputy Director for Licensing and Operations was received into evidence which established that BMillzz did not possess a registration, license, or permit issued by OCM to sell or store cannabis or any other such product for which a license by OCM was required (State’s Exh 2). Inspector Schlipmann further testified that licensed cannabis shops in NYS have a “QR code” posted on the outside of the building which customers can scan to verify that they are in fact a licensed shop. He testified that at no time during the regulatory inspection of BMillzz was any such QR code observed.

The regulatory inspection occurred during the hours that BMillzz was open to the public. At the commencement of the regulatory inspection, the Endicott police officer(s) stood outside the front door for the sole purpose of providing security. They did not otherwise participate in the inspection. There were numerous depictions of cannabis leaves on the wall in the form of murals, stickers and posters (State’s Exhs 7-8). While BMillzz is in possession of a Certificate of Authority from DTF for the sale of other products, Inspector Schlipmann testified that he saw very little clothing in the store, stating that he observed some socks, sneakers, and a minimal amount of t-shirts (State’s Exh 20). Furthermore, he did not see any posters or images depicting sneakers or

clothing, nor did he observe a price list for those items. He testified that he observed an ATM machine at the site as well as a cashbox (State's Exhs 7, 13). Inspector Schlipmann credibly testified that upon entering the store, the display counter was visible to the public. He also testified that the display case contained one of several different types of cannabis edibles with more of each located in boxes behind the counter (State's Exhs 21-26). Also located behind the counter in a back room, he observed three cannabis plants positioned under a light, and a box which contained packages of cannabis flower labeled with the common strain of cannabis identifying each package (State's Exhs 9-10). He also identified a bag of cannabis pre-rolls, additional packages of cannabis flower labeled with the strain, and cannabis vape cartridges (State's Exhs 28-31). Two brands of cannabis infused chocolate bars were located in refrigerator in the back of the store as well as numerous containers of cannabis concentrate (State's Exhs 11-15). Inspector Schlipmann credibly testified that he observed a sign, visible on the counter, entitled "Daily Deals" (State's Exh 16). The sign listed all seven days of the week and each day reflected a \$5.00 reduction of the price of a specific cannabis product including cannabis flower, cannabis concentrate, and cannabis edibles (State's Exh 16). The sign describing the "Daily Deals" did not include any language or reference to a requirement for a customer to purchase a patch or any other item which needed to be purchased so as to obtain the discounted cannabis product described (State's Exh 16). Inspector Schlipmann also described a page entitled "Daily Sales Log Book" which he testified was located in the proximity of the counter area. The document is comprised of columns which listed specific cannabis products and the price corresponding to each cannabis product (State's Exh 27). Inspector Schlipmann also testified that he observed a page/sign entitled "Edibles" which described five categories of cannabis edibles of various prices and strength of cannabis, each listing some of the cannabis edibles observed during the regulatory inspection (State's Exh 18). Similar to the list of "Daily Deals," the list of "Edibles" did not indicate that any additional purchase was required or included in the price stated, so as to allow a customer to purchase the cannabis product. Inspector Schlipmann also observed and produced photographic evidence of a document entitled "Prices" (State's Exh 17). That document listed prices for "3.5, 7.0, 14.0, and 28.0" which he credibly testified was common nomenclature in the cannabis industry to denote quantity of cannabis flower as weighed in grams (State's Exh 17). Also contained on that document were prices for various forms of cannabis concentrates, pre-rolls, as well as edibles, specifically including the brand of cannabis infused chocolate bar which had been found in the refrigerator at the location (State's Exh 11-12, 17). Once again, the document entitled "Prices" did not indicate that the price required that a patch or any other item must also be purchased so as to purchase the cannabis product listed.

Inspector Schlipmann located a notebook containing what appeared to be a sales record for June 20, 2023, the day before the regulatory inspection occurred (State's Exh 32). The record provides the time of each sale and what specific cannabis items were purchased (State's Exh 32). These include carts, edibles, concentrate and what has previously been described as designations of 3.5, 7.0, as well as gummies and jet packs (State's Exh 32). Inspector Schlipmann also observed and provided photographic evidence of what appears to be an inventory list of the cannabis products

contained in the store (State's Exh 33). There are two locations designated on the inventory list, one being "Safe" and one being "Floor" (State's Exh 33). The list includes a breakdown of each category of cannabis products such as edibles, concentrates, and flower, and provides a further breakdown of each specific brand of product under each heading, including the quantity (State's Exh 33). The items listed under "Floor" consist of almost half the page of the document (State's Exh 33).

Investigators from both OCM and DTF completed voucher forms which inventoried the products seized from the facility at the time of the regulatory inspection (State's Exh 3). Collectively, the documents total seven pages which list all the cannabis products seized from that location on June 21, 2023 (State's Exh 3). While OCM had just one voucher, DTF had six pages of vouchers (State's Exh 3). According to Inspector Schlipmann, it is a customary practice for DTF to seize cannabis products during the regulatory inspections and he testified that he witnessed the inventory and seizure of the products documented on the DTF vouchers.

The only employee present at the time of the regulatory inspection was the store manager, Eboni Bryant. According to Ms. Bryant, her duties included sales, cleaning, and making up schedules. She testified that the store sold sneakers, bongs, pipes, rolling trays, and iron on patches. Ms. Bryant testified that BMillzz sells patches which includes a gift of a cannabis product of the buyer's choice stating that the gift was for "promotional reasons." She testified that the store sold t-shirts which were \$25 each and stated that no cannabis products were gifted with the sale of t-shirts. According to Ms. Bryant, cannabis products were no longer on display at the location since BMillzz received a Cease and Desist Letter from the City of Endicott a few months prior. Ms. Bryant testified that at the commencement of the regulatory inspection, a "couple" members of the enforcement team identified themselves to her. Ms. Bryant testified that during the time of the regulatory inspection, she did not feel that she was able to leave, citing the presence of the officer(s) outside the shop's door as the reason for her feeling unable to do so. She also testified that at no time was she advised that she was under arrest or that any detainment devices were used on her.

At the conclusion of the regulatory inspection, Ms. Bryant signed the NOV which indicated the cannabis products seized by OCM and Inspector Schlipmann affixed the NOV and a Warning Sticker (hereinafter "WS") to the store front (State's Exh 1). The WS advised the public that illicit cannabis had been seized from that location and ordered the business to stop illegal activity.

The owner of BMillzz, Bartholomew Miller Jr., was not present at the time of the regulatory inspection however testified at the hearing. Mr. Miller opened BMillzz April 7, 2021 which he described as a custom clothing store but also referred to his business as a "marijuana gift shop." According to Mr. Miller, he did research on the gifting of marijuana by looking at cannabis gifting business models implemented in other states. He discussed the idea with his father and uncle and testified that he and his father also inquired regarding the gifting of marijuana with the Chief of Police from the Waverly Police Department. According to Mr. Miller, the Chief of Police stated

that while he could not give legal advice, it was his understanding that what Mr. Miller was doing was legal. According to Mr. Miller, based upon his understanding of the law, research, and reliance upon his conversation with the Waverly Chief of Police, he believes that his practice of selling t-shirts and offering the buyer a cannabis product with the purchase, is legal. He testified that he was unable to keep up with the demand for t-shirts so began selling stickers which allowed the buyer to receive a cannabis product which Mr. Miller described as a “promotional item.” Mr. Miller testified to owning four stores currently which he indicated that a year after opening, he received a Cease and Desist Letter and on that same day, he was arrested, his doors were kicked in and stated that he was treated like a criminal. Mr. Miller testified that he is not engaging in indirect sales because he gives away the cannabis product as a promotional item in furtherance of his business, likening it to a toy given away by McDonald’s with the purchase of a Happy Meal. Mr. Miller testified that BMillzz had previously offered a cannabis product with the purchase of a t-shirt, then a sticker, and currently with custom patches which he designs. According to Mr. Miller, the cannabis product offered with the purchase is anything that the buyer chooses from the box which is offered to people 21 years or older.

When shown a photograph of the “Daily Deals” as described above, Mr. Miller testified that it describes the daily deals for every day of the week and stated that nothing is promoted and that the document is merely kept for employee reference. He testified that an employee must have made this document explaining that where it lists the deal for each day, the employee must have run out of room and therefore failed to add the word “gift” after the words indicating the cannabis product which constituted the deal for each particular day.

When asked regarding the “Price List” described above, Mr. Miller testified that 3.5, 7.0, 14.0, and 28.0 do not reference grams but rather references the categories of the size of the patches while also testifying that the numbers do not reflect the specific size of the patches. Mr. Miller testified that the price of \$150 for a 28.0 patch is a fair price for a custom art image which he described as approximately the size of his hand. He also said that the word “Dab” which was defined by Inspector Schlipmann as a form of a cannabis concentrate and appears on the “Price List” with \$15 next to it, represents patches. When specifically asked if Wonka Bars, one of the cannabis infused chocolate bars located in the refrigerator at BMillzz and labeled with a price of \$40 on the “Price List,” was a cannabis edible, Mr. Miller stated that he did not know and “you would have to read the packing to get a perspective on it.”

Mr. Miller stated that when he opened the first of his four operating stores in 2021, OCM was not yet created therefore he could not contact OCM regarding the legality of his business. Mr. Miller testified that at no time did he consult with an attorney when he initially started his business because he could not afford to do so. He also testified that at no time has he applied for a license issued by OCM authorizing him to sell cannabis. Mr. Miller testified that he tried to open four additional shops more recently and they were blocked by the local code enforcement which characterized them as a marijuana dispensary. Mr. Miller testified that after that occurred, he did not at any time attempt to contact OCM for zoning requirements stating that “I have no legitimate

reason to have to or be obligated to contact OCM as I am not a cannabis retailer. You don't have the right to regulate, inspect or enforce me to call you for regulations on a business that I am not a part of. I am not a marijuana dispensary." When asked by his attorney "If you were provided with the opportunity to become a licensed cannabis retail establishment, would you do so" Mr. Miller responded "absolutely."

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.

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

OCM witness Inspector Schlipmann testified that the regulatory inspection of BMillzz, located at 122 Washington Avenue, Endicott, New York, which was conducted on June 21, 2023, occurred during hours that the shop was open to the public for business. Inspector Schlipmann credibly testified that members of the OCM and DTF Enforcement Units walked into the open store, observed cannabis products on display being offered for sale and commenced with the inspection of the shop. Inspector Schlipmann testified that one or two Endicott Police Officers also were present for the purpose of providing security only and did not otherwise take part in the inspection.

Inspector Schlipmann testified that prior to the regulatory inspection, a diligent search of the OCM database was conducted and that no records were found to indicate that the Respondent was in possession of a registration, license or permit to sell or store cannabis. In further support, OCM provided documentary evidence in the form of an affidavit signed by OCM’s Deputy Director for Licensing and Operations which confirmed that BMillzz did not possess a registration, license, or permit issued by OCM authorizing the sale of cannabis. Furthermore, Respondent testified that he would be interested in becoming a licensed cannabis retail establishment if presented with the opportunity to do so. Based upon his very response, Mr. Miller admitted that Respondent is not in possession of a registration, license, or permit to possess or sell cannabis. Therefore, based upon the testimony and evidence, I find that the

Respondent was not in possession of a registration, license, or permit issued by OCM, which authorized the Respondent to offer cannabis products for sale to the public.

I assess no credibility to the testimony of Ms. Bryant indicating that she felt that she could not leave merely based upon the presence of the one or two Endicott Police Officers stationed outside the door. Inspector Schlipmann credibly testified that their role was to solely provide security and no testimony or evidence has been provided to establish that Ms. Bryant was restrained, physically prevented from leaving, or even directed not to leave the location.

As to the presence of cannabis products in the Respondent's shop, this has been confirmed not only by the testimony and the overwhelming photographic evidence taken by Inspector Schlipmann but also by the testimony of Mr. Miller and Ms. Bryant. The testimony and evidence produced at the hearing establishes that the Respondent was in possession of numerous forms of cannabis products including cannabis flower, cannabis pre-rolls, cannabis edibles, and cannabis concentrate. The cannabis products were either pre-packaged with labels identifying the product as containing cannabis or in packaged bags and containers located in bins and drawers which were labeled with the specific strains of cannabis which Inspector Schlipmann was familiar with and recognized as a result of his training and experience. It should also be noted that Mr. Miller himself initially testified to engaging in what he referred to as gifting promotional items with the sale of other items which he described as giving away some form of cannabis product with the purchase of a sticker, t-shirt, or a patch. The document entitled "Inventory" provided a list of the multiple products located at the store. As such, I find that cannabis was being sold at this location.

Mr. Miller testified that his actions were legal based upon several reasons that he cited. I find it significant that he was adamant that his action of selling a sticker, patch or t-shirt and allowing the buyer to choose a cannabis product to accompany that sale was legal as the cannabis was merely gifting a "promotional item." The gifting described is also known as an indirect retail sale and is consistent with BMillzz practice as Mr. Miller describes it and is a violation of Cannabis Law Article 1 § 3 (46-a). Respondent's attorney argues the defense of detrimental reliance based upon Mr. Miller's testimony that he based his concept on research of models from other states and reliance upon "advice" from the Waverly Chief of Police who, by Mr. Miller's own admission, stated that he could not give legal advice. I reject the argument of detrimental reliance and find that Mr. Miller's reliance upon the "advice" of the Chief of Police was misplaced and not reasonable. I also find that his research of the laws and practices in other states are irrelevant to the laws which govern cannabis sales in New York State and further find that Mr. Miller made no effort or due diligence to obtain clarification from OCM or an attorney with cannabis knowledge, prior to opening his store, as to whether his business was in compliance with the New York laws governing cannabis sales. Mr. Miller made his opinion abundantly clear that OCM has no right to regulate, inspect or enforce against him nor was it

incumbent upon him to call OCM to inquire about the regulations. Furthermore, I note that he had previously been in receipt of a Cease and Desist letter putting him on notice that he was prohibited from selling cannabis and therefore knew or should have known that his actions were in violation of the law.

Respondent argues that his conduct was legal because he was conducting a gifting practice which is defined by the law as an indirect retail sale. While as stated above, such conduct is not legal under Cannabis Law Article 1 § 3 (46-a), I find that Respondent was not engaging in indirect sales but rather was conducting retail sales as defined by Cannabis Law Article 1 § 3 (46), however doing so without a license issued by OCM. Such finding is based upon the totality of the testimony and evidence. Inspector Schlipmann credibly testified that he observed cannabis products offered for sale in the display case upon entering the location as well as additional cannabis products stored in the back of the shop. In further support of a finding of retail sale, I find it significant that the “Daily Sales Log Book” listed the cannabis products and corresponding prices with nothing indicating that purchase of these items were predicated upon the purchase of any additional items such as a sticker, t-shirt, or patch. The cannabis items were listed with a price for each item next to it similar to a typical price list. Similarly, the document entitled “Edibles” listed five headings based upon price and milligram strength, with descriptions of the products available under each heading which were consistent with products identified during the regulatory inspection. Once again, I find it significant that nowhere on the document entitled “Edibles” is there any indication that any other item is required to purchase so as to obtain these products. The document entitled “Prices” clearly indicates the category of cannabis products available and the cost with no reference to any other product required to buy so as to receive the cannabis products listed. I accept as credible Inspector Schlipmann’s explanation that on the document entitled “Prices,” “3.5, 7.0, 14.0 and 28.0” refer to grams of cannabis flower and reject Mr. Miller’s testimony that these numbers randomly assigned to designate different patches. The assertion that the price of \$150 was for a “custom patch” lacks credibility, particularly as the rest of the items listed on that document reflect cannabis products.

Therefore, based upon the evidence and testimony establishing that cannabis products were on display and the substantial amount of cannabis products located in BMillzz on June 21, 2023 which, based upon their display and the documentation cited in this decision, were clearly being offered for sale to the public, I find that the Respondent is in violation of Cannabis Law Article 6 §125(1) on June 21, 2023 for selling cannabis without a registration, license, or permit issued by OCM.

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. 112 2023 0718 0055

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 122 Washington Ave, Endicott, NY, on July 18, 2023.

A virtual hearing was held on August 4, 2023 from the Albany Office of Cannabis Management before Administrative Law Judge Karen Lavery. Jasmine Norman, Esq. appeared on behalf of the OCM and Paula Collins, Esq. appeared on behalf of the Respondent. OCM Investigative Specialist William McKay (hereinafter “Inspector McKay”) testified on behalf of OCM. Bartholomew Miller Jr. testified on behalf of the Respondent.

FINDINGS OF FACT

On July 18, 2023, two members of the OCM Enforcement Division, including Inspector McKay, as well as members of the Enforcement Unit of the New York State Department of Taxation and Finance (hereinafter “DTF”), accompanied by a Police Officer from the Village of Endicott, conducted a regulatory inspection of BMillzz LLC (hereinafter “BMillzz”), located at 122 Washington Avenue, Endicott, New York (State’s Exh 1). This was a re-inspection of this location as a regulatory inspection had been previously conducted at that location on June 21, 2023 at which Inspector McKay was not present. According to Inspector McKay, he was familiar with BMillzz as the OCM Enforcement Unit had received complaints of this location being a retail dispensary prior to the time when OCM began issuing licenses for adult retail dispensaries. He testified that he was aware that the Respondent was not in possession of a license issued by OCM to sell cannabis as he was aware of the locations to which licenses had been issued by OCM. He testified that it was typical for DTF Investigators to accompany OCM Investigators as DTF Investigators actually seize the cannabis products. Furthermore, he testified that it is customary for local law enforcement to also be at the site during a regulatory inspection for the purpose of securing the outside of the location, however it is not their role to participate in the regulatory inspection. Inspector McKay testified that when he arrived at the location, DTF investigators were concluding the seizure and completion of the vouchers consisting of six pages which inventoried the type and quantity of cannabis products seized which included numerous brands of cannabis edibles, cannabis pre-rolls, cannabis concentrate, and cannabis flower (State’s Exh 2). The “Information for Unregistered Cannabis Retailer” and “Referral Report” which were included with the voucher packet were completed by DTF Investigator Chad Houle and signed by Autumn Walters (State’s

Exh 2). An affidavit signed by Chad Houle was provided at the hearing attesting that on July 18, 2023, he inspected the BMillzz site located at 122 Washington Avenue, Endicott, New York and during such time, observed “cannabis products stored and being offered for sale at the subject premises” (State’s Exh 3). Investigator Houle also indicated in his affidavit that he documented the observations made at BMillzz at the time of the July 18, 2023 inspection, in the documents marked as State’s Exh 2 and shared such documents with OCM Investigative Specialists (State’s Exh 3).

Inspector McKay testified to conducting a full regulatory inspection upon his arrival at the location by first talking to Autumn Walters who identified herself as an employee of the location. According to Inspector McKay, he had an amicable conversation with Ms. Walters and asked her if they were selling cannabis products to which she responded “yes” and when asked regarding the identification of specific products sold, she indicated “all of it” including advising him of the price for cannabis vape concentrates and cannabis edibles. Photographic evidence of a white board calendar was entered into evidence which listed “Autumn” working on July 18, 2023 and also had Autumn and another employer each working on different days, also reflecting that the shop was open seven days a week (State’s Exh 4). Inspector McKay photographed a box of empty glass jars located on the display counter which were labeled as containers for cannabis pre-rolls as well as with the cannabis logo (State’s Exhs 6, 8). Inspector McKay also observed a cashbox at the location (State’s Exh 7). He testified that at the time of the regulatory inspection, he observed very few t-shirts either on display or indicated for sale (State’s Exh 9).

Inspector McKay completed an NOV documenting the location as well as his findings and that it was served upon Autumn Walters (State’s Exh 1). At the time that he completed the NOV, he identified the street address as 112 Washington Ave as opposed to the correct street number of 122 Washington Ave which he testified was done in error (State’s Exh 10). The NOV was posted on the door to the left of the NOV previously posted on the door at the time of the June 21, 2023 regulatory inspection (State’s Exh 10). Investigator McKay also testified to completing and posting the WS on the storefront (State’s Exhs 11). The WS completed by Inspector McKay identified the street address as 122 Washington Ave and was affixed to the storefront located to the right of the WS previously placed on the storefront at the time of the June 21, 2023 regulatory inspection (State’s Exh 11). Photographic evidence was introduced at the hearing depicting all four documents affixed to a building identified with the number 122 at the top of the door (State’s Exh 12).

BMillzz owner Bartholomew Miller Jr. testified that while he was not present at the Endicott location during the time of the regulatory inspection on July 18, 2023, he was on the phone with Ms. Walters for part of the time during which the inspection was occurring. He initially testified that at the time of the July 18, 2023 regulatory inspection, he was visiting his sister in South Carolina as he was “pretty comfortable” and did not think that the location would be the subject of a re-inspection prior to the hearing pertaining to the June 21, 2023 inspection which had not yet occurred. He subsequently testified that at the time of the July 18, 2023 regulatory inspection of

BMillzz located at 122 Washington Avenue, Endicott, NY, he was present at his store in Conklin, NY which was simultaneously undergoing a similar regulatory inspection. Mr. Miller testified that he was aware of the NOV and WS placed on the BMillzz at the time of the June 21, 2023 inspection however had continued to operate “as normal” which including what he described as “gifting cannabis.” Mr. Miller testified that between the June 21, 2023 and the July 18th, 2023 regulatory inspections, he continued to operate “as normal” until he had his chance of a hearing in court to determine whether it was in fact illegal or not because according to his perspective, it was legal and ultimately was for a judge to decide. He also testified that if he was presented with the opportunity to obtain a cannabis retail license, he would be interested in doing so. According to Mr. Miller, he had read the language of the WS issued June 21, 2023 which ordered the business to immediately cease the sale of unapproved and unauthorized cannabis products however believed that he was operating legally. He also testified that it was not financially feasible to close and was awaiting his hearing so as to tell his story.

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 McKay 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. In addition, Mr. Miller testified that if given the opportunity to obtain a license from OCM, he would be interested in doing so. Furthermore, based upon the testimony of Inspector Schlipmann as it pertained to the June 21, 2023 regulatory inspection of BMillzz, it was well established that Respondent was not

in possession of a license issued by OCM to offer cannabis products for sale to the public. Therefore, based upon the testimony of Inspector McKay, the statement by Mr. Miller, and the prior testimony of Inspector Schlipmann 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.

Inspector McKay testified that at the time of the July 18th, 2023 regulatory inspection, by the time he arrived at the location, DTF Investigators were concluding their inspection. He testified that he was provided with the DTF vouchers indicating the cannabis products observed and seized which included cannabis edibles, cannabis flower, cannabis pre-rolls and cannabis concentrate. Furthermore, the affidavit of DTF Investigator Chad Houle who participated in the initial inspection and seizure on behalf of DTF, indicated that he observed the cannabis products itemized in the voucher as “stored and being offered for sale at the subject premises.” In addition to the affidavit, I find it significant that Mr. Miller testified that between the June 21, 2023 and the July 18th, 2023 regulatory inspections, he continued to operate “as normal” until he had his chance for a hearing in court to determine whether his practice was in fact illegal or not because in his opinion it is legal and he believes that is for a judge to decide. The testimony and evidence presented at the hearing for the regulatory inspection which occurred on June 21, 2023 clearly established that cannabis product was displayed and several price lists and inventory logs were admitted into evidence which indicated the products for sale and significantly none of the documents indicated that any products such as patches or t-shirts were required to purchase so as to obtain the cannabis products, thereby negating his assertion of engaging in gifting or indirect sales. I reject Mr. Miller’s testimony that the cannabis products were gifted with a purchase of another product as his testimony was inconsistent and thus lacked credibility. In so finding, I note that he first testified that at the time of the July 18, 2023 regulatory inspection, he was in South Carolina and then subsequently stated that he was at his Conklin store during the time of the inspection. I find it significant that the affidavit of DTS Investigator Chad Houle indicated that he observed cannabis products offered for sale on July 18, 2023 in addition to the testimony of Mr. Miller himself who stated that between the June 21, 2023 and July 18, 2023 regulatory inspections, he continued to operate “as normal.” The finding for the June 21, 2023 hearing held that Mr. Miller was offering cannabis for sale to the public and engaging in retail sales without a license issued by OCM. As Mr. Miller indicated that between the two regulatory inspections he continued to operate “as normal,” it can be logically concluded that the retail sales for which he was found in violation based upon the June 21, 2023 inspection, continued during the time period until the July 18, 2023 inspection.

I reject Respondent’s claim that he was denied due process based upon the second regulatory inspection having occurred prior to the hearing regarding the regulatory inspection which occurred on June 21, 2023. Mr. Miller testified that he was aware of the language of the NOV and WS placed on the storefront during the June 21, 2023 regulatory inspection which clearly

directed him to cease the sale of unapproved and illicit cannabis at the location. He further testified that he read that language but believed that the activity was legal and therefore disregarded the directive. The language contained in the WS lacked any ambiguity with respect to OCM's directive to stop selling cannabis. The re-inspection which occurred on July 18, 2023 to ensure compliance with the NOV and WS issued at the time of the June 21, 2023 regulatory inspection was not inappropriate or prohibited by any laws or regulations. Mr. Miller testified that he was "pretty comfortable" that another inspection would not occur prior to him having his "day in court." I find that Mr. Miller was put on notice at the time of the June 21, 2023 inspection that he was directed to immediately cease the sale of cannabis products. Such directive from OCM was controlling and his testimony that he continued "as normal" because he believed that his practice of selling cannabis was legal, is rejected as self-serving and a flagrant disregard of the directive that he was issued on June 21, 2023 pursuant to the the violations of the Cannabis Laws and Regulations cited in the NOV and the clear language contained on the WS.

I find that Respondent's attorney's contention that the process was a gross violation of the procedures outlined in Article 2, § 16 of the amended Cannabis Law is without merit. I reject the argument that Cannabis Article 2, § 16 sets forth the procedure as to how OCM must proceed with respect to the enforcement against the unlicensed sale of cannabis. Cannabis Law § 16-a provides a process by which an action to enjoin the unlicensed sale of cannabis can be brought in the New York Supreme Court rather than an administrative hearing such as this. Therefore, Cannabis Law § 16-a is not applicable to the regulatory inspections which occurred at BMillzz.

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 dismiss any allegations asserted by Respondent's attorney as to Inspector McKay erroneously writing the street address as "112" Washington Avenue rather than "122" Washington Avenue on the NOV and find that it was attributed merely regulatory inspection to a scrivener's error. Such a finding is based upon Inspector McKay's credible testimony that he inadvertently wrote it in error, the correct address was written on the WS, there was no assertion by Respondent that a regulatory inspection did not occur at 122 Washington Avenue on July 18, 2023, and the picture received into evidence depicting the NOV and WS from both the June 21, 2023 and July 18,

2023 affixed to the front of a location, clearly marked with a street number identifying it as 122 Washington Avenue.

Therefore, based upon the totality of testimony and evidence, I find that 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).

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: November 7, 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 November 7, 2023 to the following:

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