

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

CALI CLOUD, INC.

Respondent.

DECISION

Inspection No. - 118202406200025

Respondent requested a hearing on November 15, 2024, for an inspection which occurred on June 20, 2024

The date of the hearing was scheduled for December 2, 2024, and commenced on that date.

The Respondent was represented by Matthew Swedick, Esq.

Mohamed Alghaithi (hereinafter “Alghaithi”) testified on behalf of Respondent.

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

Investigative Specialist One (1) Zach Roubelakis (hereinafter “Roubelakis”) and Legal Secretary Donna LaForest (hereinafter “LaForest”) testified on behalf of OCM.

ISSUE

The allegations set forth in the Notice of Violation indicate that the Respondent was offering cannabis products, as defined by Cannabis Law Article 3, for sale without an appropriate registration, license, or permit. This allegation was based upon observations made during a regulatory inspection which was conducted at 575 New Scotland Ave., Albany, NY 12208.

The scope of the hearing involves determination whether OCM, by a preponderance of the evidence, were justified in issuing to Respondent the Notice of Violation and Order to Cease

Unlicensed Activity (jointly hereinafter “NOV”) and what penalty under Article 6 § 132 is justified. OCM requested the maximum fine of \$10,000. Additionally, this hearing was to determine the issue of whether the padlocking provisions Cannabis Law Article 6 § 138-b of have been met by a preponderance of the evidence.

APPLICABLE LAW

Cannabis Law Article 6 §125(1) states that “[n]o 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, or any product marketed or labeled as such, within the state without obtaining the appropriate registration, license, or permit therefor required....”

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

Cannabis Law Article 6 §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) requires that any civil penalties assessed “shall take into consideration the nature of such violation and shall assess a penalty that is proportionate to the violation....”

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

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

- (a) no part of the premises to be sealed is used in part as a residence and pursuant to local law or ordinance is zoned and lawfully occupied as a residence; and

(b) the unlicensed activity as described in this section is more than a de minimis part of the business activity on the premises or in the building to be sealed pursuant to this subdivision, the office shall issue a notice of violation and order to cease the unlicensed conduct, which shall constitute notice that such activity must cease immediately. (See Regulations at 9 NYCRR 133.25(f)(2-3)).

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

- (a) the presence of signs or symbols, indoors or out, advertising the sale of cannabis or otherwise indicating that cannabis is sold on the premises;
- (b) information shared in any advertisements or other marketing content in connection with the unlicensed business activity and any direct or indirect sales of cannabis or other conduct in violation of this chapter;
- (c) the volume of illicit cannabis products on site; and
- (d) the variety of illicit cannabis products on site. (See Regulations at 9 NYCRR 133.25 (f)(3)(i-iv)).

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

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

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

with this chapter. (See Regulations at 9 NYCRR 133.25(f)(1)(i-vii).

FINDINGS OF FACT

1. On June 20, 2024, OCM conducted an inspection of Cali Cloud, Inc. (hereinafter “Cali Cloud”) located at 575 New Scotland Ave., Albany, NY (Ex. A). At that time, a Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was issued and the premises were sealed (Ex. A). In November of that same year, Respondent requested a hearing, which was held on December 2, 2024. During the hearing, Roubelakis first appeared testifying that Cali Cloud acted as a retail store and was open to the public. The store displayed the typical signs of a retail store (signs identifying it and an “open” sign) and also had a number of signs and symbols that advertised it as a “smoke shop” (Ex B 1). Symbols, such as the paraphernalia on display in the windows, could readily be viewed and interpreted as belonging to a store that traded in not only paraphernalia but possibly cannabis, by consumers seeking to purchase. Roubelakis testified as to these symbols and advertisements and that upon entering the store, he discovered a wide array of cannabis products (Ex. B 8-10, & 17-19). While other legal products were on display in the store (Ex B 2), an entire display case within the store was dedicated to products which would qualify as illicit under Cannabis Law Art. 6 (Ex. B 8; C 3-7). Within this significant amount, a wide variety of forms, brands, and flavors of cannabis products were present. Many of these products were prominently displayed with sales stickers attached (see e.g., Ex. B 9; C 9, 10, 19, 20, 25, & 29). Further, a pricing guide/menu of suspected cannabis products was discovered on site (Ex. B 7). Cannabis edibles, concentrate, vape cartridges, pre-rolls, flower (both bulk and individually packaged), and gummies were on display, referenced on the pricing guide, or discovered in storage areas (Ex. B 7-10, 17-19; C 3-33). Upon searching the store, Roubelakis stated, and the evidence supports, that numerous products found in the store were labeled as cannabis, contained an explicit reference to the product containing THC, or possessed a sticker/stamp that identified it as containing cannabis (such as “CA!” or a cannabis leaf)(Ex. B 9-10; C 3-4, 6, 13-16, 21-23, 25-26, 28-31). Other packaging had warning labels stating that the product contained cannabis or other writing on the label that suggested a cannabis product was contained within (see e.g., Ex. C 26). Some of these products also contained signs and symbols on the packaging indicative of cannabis products (see e.g., Ex C 23). Finally, some products were contained in transparent or semi-transparent packaging that allowed the consumer to see the cannabis product (Ex. C 9, 15, 16, 17, & 18-22). Among the collection found on site, were products made by well-known brands of cannabis producers, including: Stiizy, Jeeters, Zkittlez, Sauce, Fryd, Flav, and Snow (Ex. C 3-7, 10-11, 25, & 27-30). Cali Cloud also appeared to be processing cannabis. Scales, with what appeared to be cannabis residue and self-labeled plastic containers with cannabis inside were discovered on site (Ex B 15-16; C 1-2, & 18-20). Further, baggies with branding specific to Cali Cloud were discovered on site. This indicates that Cali Cloud intended to move significant product as Roubelakis estimated that more than 1000 bags were present and ready for use. It is more likely than not that the large amount of cannabis flower was being sold after it was processed on site. Roubelakis further stated that Cali Cloud had a cash register/point of sale system and an ATM (Ex. B 5, & 11-12), which allows for the conclusion that it regularly conducted business as a publicly operating store. In addition to the paraphernalia displayed in the store front window, more paraphernalia was discovered in the store. Bong, hookahs, and other glassware were prominently displayed, and while legal, support a finding that customers may conclude that cannabis may be present for sale on site (Ex. B 1-2).

Roubelakis next testified that Cali Cloud did not possess a hemp or an adult-use cannabis license; Respondent did not refute this testimony. Finally, Alghaithi, who testified that he was employed as a manager of the shop, openly admitted that cannabis products were being sold at Cali Cloud.

The factors introduced into evidence and through testimony indicate by a preponderance of the evidence that Respondent was offering cannabis products for sale without the necessary license being issued by OCM. A multitude of cannabis products were readily on display which most anyone who entered the store would see. Sales tags were present on a multitude of cannabis or suspected cannabis products and the “menu,” found in the store listed types of cannabis known to Roubelakis along with a price. The products discovered were labeled as cannabis, either explicitly or with some marking that identified it as containing cannabis. Warning labels, the “CA!” cannabis mark that indicates cannabis produced out-of-state, and ingredient lists would readily indicate to the average consumer that the product was labeled as cannabis and likely contained cannabis within. Finally, Alghaithi’s admission that cannabis was being sold at Cali Cloud solidifies a finding that cannabis was being sold on site.

2. Roubelakis testified that no part of the premises to be sealed was used in part as a residence and that the building was zoned for commercial use. He stated that a complete search of the location was conducted and that no indications that it was being used as a residence were found (i.e., a bed). Respondent made no assertion to the contrary.

3. The unlicensed activity which warranted an order to seal constituted more than a “de minimis” part the business activity. The Cannabis Law Article 6 §138-b (7) and OCM Regulations part 133.25(f)(3) enumerate the factors to consider when determining if unlicensed activity occurring within a business is more than de minimis. “[A]ny one or more” of the four enumerated factors may lead to a finding that the unlicensed activity is more than a “de minimis part of the business activity.” I find that Respondent violated at least three, if not all four of the factors. Its violations of some factors were not by thin margins, and I have little trouble determining by a preponderance of the evidence that Respondent unlicensed activity was more than a de minimis part of the business activity.

In the Matter of Cali Cloud, the sale of cannabis appears to be a significant portion of the business. The variety of the products was significant. There are dozens of distinct products on site and for sale (Ex. C). They vary in form, flavor, potency, brand, strain, and quantity. The Respondent’s attorney seems to concede on cross examination of Roubelakis that “it is pretty clear” that a wide variety of products were present, most or all of which, were available for sale. While Respondent argued that volume was less clear cut, the evidence bag of flower alone is significant (Ex. C 33). The additional items that were introduced through photographic evidence add further to the total volume seized from the store. Also, evidence that the store was processing cannabis and preparing to market its own brand in significant volumes (Roubelakis estimated that there were 1000 empty bags with the branding “Cali Cloud” embossed on the front, which he believed were designed to contain cannabis flower)(see Ex C 1 & 2). Finally, although there are not a tremendous number of advertisements on the shop, the cannabis leaf on the marquee sign for Cali Cloud is a blatant and obvious advertisement that cannabis is likely sold on site. Couple this sign with the paraphernalia that is displayed in the window of the store, and it is

more likely than not that Cali Cloud meets three of the four factors (138-b(7)(a,c, & d) listed in the statute when considering whether the illicit sales of cannabis exceed a de minimis part of the business. If the processing and development of a “Cali Cloud” brand is considered “marketing content,” which I believe it could be, this would also violate Can. Law § 138-b(7)(b) which would mean that Respondent violated each of the four enumerated factors of the statute. Regardless, any one of the four may result in finding of more than de minimis and the variety and volume of product found on site make it more likely than not that the unlicensed activity discovered at Cali Cloud constituted a more than de minimis part of the business activity.

Respondent’s attorney argued that the total volume of “legal” business conducted at Cali Cloud should be measured against the illicit product which was seized from the location. By comparing the two, he argues, the legal product would produce a “counterbalance” to the illicit product, thereby allowing a store which conducts significant legal business to possess a larger amount of illicit product while still qualifying the illegal sales as a “de minimis part of the business activity.” Respondent further argued that such an analysis would allow a store like Cali Cloud, which Respondent argued had a large number of legal sales, to possess the illicit product which OCM seized and not be subject to an order to seal. I find this interpretation of Cannabis Law § 138-b(7) to be both unworkable and misguided. First, as mentioned above, any single factor under this section of law could produce a finding of “more than de minimis.” Volume, variety, signs and symbols, or marketing, “any one or more” of these could lead to a finding of more than de minimis (Can. Law § 138-b(7)). To link the de minimis issue solely to sales misses the intention of the statute. Further, the information necessary to compare legal sales to illicit ones, would require a full accounting of the business, a highly cumbersome and potentially dubious process which I do not believe was intended by the statute. Finally, Respondent would seem to want a finding of de minimis, if the illicit activity is a minority share of the total business.¹ While the statute could have said a “minority part of the business activity,” it does not. It likewise does not set a standard which allows for the illicit sales to be a “minimal part of the business activity.” The standard explicitly stated in the statute is “de minimis,” which means that any activity that rises above a “trifling” or “negligible” amount violates this statute.

Even if I found Respondent’s interpretation of Can. Law 138-b(7) persuasive, Cali Cloud would more likely than not fail such a balancing “test” and violated the statute. Alghaithi testified that the store had begun selling the cannabis products due to overhead costs and not being able to meet financial obligations (e.g., rent). That cannabis sales could turn around a business who is having trouble making rent, indicates that cannabis had become an intricate and necessary part of the business, one that the store must continue in order to survive.² While Respondent argued that only a small portion of the total space in the store contained cannabis products, they were prominently displayed and entirely filled one of the three or four display cases at Cali Cloud. Further, the cannabis leaf on the store-front sign highlighted the sale of cannabis. Additionally,

¹ This appeared to be the strategy as Alghaithi testified on direct that, while Cali Cloud did sell cannabis, the total amount constituted approximately 10% of the total business. This estimate is somewhat questionable as testimony on cross seemed to suggest that sales of glassware, cigars, and other legal items to be, at most, \$500/day. However, the receipt which was submitted into evidence shows that total sales for the date June 16th total a number significantly higher than that (Ex. B 20).

² While there is no direct evidence that the cannabis sales achieved this goal, Alghaithi made it clear that this was the intent.

the store's development of a personalized brand of product, the evidence of processing cannabis, and the large amount of cannabis flower shows that Cali Cloud had the intention and ability to sell a tremendous amount of cannabis. The development and creation of a brand further add to the time, energy, and focus that the shop dedicated to cannabis processing and sales. It is difficult to imagine the large volume and variety of cannabis products seized from Cali Cloud to be de minimis in any store, regardless of size. Taken as a whole, the significant amount of time, money, and effort which the store dedicated to ordering, displaying, processing, branding, and selling cannabis products, regardless of the "legal sales," makes it impossible to view the cannabis sales as a de minimis part of the business.³ While the size of a store and the amount of its legal sales may impact a future determination of de minimis, given the right set of circumstances, Cali Cloud presents no such circumstances. Under no logical conclusion can I reach a finding of "de minimis" as it relates to Cali Cloud. The store was operating a significant cannabis operation, likely conducting a large amount of unlicensed business, and dedicating a large amount of time and energy to increasing their sales (processing and branding). Their actions violate at least three of the four factors listed in the statute (signs and symbols, variety, and volume). And while Cali Cloud may have also traded in legal products, the amount of cannabis product and effort to promote those products were highly significant. While I believe Respondent's interpretation of Can. Law 138-b(7) to be misguided, under this interpretation I would, nonetheless, find by a preponderance of the evidence, that Cali Cloud's unlicensed activity constituted more than a de minimis part of the business activity.

4. The unlicensed activity being conducted at Cali Cloud constituted an imminent threat to public health, safety, and welfare. There were sales of, or offers to sell, cannabis products that were not tested or labeled lawfully in accordance with Cannabis Law. Those that did have labels, were labeled from outside New York State or possessed generic labels (see generally Ex. B & C). It is more likely than not that few, if any products in the store were tested for quality and safety using New York standards.⁴ Roubelakis went so far as to scan the QR code on one of the products to search for a record of testing. He testified that the QR code did not produce any evidence that testing was performed on the product. Further, the presence of processing equipment (bags and plastic canisters, scales, and loose flower) all suggest that processing of cannabis was occurring on site (Ex. B 15-19; C 19-20, 24, & 31-33). The volume of cannabis and the amount of process paraphernalia suggest a significant amount of processing was occurring. Roubelakis testified that Respondent possessed no producers license and Respondent presented nothing to counter this testimony. Due to the probable processing and the volume of untested product available, the activity occurring at Cali Cloud constituted an imminent threat to public health, safety, and welfare.

³ The menu listed sales as being \$100-180/ounce. Considering this while looking at the total amount of loose flower seized from the establishment shows that significant money was being brought in due to the unlicensed activity.

⁴ Roubelakis testified that there were a very small number of products that had a counterfeit New York stamp (Ex C 15). He testified that he knew the stamp to be false as it was not the stamp used by New York. Instead, he testified, it appeared to heavily borrow from the California stamp in an attempt by the manufacturer of the product to appear legitimate.

5. Respondent argued that service by OCM was not properly carried out. Under Can Law § 138-b service is complete under the provisions of 138-b(2) when an Order to Seal (hereinafter “OTS”) is provided to an employee of the business and, if the name and address of the owner is provided by an employee, a copy is mailed to the owner at the address provided. Roubelakis testified that he provided a copy of the OTS to the employee on site and LaForest testified that she mailed a copy to the owner, whose name was provided (Ex. E). While the timing of the OTS being mailed is troubling, more than five months after the inspection, it does not appear to violate the statute. It should also be noted that the mailing and receiving of the OTS does not seem to have prompted Respondent requesting a hearing. This would seem to indicate that notice seemed to reach Respondent independent of the mailing of the OTS. Respondent also claimed that it would have been unlikely that Respondent would have received the mailing. This might be true, but the fact that the address which was provided to OCM and to which the letter was sent was the address of the sealed business is not pertinent. Respondent, perhaps rightfully, argued that any mail delivered to the sealed address would be inaccessible, but since a copy of the OTS was displayed on the building itself (Ex. D 3), should the owner have gone to the store at 575 New Scotland Ave. to pick up the mail, service would have been effectuated, nonetheless. OCM conducted their actions according to the requirements of the statute, albeit significantly delayed, and, therefore, effectuated service. While effectuating service under Can. Law § 138-a is less clear and service of a NOV is more nebulous, Respondent’s act of requesting a hearing, retaining counsel, and having counsel appear at this hearing undercuts any argument that he did not receive service. The purpose of service in an administrative hearing is for the purpose of notice and not to assert personal jurisdiction over the Respondent (see *Drolet v. New York State Racing & Wagering Bd.*, 115 Misc. 2d 7, 10, 453 N.Y.S.2d 361, 363 (Sup. Ct. 1982) (citing *Avelli v. Town of Babylon*, 54 Misc.2d 662, 665, 283 N.Y.S.2d 261; *Olin Industries v. NLRB*, 192 F.2d 799 [5th Cir., 1951])). Since actual service was effectuated, as evidenced by the Respondent requesting a hearing and hiring counsel, the requirements of notice and due process are satisfied.

6. OCM requested the maximum fine of \$10,000 be levied against Cali Cloud for the violations that were discovered during the inspection. While the statute does not provide extensive guidance for determining the penalty for violations under Cannabis Law Article 6 §125, 132, and 138-a, it does require a penalty proportionate to the violation (Cannabis Law Article 6 §132(1)(c)). In the Matter of Cali Cloud, Roubelakis did not provide testimony as to the comparable size of this seizure. The amount of flower was voluminous, and the variety of cannabis is significant, however, without direct testimony from OCM, a proportionate fine is more elusive. Cali Cloud had the amount of product and the intent to process and sell significant cannabis products (Ex C 1-2). This act alone warrants a significant penalty. Further, the variety of product is large and while the volume of these products may be less than is sometimes seen in similar cases, this is more than made up for by the large amount of loose flower discovered on site (Ex. C 33). Therefore, based on the amount present during the inspection, the variety of the products, the processing occurring on site, and the openness with which Cali Cloud operated, and without a clearer picture of OCM’s opinion of the severity of this seizure, I am assessing a fine of \$7,500.


DECISION

The Respondent engaged in the sale of illicit cannabis and cannabis products without a license, registration, or permit to do so, at the location of 575 New Scotland Ave., Albany, NY 12208. In so doing, Respondent violated Cannabis Law Article 6. The Order to Cease Unlicensed Activity and Order to Seal are hereby affirmed and a penalty is assessed.

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

FURTHER, THE RESPONDENT IS HEREBY ORDERED TO PAY A \$7,500 FINE UNDER CANNABIS LAW ARTICLE 6 §132 FOR VIOLATIONS UNDER §125, AND AS A PROPORTIONATE PENALTY, FOR THE UNLICENSED SALE OF ILLICIT CANNABIS ON JUNE 20, 2024.

Dated: December 9, 2024


Administrative Law Judge

PLEASE BE ADVISED: Either party may appeal this decision within 30 calendar days of receipt, according to the specific manner described in Regulations at 9 NYCRR 133.25(k). This decision was sent via email on December 9, 2024, to the following:

Matthew Swedick, Esq.

Luwick Francois, Esq.

Nickolas Perry

Sheila Wagner

Celena Ditchchev, Esq.