

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

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**OFFICE OF CANNABIS MANAGEMENT,**

Petitioner,

-against-

**DECISION**  
**Inspection No. 207202408200039**

**Smoker’s Choice of Upstate New York, Inc. (Cobleskill)**

Respondent.

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Respondent requested a hearing on August 21, 2024. The inspection occurred on August 20, 2024. The hearing was conducted on December 6, 2024.

The Respondent was represented by Joshua Bauchner, Esq. and Natalie Diaz, Esq.

Dwayne Phillips testified on behalf of the Respondent.

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

Investigative Specialist Joshua Coons testified on behalf of OCM.

**ISSUE**

The allegations set forth in the Notice of Violation and Order to Cease Unlicensed Activity (hereinafter “NOV”) and Notice of Hearing indicate that the Respondent was offering cannabis products, namely, THC-A Flower and THC-A concentrate, 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 703 E. Main Street, Suite 2, Cobleskill, New York 12043. (Exhibit A).

**APPLICABLE LAW**

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...”

Cannabis Law Article 1 §3 (3) defines "Cannabinoid hemp" as any hemp and any product processed or derived from hemp, that is used for human consumption provided that when such product is packaged or offered for retail sale to a consumer, it shall not have a concentration of more than three tenths of a percent delta-9 tetrahydrocannabinol.

Cannabis Law Article 1 §3 (17) defines "Concentrated cannabis" means: (a) the separated resin, whether crude or purified, obtained from cannabis; or (b) a material, preparation, mixture, compound or other substance which contains more than three percent by weight or by volume of total THC, as defined in this section.

Cannabis Law Article 1 §3 (27) defines "Hemp" as the plant *Cannabis sativa* L. and any part of such plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration (THC) of not more than three-tenths of a percent on a dry weight basis. It shall not include "medical cannabis" as defined in this section.

## FINDINGS OF FACT

1. Respondent was offering cannabis products for sale without a license issued by OCM. Respondent had a license to sell cannabinoid hemp which expired August 16, 2024<sup>1</sup>. The license was posted in the window of Respondent's store. During the course of the hearing, Investigator Joshua Coons testified regarding his inspection of the premises. He explained that he had training and experience in identifying cannabis. He stated that he received this training both in the field and in the classroom. Investigator Coons observed products he deemed to be illicit cannabis products in two locations at Smoker's Choice Cobleskill during his inspection; a safe located under the cash register and a storeroom labeled maintenance and IT. Investigator Coons testified that at the premises he observed a safe located under the cash register. On the exterior of the safe was what appeared to be an entry code to the safe and directions to make sure the safe was shut and locked overnight. (Exhibit B7 and B8). Investigator Coons said that he believed Ronald the store manager opened the safe during the inspection. Inside of the safe were various boxes labeled, change box, Reg 1, Reg 2, Acid, and approximately 9 products. Exhibit B10 features the contents of the box labeled "Acid." The inside lid of the box contained a sign stating, "What we have" and then listing various flavors and strains of cannabinoids. Inside of the box were products by Catskill Hemp and others. The products in the safe included: THCA concentrate marked 99.9% THCA, Wild Orchard Hybrid Cantaloupe Crush THCA diamonds vape cartridge, which Investigator Coons stated contained more than .3% total THC according to the QR Code. (Exhibit B11-B14). Investigator Coons also stated that the QR codes for STNR Mary Jane Edition THCA Banana Punch Hybrid Disposable Vape and Bak8d THCA Exotic Indoor Flower showed they each had more than the allowable total THC percentage. (Exhibit B15-B18). In addition, he testified that at least three of the products listed in Exhibit B10, Frozen Lemonade, Big Dipper, and White Truffle, had total THC percentages in excess of the allowable limit of .3% according to the certificates of analysis provided by the store manager Ron. Ron also provided certificates of analysis for the Catskill Exotic products found in the storeroom, specifically the strains Black Garlic, Honey Banana, and Cereal Milk. (Exhibit B30-35) Those products were also found to have a total THC in excess of the allowable limit of .3%.

2. Respondent's defense emphasizes three points. First, that the non-compliant products were removed from the shelves and stored in accordance with OCM guidance propagated circa December 2023, which did not require Respondent to remove the non-compliant product from the premises. Second, the products in the store were to be sold in Respondent's stores in another jurisdiction where the products were legal. Third, the products stored in the safe under the register were returns waiting to be moved to the storage room. The Respondent asserts that all of the products featured in Exhibit B were compliant prior to the guidance issued in December of 2023. While that may be true, that does not explain why those products were being offered for sale in August of 2024. I find that Petitioner has proven beyond a preponderance of the evidence that the products located in the safe under the cash register were being offered for sale.

3. Mr. Phillips testified that he is the Operations Manager for the Smoker's Choice stores. He stated that he made visits to the Smoker's Choice Cobleskill location prior to the inspection, and that the location was required to remove non-compliant hemp product from the shelves, and

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<sup>1</sup> Respondent's witness Mr. Phillips testified that the license could not be renewed because the website was down around August 4, 2024. It was subsequently renewed August 29, 2024.

it was secured in the back storage room. He asserted that the storage room was only accessible by the store manager Ron, district manager, and corporate staff. However, he also stated that while he was aware that there was a safe under the main cash register, he did not know until the inspection that there was product located in that safe. In addition to having a code written on the safe, the safe contained a cash box for each register. Employees had access to the safe and would have needed to access it regularly in order to make change. Per Mr. Phillips it was even known as the “employee” safe. Mr. Phillips stated that the non-compliant product in the safe was product that had been returned. He also stated that the yellow sign stating, “what we have” was a list of products that were previously available for sale. This is not plausible. There was no explanation as to why there would be numerous returns of products that were sold at least eight months prior. There was no explanation as to why the returns would be of mostly the same few brands, and there was no explanation as to why they were all still in a safe accessible by employees at the location. It also does not strike me as irrelevant that those same illicit products would be placed in a box with a sign taped on stating, “what we have.” When viewing that sign in Exhibit B10, it is clear that it is attached with clear scotch tape. If the box indeed was being used solely for storage, the sign should have been removed to avoid any appearance that the products were still for sale. While Mr. Phillips asserts that the products were to be sold in Respondent’s other location, their placement in a safe under the cash register advertising products for sale and in a clear glass case in a storage room, are not in line with products being stored for transport and sale in another jurisdiction. Additionally, Mr. Phillips lack of knowledge of the products contained in the safe, until the day of the inspection, indicates that he was not aware of the day-to-day activity transpiring at the Cobleskill location of Smoker’s Choice. Mr. Phillips testified that he is able to run reports to track the location’s inventory and any transactions. However, that would only reflect the products being sold if the store manager or other staff member was accurately tallying up the inventory and transactions, including any returns that were made. Mr. Phillips did not state that he had run reports on the Cobleskill location to confirm the inventory lined up with transactions. The products in the safe could easily be accessed by any employee, and there was no evidence that they were being inventoried regularly. Thus, they could have been stored and sold without making it into an official store ledger.

4. Additionally, given that the store manager Ron asked Investigator Coons when he was going to get back the product as he was losing a lot of money, there is more than ample evidence that he was complicit in the sale of cannabis products. The fact that he may have been the only one with access to the storeroom, is irrelevant as he clearly intended to sell the illicit products located in the store. The Respondent asserts that the facts in this case are identical or similar to the facts in Office of Cannabis Management v. Smoker’s Choice of Mid-Hudson (Middletown), Inspection No. 118202406270027. In that case Respondent had secured non-compliant product in a locked large metal storage cabinet in a locked storeroom. The cabinet in that case could only be opened by Mr. Phillips, the district manager, and maintenance staff. As such, I stated in my decision, “[g]iven the fact that the products were contained in a locked room, in a locked cabinet, to which limited individuals had a key, I find that there is not sufficient evidence to show that the products were being sold or offered for sale.” The facts of this case are markedly different. Product was found under a register, in a safe, inside a box with writing indicating that it was being offered for sale. The safe had a combination written on it and was accessible by employees of the store generally. The remainder of the product was located in a storeroom where the store

manager, not district manager, had a key. That same manager inquired as to when he would get his product back because he was losing money. He also produced certificates of analysis for the products showing that they were non-compliant, which means he knew that he was offering cannabis products for sale in contravention of the OCM regulations and the Cannabis law. While Respondent may not have been required to remove the non-compliant product from the premises, if they had done so there would have been no opportunity for this location to flagrantly disregard the Cannabis Law and OCM regulations.

OCM has requested that the maximum fine of \$10,000 be issued against Respondent. OCM has also requested that Respondent's hemp license be revoked. As to the revocation of the Hemp License, I believe OCM has the power to revoke Respondent's hemp license under 9 NYCRR 133.7(a). OCM has not initiated a case under those regulations. As such, I will not consider whether or not license revocation is warranted at this time. As for the fine requested by OCM, while the statutes do 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)). There was a limited number of products observed at the location and featured on the voucher in Exhibit C. Additionally, I credit Mr. Phillips testimony regarding the main corporation's directions to this Smoker's Choice location, whether or not it was heeded. For those reasons I deem a fine in the amount of \$6,000 proportionate to the conduct.

### **DECISION**

The Respondent engaged in the sale of cannabis and cannabis marketed products without a license, registration, or permit to do so, at 703 E. Main Street, Suite 2, Cobleskill, New York 12043, on August 20, 2024. In so doing, Respondent violated Cannabis Law Articles 6 §125(1) and §132(1)(a). The Notice of Violation and Order to Cease Unlicensed Activity is hereby **Affirmed**.

**WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 § 132(1), THE RESPONDENT IS HEREBY ORDERED TO PAY A \$6,000 FINE, AS A PROPORTIONATE PENALTY FOR THE UNLICENSED SALE OF CANNABIS AND CANNABIS MARKETED PRODUCTS ON AUGUST 20, 2024.**

Dated: January 3, 2024

*Laurie Cartwright*

Administrative Law Judge

This decision was sent via email on January 3, 2024, to the following:

Nickolas Perry  
Sheila Wagner  
Celena Ditchev, Esq.  
Sisi Wu, Esq.  
Joshua Bauchner, Esq.  
Natalie Diaz, Esq.

**PLEASE BE ADVISED:** Either party may appeal this decision within 30 calendar days of receipt, according to the specific manner described at 9 NYCRR 133.23(g)(5).