

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. - 109202411200022**

**ELITE SMOKE SHOP, INC**

Respondent.

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The Office of Cannabis Management (hereinafter “OCM”) requested a hearing to determine the appropriate fine for the issued Notice of Violation/Order to Cease Unlicensed Activity (hereinafter “NOV”). Previously, the parties participated in an Emergency Hearing on November 26, 2024, at which time the Order to Seal (hereinafter “OTS”) was affirmed and extended for one year. No appeal was filed concerning the Emergency Hearing. Respondent and OCM agreed that the facts established during the first hearing would service as the basis for the determination and assessment of a fine.

A brief conference was held on January 14, 2025, at which time both parties formally agreed to waive any further proceedings in this matter.

The Respondent was represented by Phil Modrzynski, Esq.

The Office of Cannabis Management was represented by Sisi Wu, Esq.

**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 229 Lake St., Hamburg, NY 14075.

The scope of this decision is limited to the determination of whether OCM, by a preponderance of the evidence, were justified in issuing to Respondent the NOV and what penalty, if any, under Article 6 § 132 is justified. OCM requested the maximum fine of \$10,000.

### **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....”

### **FINDINGS OF FACT**

The facts of this matter were established during the Emergency Hearing, conducted on November 26, 2024. They are reproduced below as described in the original decision.

1. On November 20, 2024, OCM, after receiving a report of suspicious activity, specifically the offer to sell cannabis flower to a customer, from local law enforcement, as testified to by Gregory, conducted an inspection of Elite Smoke Shop, Inc. (hereinafter “Elite Smoke”) located at 229 Lake St., Hamburg, NY (Ex. A 2). At that time, Gregory issued a Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal and the premises were sealed (Ex. A 2). The next day, November 21, 2024, Respondent requested an Emergency Hearing with respect to the Order to Seal. A hearing was scheduled for November 26, 2024, at which Gregory

appeared as the sole witness. Evidence presented at the hearing showed that Elite Smoke had a cash register, credit card reader, and that receipts from recent cash transactions were present (Ex B 4, 5, & 7). Gregory testified that an “IPAD,” which he found in the vicinity of the register, when turned on, displayed a menu of products and prices, which he recognized, due to his training and experience, as being cannabis brands and products (Ex B 6). Only a single suspected cannabis product was found in the “retail section” of the store, but significant amounts of cannabis products, both labeled and suspected, were present in the storage rooms within the building, rooms easily accessible from the retail section, and under the control of the owner (Ex B 10-36). Many of these products contained price tags (Ex B 10, 29, 30, 32, 36) and some of them corresponded to the items listed on the menu found on the IPAD (compare Ex B 6 & 14-20, & 27). Some of the products found were labeled as a cannabis product (i.e., Ex B 13, 18, 23 & 29). Other products listed THC as an ingredient of the product (i.e., Ex B 17, 20, 29). Still other products had a “stamp” which indicated that cannabis products were contained within (i.e., Ex B 20, 23-34, & 29-32).<sup>1</sup> Finally, many of the products had signs, symbols, and words on the packaging which Gregory recognized as being indicative of products that are being “advertised” as containing cannabis (generally Ex B 10-35); Gregory also testified that some of the products were known to him and that previous testing had shown that they contained THC (Ex B 32). While little time was spent during testimony discussing the signs and symbols present in the store, some can be seen in the pictures submitted into evidence. Respondent argued correctly that the outside had minimal signs which might indicate the sale of illicit cannabis (the zig-zag rolling papers being the main example) (Ex B 1); however, paraphernalia (bongs, trays, and rolling paper) and advertisements (Raw rolling papers) were present in the store (Ex B 2-3). Gregory also testified that Respondent did not possess an adult-use license; Respondent’s attorney produced no evidence of such a license.

As a result of the testimony and evidence submitted during the course of the first hearing, it was determined that Elite Smoke was offering cannabis products for sale without the necessary license. Large amounts of cannabis were discovered by Gregory, many possessing price tags that clearly marked them as being for sale. The variety of cannabis, which played an important role of upholding the order to seal, also demonstrates Elite Smoke’s desire to provide a selection of cannabis products for its customers. A menu was discovered which listed cannabis products available for purchase. It was firmly established that Elite Smoke held itself out as a business which was open to the public and contained the typical accoutrements of such a business (point-of-sale system, credit card reader, “open” sign, receipts, etc.). Due to all of these factors, and the discovery of the items listed above, OCM clearly demonstrated by a preponderance of the

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<sup>1</sup> Respondent’s attorney argued that the “stamp” that indicated a California origin could not reliably indicate that the product contained cannabis. He appeared to argue that both cannabis and hemp products from California may possess this stamp. This argument is unpersuasive for a number of reasons. First, many of the products introduced into evidence that possess the “CA!” stamp also have a THC content listed on the packaging (see e.g., Ex B 17). Further, Gregory testified that his training leads him to believe that this stamp indicates that the product contains cannabis. Also, it is likely that this stamp is used by the business to demonstrate the presence of cannabis for the purposes of sales. Finally, although the evidence seems to suggest that such a stamp indicates cannabis, this is not the sole reason for its relevance. Such a stamp is also evidence that the product is not from New York and is, therefore, not a legal product, having not been tested in New York and a danger to the consumer.

evidence that Elite Smoke was violating cannabis law and selling cannabis products without the necessary license. While during the first hearing, this supported a finding that the Order to Seal was proper and the business was legally padlocked, for the purpose of this decision, I find that the evidence supports, by a preponderance of the evidence, that the NOV was properly issued.

2. When determining an appropriate fine to be levied against Elite Smoke for the violations discussed in section 1, the law requires a proportional penalty based on the nature of the violations. As a result of the Emergency Hearing, a finding was made that the quantity of illicit product discovered in Elite Smoke shop exceeding a “de minimis” amount. Further, a finding that Elite Smoke’s unlicensed activity constituted an imminent threat to public health, safety, and welfare, was also made. While these two findings are not necessarily when making a finding on the Notice of Violation and assessing a fine, the quantity discovered, the business practices of Elite Smoke, and specific actions undertaken by the store are, in part, pertinent. The pertinent findings and discussion from the first decision are reproduced below.

#### *Finding of More Than De Minimis*

A large variety and volume of illicit products were discovered at Elite Smoke. A variety of brands were observed on premises, including: Fusion, Ghost, Get Lit, Kush King, and Treezy (Ex B). Many additional brands or un-branded products were also found (Ex B). A variety of product types were also observed including: pre-rolls, live resin, concentrate, various edibles (e.g., bars and gummies), vape inhalers, and cannabis flower (Ex B). From the photographic evidence submitted by OCM, there appears to be hundreds of individual products seized from Elite Smoke. This estimate is supported by the inventory list prepared by the Department of Taxation and Finance (Ex C).<sup>2</sup> Although there were, as Respondent claims, several legal products for sale in Elite Smoke, the volume and variety of cannabis products discovered within the store cannot be overlooked. Both the volume and variety of products were significant. The photos submitted into evidence show a tremendous amount of illicit product from the store, more than necessary to determine that the activity was more than de minimis. Further, while the signs and symbols present in Elite Smoke were not voluminous, they were present and could readily be seen by potential customers as indicators that cannabis may be procured from the store. The totality of the evidence and by a preponderance of the evidence demonstrates that the trade of illicit product at Elite Smoke was more than de minimis and that the volume and variety of product showed that the store was primed to make significant sales in illicit cannabis.

#### *Finding of Imminent Threat to Public Health, Safety, and Welfare*

The unlicensed activity being conducted at Elite Smoke constituted an imminent threat to public health, safety, and welfare in that there were sales of, or offers to sell, cannabis products that were not tested or labeled lawfully in accordance with Cannabis Law Article 6. Many of the items found during the inspection were labeled as cannabis products and either contained an

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<sup>2</sup> There are weights listed on the final drafts of the DTF forms (C 1-4). However, respondent rightfully raised questions as to the veracity of such weights. They don’t seem to make mathematical sense and no explanation for the process were provided. Further, no one testified as to how the weights are gathered, what instruments are used, and what process is followed. I will, therefore, give no evidentiary weight to these measurements. The numbers that list the total count of the products is sufficient.

inspection stamp of production outside New York State (many appeared with a California stamp), a generic stamp, or no inspection stamp at all (see Ex B). It is likely that none of the products were tested in New York, as nearly all of the products shown in the photographs and submitted into evidence lacked the inspection stamp of New York State (Ex B). A very few product appears to possess a New York stamp/sticker (Ex B 29); even excluding these, there were significant amounts of, what is likely, untested product present at Elite Smoke. Due to the volume of product not tested in New York which was discovered during the inspection as demonstrated by the absence of labels or labels not in accordance with New York state law, and no testimony by Respondent to the contrary, the activity occurring at Elite Smoke constituted an imminent threat to public health, safety and welfare.

*Assessing a Civil Penalty Under Cannabis Law Article 6 §132*

The size and sophistication of Elite Smoke's operation was significant and warrants a sizable fine. The quantity of product that the store offered was substantial. The store operated in a bold fashion that seemed designed to bring in significant income. Illicit products were price-tagged and the menu, which listed illicit products and discovered at the point-of-sale system, showed that illegal sales were likely occurring. The business had a large variety of cannabis, both brands and varieties, none of which seemed to have undergone the necessary inspection or testing to ensure a safe, good quality product. Further, some of the products had THC amounts that far exceeded the amount allowed under New York State Law, making them illegal in New York (even when in possession of the necessary license) and dangerous (e.g., Ex B 32). Finally, although I do not believe that a product's compliance with New York State packaging rules is relevant when determining whether an Order to Seal is proper, I do believe that unlicensed packaging, the kind that contain bright colors or cartoon characters, the kind that might be appealing to children, can play a role in the assessment of a fine under § 132. A number of products discovered at Elite Smoke had packaging that violated New York State laws and regulations. Packages contained depictions of cartoon characters, designed to mimic popular kid's products (such as video games), or had pictures of fruit on the package, which might lead a child to mistakenly believe the product was food (Ex B 21-24 & 29-34). These packages further contributed to the reckless disregard for safety displayed by Elite Smoke. These factors, taken as a whole, show not only a sizable amount of product but product that violated numerous safety standards designed to protect the consumer. Taken as a whole, I find that the violations discovered at Elite Smoke warrant the maximum fine of \$10,000.

3. Although both parties agreed to forego a hearing concerning the NOV, Respondent's attorney raised legal issues that I will now address.

*Due Process Violation*

Respondent claimed that OCM was targeting individuals who challenged the office's finding and subsequent Order to Seal. In essence, he claimed that the only those Respondents who challenged the OTS are being fined through a NOV Hearing. While this would be troublesome if true, and I agree with Respondent assertion that such an act could "chill" a Respondent's due process rights, he presented no evidence of such actions occurring other than

his assertion and the matter at hand. There is no basis in the record for such a finding. Further, there are time constraints placed on parties requesting a hearing under the rules and regulations governing these hearings. The fact that OCM requested this hearing is, I believe, a product of these time constraints more than a concerted effort to “punish” those that challenge OCM’s authority. Issued NOV’s which have not undergone an Emergency Hearing, may proceed at a more leisurely pace and are not constrained by the strict time limits that are imposed on matters which have already been the subject of a hearing. Finally, I am aware of NOV’s which have been adjudicated where there are no OTS associated with the matter. Regardless, the record does not support a finding as asserted by Respondent.

#### *Unreasonable Search and Seizure*

Respondent next challenged the search of Elite Smoke as a violation of the 4<sup>th</sup> amendment of the US Constitution. There is no evidence to support such a violation in the record of the first hearing. Further, the search was commenced by the Department of Taxation and Finance (hereinafter “DTF”) who was conducting an administrative search pursuant to the Respondent’s license, issued by DTF, to collect sales tax (Ex. D5). The primary fact discussed by Gregory during the Emergency Hearing was that DTF opened one of the backrooms with a key that a DTF officer found on the counter of the store. It is likely that this administrative search by DTF would be allowed under the 4<sup>th</sup> amendment, however, the details of this search were left unexplored during the first Elite Smoke hearing and, therefore, cannot be relied upon during this hearing as a basis for dismissal.

#### *Service and Notice*

Respondent raised the issue of service and notice during the OTS hearing for Elite Smoke. The matter was discussed at length in the first decision. Respondent raised no additional challenges to service and notice for the NOV adjudication.

### **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 229 Lake St., Hamburg, NY 14075. In so doing, Respondent violated Cannabis Law Article 6. The NOV is hereby affirmed, and a penalty is assessed.

**WHEREFORE, THE RESPONDENT IS HEREBY ORDERED TO PAY A \$10,000 FINE UNDER CANNABIS LAW ARTICLE 6 §132 FOR VIOLATIONS UNDER §125, AND AS A PROPORTIONATE PENALTY, FOR THE UNLICENSED SALE OF ILLICIT CANNABIS ON NOVEMBER 26, 2024.**

Dated: January 22, 2025

  
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 January 22, 2025, to the following:

Phil Modrzynski, Esq.

Sisi Wu, Esq.

Nickolas Perry

Sheila Wagner

Celena Ditchev