STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
CANNABIS CONTROL BOARD

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IN THE MATTER OF
THE JERK SHACK LLC,

APPELLANT-RESPONDENT,

-against-

NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT,

APPELLEE-PETITIONER.

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DECISION ON APPEAL

Inspection No.:
115202406260020

Application by Appellant-Respondent, The Jerk Shack LLC ("Appellant"), appealing from the decision and order of the Office of Administrative Hearings ("OAH") wherein the presiding Administrative Law Judge ("ALJ") extended a sealing order issued against Appellant's business. The sealing order was issued by Appellee-Petitioner, New York State Office of Cannabis Management ("OCM").

Appellee-Petitioner OCM ("Appellee") conducted a regulatory inspection of Appellant's place of business pursuant to New York State Cannabis Law ("Cannabis Law") Article 6 §§ 138-a and 138-b and Title 9 of the Codes, Rules and Regulations of the State of New York ("NYCRR") 133.25. Appellant requested an emergency hearing with the OAH pursuant to Cannabis Law § 138-b(3) and 9 NYRR § 133.25(h)(1). After a hearing was held, the presiding ALJ issued a decision extending the sealing order for one year finding Appellant was engaged in unlicensed activity and that activity posed an imminent threat to the public health, safety, and welfare. Appellant takes exception to the ALJ's decision and has submitted the instant administrative appeal, and the exceptions noted therein to the Cannabis Control Board ("Board") for review pursuant to Cannabis Law §§ 10(18) and 17(8) and 9 NYCRR § 133.25(k).

BACKGROUND

In March 2021, New York enacted the Marihuana Regulation and Taxation Act ("MRTA"). The MRTA legalized recreational adult use of marijuana and created a regulated cannabis industry. The Cannabis Law governs medical cannabis (Cannabis Law Article 3), adult-use cannabis (Cannabis Law Article 4), and cannabinoid hemp and hemp extract (Cannabis Law Article 5). The Cannabis Law also contains general provisions, (Cannabis Law Article 6), including the enforcement framework, that apply to the entire regulatory program. Appellee is the regulatory agency for the cannabis industry in New York.

Cannabis Law § 3(5) defines cannabis as "all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. Cannabis does not include "the mature stalks of the plant" and it does not include "hemp[1], cannabinoid hemp or hemp extract as defined by this section or any drug products approved by the federal Food and Drug Administration." (Cannabis Law § 3[5]).

Cannabis Law § 125 states that "[n]o person[2] shall cultivate, process, distribute for sale or sell at wholesale or retail or deliver to consumers any cannabis, cannabis product[3], medical cannabis or cannabinoid[4] hemp or hemp extract product, or any product marketed or labeled as such, within the state without first obtaining the appropriate registration, license or permit" that is required under the law. Appellee is authorized to conduct, without notice, site visits, inspections, or investigations of any person and any premises cultivating, processing, distributing, selling, or offering for sale cannabis, cannabis product, cannabinoid hemp or cannabinoid 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. (Cannabis Law § 138-a and 9 NYCRR § 133.25).

In response to a violation of the Cannabis Law, and related regulations, Appellee is authorized to take various actions, including issuing a notice of violation, an order to cease unlicensed activities, and an immediate order to seal the premises. (Cannabis Law §§ 138-a and 138-b). Appellee can issue an immediate "order to seal the building or premises of any business engaged in unlicensed activity, when such activity is conducted, maintained, or permitted in such

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[1] Hemp is defined 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 of not more than three-tenths of a percent on a dry weight basis. (Cannabis Law § 3 [27]). Tetrahydrocannabinol concentration ("THC") means Delta-9-THC; Delta-8-THC; Delta-10-THC and the optical isomer of such substances." (Cannabis Law § 3[52]).

[2] Cannabis Law § 3(40-a) broadly defines person "an individual, institution, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other entity."

[3] Cannabis product, or adult-use cannabis product, means cannabis, concentrated cannabis, and cannabis-infused products for use by a cannabis consumer. (Cannabis Law § 3[9]). A cannabis- infused product is defined as "products that have been manufactured and contain either cannabis or concentrated cannabis and other ingredients that are intended for use or consumption." (Cannabis Law §3[10]).

[4] Cannabinoid is defined as "the phytocannabinoids found in hemp and does not include synthetic cannabinoids as that term is defined in subdivision (g) of schedule I of section thirty-three hundred six of the public health law." *Cannabis Law, § 3(2).* "Phytocannabinoid" means any of the chemical compounds, excluding terpenes or any other compounds set forth by the Office, that are the active principles of cannabis sativa, including, but not limited to, THC and cannabidiol (CBD), and does not include synthetic cannabinoids as that term is defined in subdivision (g) of schedule I of section thirty-three hundred six of the Public Health Law. *9 NYCRR § 128.1(r).*

building or premises, occupied as a place of business"[5] and upon a finding of an imminent threat[6] to public health, safety, and welfare. (Cannabis Law § 138-b; 9 NYCRR § 133.25[f]). After establishing an imminent threat, Appellee must also demonstrate that (a) no part of the premises to be sealed is used in part or lawfully zoned and occupied as a residence; and (b) the unlicensed activity is more than a de minimis[7] part of the business activity on the premises or in the building to be sealed pursuant to the order.

When Appellee issues an immediate sealing order, Cannabis Law § 138-b(2) provides that a copy "shall be served by delivery of the order to the owner of the business or other person of suitable age or discretion in actual or apparent control of the premises at the time of the inspection and shall be posted at the building or premises that have been sealed, secured and closed." The law further provides that "[a] copy of the order shall also be mailed to any address for the owner of the business at any address provided by the person to whom such order was delivered pursuant to this subdivision." (Cannabis Law § 138-b[2]). Subdivision (10) of section 138-b provides that a copy of the sealing order shall be mailed, within five (5) days of being issued, by certified mail, to the person holding ownership over the real estate affected by the sealing order.

The Order to Seal provides information to request an emergency hearing on the order to seal with the OAH. Following the hearing, the presiding ALJ shall prepare a written decision based on the ALJ's findings of facts and conclusions of law. (9 NYCRR § 133.25[i][2]). Within thirty (30) days of the issuance of the ALJ's determination, any party may submit an appeal of the ALJ's determination to the Board and such appeal shall be based solely on the record on appeal. (9 NYCRR § 133.25[k]).

In this matter, Appellant timely filed the instant appeal on July 10, 2024, and asserts the Order to Seal was erroneously extended because the notice of violation lacked essential elements and because the Appellee failed to establish proper and sufficient service of the sealing order.

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[5] "[P]lace of business" shall not include a residence or other real property not otherwise held out as open to the public or otherwise being utilized in a business or commercial manner or any private vehicle on or about the same such property, unless probable cause exists to believe that such residence, real property, or vehicle are being used in such business or commercial manner as described herein." Cannabis Law § 10(8).

[6] In assessing whether there is an imminent threat to public health, safety, and welfare, Cannabis Law § 138-b(4) provides factors Appellee shall consider.

[7] In assessing whether unlicensed activity within a building or premises is more than a de minimis part of the business activity at the premises, Appellee shall consider the factors set forth in Cannabis Law § 138-b(7).

ISSUES ON APPEAL

Whether the Notice of Violation, Cease Order, and Order to Seal was jurisdictionally defective for failure to the date, time, and location of the alleged violation and whether the ALJ's determination extending the Order to Seal was an error of law.

FINDINGS OF FACT

Following a review of the record on appeal, the Board finds the following facts.

Regulatory Inspection

Appellant conducts business as The Jerk Shack LLC. On June 26, 2024, Appellee conducted a regulatory inspection, Inspection Number 115202406260020, of Appellant's business. Based on observations during the inspection, Appellee issued: a Notice of Violation ("NOV") indicating that the Appellee was in violation of Cannabis Law §§ 125 and 132 as well as 9 NYCRR 120(i); an Order to Cease Unlicensed Activities ("Cease Order") pursuant to Cannabis Law § 138-a and 9 NYCRR § 133.25; and an Order to Seal pursuant to Cannabis Law § 138-b. Appellee's NOV, Cease Order and the Order to Seal are all contained on a single, 8 x14, page document. The first portion of the document is the NOV and Cease Order, the second the Order to Seal, and then a section entitled Certificate of Service.

On July 19, 2024, Appellant, through counsel, requested an emergency hearing regarding the Order to Seal issued by Appellee. A virtual hearing was scheduled for July 5, 2024.

Administrative Proceedings

Appellant filed responsive pleadings with the OAH, on July 1, 2024, setting forth three affirmative defenses, including a lack of personal jurisdiction over Appellant [respondent] because service was not made in accordance with the requirements of the law.

On July 5, 2024, a virtual hearing was held before presiding ALJ Karen Lavery. Both Appellant and Appellee were represented by counsel. The scope of the emergency hearing was to determine by a preponderance of the evidence whether the Order to Seal was issued in accordance with the provisions of Cannabis Law Article 6 § 138-b. At the start of the proceeding, counsel for Appellant made a motion to dismiss because the NOV and Order to Seal failed to state the date and time of the occurrence in the prescribed area for the statement of charges. Appellant maintained that this a jurisdictional issue that cannot be cured through testimony and should render the NOV completely deficient. Appellee responded the NOV had the date that it was signed by the investigator who could also testify to when the inspection occurred, and Appellee could present additional evidence. The ALJ reserved decision and the proceeding continued.

Appellee presented evidence in support of executing the Order to Seal, including testimony of two witnesses along with document and photograph exhibits. The first witness was Senior Investigator Aurigemma who testified to being employed with the New York State Department of Tax and Finance ("DTF"). He testified that he had a two-day training approximately a year ago on how to identify cannabis and product packaging. After testifying to his employment and training, Senior Investigator Aurigemma was immediately asked if he recognized a document. He identified the document as a DTF Referral Report[8]. Senior Investigator Aurigemma testified the report is prepared when after the inspection. He also testified that he did not prepare the report but was responsible for approving it. Over the Appellant's objection, the report was entered into evidence. The ALJ reasoned that Senior Investigator Aurigemma was present during the inspection, was a witness to the contents of the document, and it was within his job title to review and approve the document. Senior Investigator Aurigemma also identified DTF Vouchers/Receipts for Evidence ("DTF vouchers") that he testified were also completed by another investigator present during the inspection of Appellant's business. The vouchers were admitted into evidence over Appellant's objection. During cross-examination, Senior Investigator Aurigemma testified to having conducted another inspection in Bay Ridge before the inspection of Appellant's business which was further north in Brooklyn.

As their second witness, Appellee called Investigator Lawson. Investigator Lawson testified he is employed with OCM and has received training and experience in the field on conducting regulatory inspection and identifying hemp and cannabis products. Some characteristics he noted include odor and packaging. He explained that when conducting a regulatory inspection, he looks for ledgers, signage, and advertisements as evidence that cannabis products are being sold at the establishment. After testifying to his employment and training, Investigator Lawson was immediately asked if he recognized a document. Investigator Lawson testified he recognized the document and identified it as the NOV, Cease Order, and Order to Seal. Investigator Lawson was then asked whether he prepared during the course of his inspection of "the Jerk Shack LLC on June 26, 2024?" Investigator Lawson responded yes it was prepared then and he was the individual who prepared it. He identified his signature on the bottom of the form following the Certificate of Service and an acknowledgement that the statements and observations recorded are true and accurate. Investigator Lawson also identified the date alongside his signature, June 26, 2024, as the date of the inspection.

Investigator Lawson also identified photographs taken as part of the regulatory investigation. The photographs and testimony showed the presence of cannabis symbols on the

[8] The DTF Referral Report is an electronically generated form. The form indicates signatures, of the Investigator and Supervisor names included in the form, are not required.

premises, including the presence of three large cannabis leaves at the storefront, a point of sales system, receipts and other business records, and display cases with a variety of products labeled as cannabis. Investigator Lawson further testified that during the inspection there was an individual who identified themselves as a salesclerk of the business. After the Inspection, Investigator Lawson testified that the employee signed the Certificate of Service on the NOV, Cease Order, and Order to Seal document and accepted service. He also testified that the notice was posted on the front of the business after the premises was sealed. Finally, he identified two Affirmations of Service by Mailing ("affirmation"), one for the Business Owner and one for the Building Owner, to establish a copy of the Order to Seal was sent by mail. Although able to identify the documents, Investigator Lawson later testified that he did not personally do the mailing and could not confirm if sent by certified mail or regular mail. He testified that the mailings were done out of the Albany office, and he is based in the New York City office. Near the end of his testimony, the ALJ asked Investigator Lawson if the building inspected was on "St. John's Place" and he confirmed it was.

Appellant did not call any witnesses or submit any exhibits. Appellant did address the responsive pleadings filed with the OAH prior to the hearing. Appellant renewed the jurisdictional argument regarding an insufficient charging document and improper service. Appellant argued the NOV was deficient and as a result by operation of law the Order to Seal must be vacated and dismissed along with the NOV and Cease Order. Appellee contended that the testimony and evidence presented provided the date and time the inspection occurred. The ALJ indicated the position of each party would be considered and a decision would be rendered within four business days.

ALJ Decision

On July 5, 2024, the ALJ issued a decision. The ALJ determined that Appellant was engaged in unlicensed cannabis activity and the unlicensed activity constituted an imminent threat to public health, safety, and welfare in that there were sales or offers to sell cannabis products which were not tested or lawfully labeled in accordance with Cannabis Law Article 6. The ALJ further determined that such activity was more than a de minimis part of Appellant's business activity.

The ALJ also rejected Appellant's motion to dismiss based on the lack of date, time, and place in the NOV. The ALJ reasoned that while the investigator did not write the date in the prescribed area, he did write a date at the bottom of the document alongside his signature. Additionally, the ALJ determined that both of Appellee's witnesses testified at the hearing that the inspection occurred on June 26, 2024, which left no ambiguity and rendered any error harmless. Additionally, the ALJ reasoned that although the time was not written on the NOV, the DTF

Referral Report contained both the date and the time of the inspection, thus the omission of the time on the NOV was likewise a harmless error. As such, the ALJ extended the Order to Seal for one year from the date of the decision.

The ALJ found that service was properly effectuated on Appellant. The ALJ relied upon Investigator Lawson's testimony finding it credible and undisputed that the document was personally served on Appellant's employee, was conspicuously posted at the premises, and mailed to both the business owner and the real estate owner.

Arguments on Appeal

In their appeal, Appellant asserts that the ALJ erred in extending the Order to Seal and accompanying NOV and Cease Order. Appellant maintains that Appellee failed to establish proper and sufficient service in accordance with the jurisdictional mandates of Cannabis Law § 138-b and with New York's Civil Practice Law and Rules ("CPLR"). Specifically, Appellant argues that Appellee failed to establish proper and sufficient service of the Order to Seal given that the charging instrument fails to mention the city, state, and zip code where the premises inspected is located[9] and fails to mention the date and time of the alleged offense as required by law. Appellant argues such service requirements are jurisdictional prerequisites that must be established before any sealing order issued pursuant to Cannabis Law § 138-b can be enforced, sustained, and/or extended to close a business.

Appellee maintains proper and sufficient service was demonstrated by a preponderance of the evidence in accordance with the requirements mandated by Cannabis Law § 138-b. Appellee also asserts that Appellant has not cited to any supporting caselaw, section within the Cannabis Law, that would support their argument that the NOV was deficient. Appellee further argues that while the date not contained in the statement of charges, the Investigator included a date at the bottom of the sealing order alongside his signature.

OPINION AND REASONING

The Board agrees with the Appellant that the NOV failed to adequately provide notice of the charges and thus the Order to Seal was erroneously extended. The ALJ was correct that there was an error. However, the error was not harmless.

In matters where the government is taking action affecting life, liberty, or property, due process of the law is inherently within the scope of the proceeding. (U.S. Const. amend. V and

[9] Appellant did not raise the lack of a complete address in the NOV as part of their argument in the responsive pleadings or at the hearing. Appellant argued only a lack of date in the responsive pleadings and at the hearing.

XIV; N.Y. Constitution Article 1 § 6). It is well settled that the principles of due process applicable to criminal trials also apply to government administrative proceedings. (Morrissey v. Brewer, 408 U.S. 471 (1972); Mathews v Eldridge, 424 U.S. 319, 334-335 [1976]; Matter of Murray v Murphy, 24 NY2d 150, 157 [1969]; People ex rel. McGee v. Walters, 62 N.Y.2d 317 [1984]; Wolfe v. Kelly, 79 A.D.3d 406, 409 [1st Dept. 2010]). Moreover, in this matter, Title 9 NYCRR § 133.17(d)(11) mandates an ALJ to conduct a hearing in "accordance with the requirements of due process."

A fundamental principle of due process is notice of the charges. (Matter of Murray v Murphy, 24 NY2d at 157). In an administrative forum an agency must give notice of the charges that is reasonable under the circumstances, so that respondent can prepare an adequate defense. (Matter of Block v. Ambach, 73 NY2d 323, 332 [1989]; Matter of Fitzgerald v. Libous, 44 NY2d 660, 661 [1978]). In New York, courts have found a lack of due process and set aside administrative determinations made after hearings when such determinations were based on information that was not the subject of the notice. (see e.g., Murray v. Murphy, 24 N.Y.2d at 157; Matter of Brown v. Saranac Lake Cent. School Dist., 273 A.D.2d 785 [3rd Dept 2000]; Matter of Collins v. Parishville-Hopkinton Cent. School Dist., 256 A.D.2d 700, 701 [3rd Dept 1998]; Matter of Benson v. Board of Educ. of Washingtonville Cent. School Dist., 183 A.D.2d 996, 997 [3rd Dept. 1992], *lv denied* 80 N.Y.2d 756 [1992]). In Matter of Kiyonaga v. New York State Justice Center for the Protection of People with Special Needs, 204 A.D.3d 1351 [3rd Dept 2022]), the Court of Appeals set aside an administrative disciplinary determination that was based on conduct that was not the subject of the notice of hearing, observing "[t]he first fundamental of due process is notice of the charges made. This principle equally applies to an administrative proceeding for even in that forum no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged" (Id. at 1353, *quoting* Murray v. Murphy, 24 N.Y.2d at 157). In the instant matter, Appellant did lose substantial rights, access to their business premises and seizure of products, for violating the Cannabis Law despite not being provided notice of the date, time, and complete address of the occurrence in the charging document, the NOV, Cease Order, and Order to Seal.

The specificity of the notice of charges required varies from case to case, but it must be specific enough to give actual notice to the party being charged. (Matter of Block v. Ambach, 73 N.Y.2d at 333; Wolfe v. Kelly, 79 A.D.3d at 410). The Appellant correctly asserts that the statement of charges in the NOV was not reasonably specific enough to provide actual notice. While Appellant could infer the location, the date, and the time the inspection occurred, that does not absolve Appellee of its requirement to provide notice with specificity. The law is clear that the purpose of notice is to make the party charged of wrongdoing wholly aware of the specifics of the matter and this burden rests on the charging party. In Rauber v. Village of Wellsville, 83 A.D. 581, 82 N.Y.S. 9 (App. Div. 1903), the court held that a municipality should not be relieved of its notice

requirement because its fatally defective notice had not misled the defendant. In Rauber, the notice served referenced the location of an accident where Plaintiff tripped and fell in a hole on the sidewalk on "Rauber Street" which ran for about a quarter of a mile long through the village. Similarly, in this matter, the NOV failed to provide notice of the time, date, and location of the violation with specificity. The fact that Appellant was not misled or appeared through counsel and participated in the hearing does not relieve the Appellee of the burden of having to meet the minimal due process requirement of providing notice of the date, time, and location of the occurrence.

The ALJ's decision noted the failure of the investigator to include the date and time, but determined the omissions were harmless error. The ALJ reasoned the omissions were harmless error because Appellee's witnesses testified that the inspection occurred on June 26, 2024, and the DTF Referral report indicated both the date and the time of the inspection. However, the record does not contain any evidence that either witness independently testified to or recalled the date of the inspection from memory. The date was contained in the form of the question when each witnessed testified to the inspection. There is no evidence in the record to support a finding that the DTF Referral report, which was relied upon by the ALJ as providing both the date and the time of the inspection, was provided to Appellant, especially, here where the testimony established it was prepared after the inspection. Moreover, Appellee did not move to amend the charges contained in the NOV to include the full address of the business inspected, the date, or the time. Nor did Appellee move to conform the charges to the testimony before summing up and submitting the matter to the ALJ for decision. (Cf. Mandelstam v. McDonald, 229 A.D.3d 912 [3rd Dept. 2024](requirements of due process [in administrative cases] are not as exacting ... as in criminal cases and the governing rule allows an amendment "at any time prior to the submission of the hearing officer's report," provided there is "no substantial prejudice" to the accused); Matter of Roberts v. New York State Bd. for Professional Med. Conduct, 215 A.D.3d 1093, 1097 [3d Dept. 2023]; Matter of Kosich v. New York State Dept. of Health, 49 A.D.3d 980, 982 [3d Dept. 2008], *appeal dismissed* 10 N.Y.3d 950, [2008]).

In addition to the omission of the date and time, on appeal, Appellant has raised a challenge to the omission of a location, with a full street address in the NOV and Order to Seal. The address in the NOV was written as "1263 Saint John." There was no indication whether the address of Appellant's business was Saint John Street, Avenue, Road, or Place. Like the testimony surrounding the date of the inspection, the full street address of the inspection location was not testified to by either witness. Senior Investigator Aurigemma testified on cross-examination to the location being further north in Brooklyn than Bay Ridge. Investigator Lawson merely confirmed the building was on "St. John's Place." Additionally, while the full address was written on

evidentiary exhibits, the DTF records and the affirmation to the business owner, there was no evidence to establish that either of those were provided to Appellant. Senior Investigator Aurigemma testified the DTF report was completed after the inspection and there was no evidence of mailing of the DTF records. The affirmation of mailing to the business owner, submitted through Investigator Lawson, did not indicate anything other than a copy of the Order to Seal was mailed. He ultimately testified he had no personal knowledge as to the mailing and could not speak to something that was done in another office. Besides, the ALJ's decision did not rely on the exhibits for the purpose of establishing the city, state, or zip code of the inspection location and did not otherwise make factual findings as to the location. The omission of these essential elements was not harmless but was a fatal defect.

In the instant appeal, Appellant raises a challenge to jurisdiction and a procedural challenge arguing the insufficiency of the charging document, NOV, Cease Order, and Order to Seal. Appellant timely objected in responsive pleadings and at the hearing. The defense of lack of personal jurisdiction based on improper service is not waived by a party's appearance if the party makes a timely pretrial motion to dismiss for lack of personal jurisdiction. (JP Morgan Chase Bank v. Jacobowitz, 176 A.D.3d 1191, 1193, [2nd Dept. 2019]; U.S. Bank National Association v. Cadoo, 197 A.D.3d 588 [2nd Dept. 2021]; National Loan Invs., L.P. v. Piscitello, 21 A.D.3d 537 [2nd Dept. 2005]). Additionally, the statement of charges in this matter were not specific enough to provide actual notice to Appellant. (Matter of Block v. Ambach, 73 N.Y.2d at 333; Wolfe v. Kelly, 79 A.D.3d at 410).

CONCLUSION

To satisfy minimal due process protections, fair notice of the charges must be provided. The omissions in this matter, date, time, and location, are substantive elements of the charges made by Appellee against Appellant. These omissions resulted in a fatal defect. Appellant was not provided with fair notice of the charges under the law before Appellee took action against their business. Thus, due process of the law necessitates a departure from the ALJ's findings.

Based on the foregoing, Appellant's appeal and the request therein is granted. The decision of the ALJ will not be affirmed. Accordingly, the Order to Seal and Cease Order are vacated, and the violation contained in the NOV is dismissed. This constitutes the final determination of the Board.

DATE: February 14, 2025