

CAUSE NO. D-1-GN-21-006174

SKY MARKETING CORP., DBA	§	IN THE DISTRICT COURT
HOMETOWN HERO	§	126TH, DISTRICT COURT
Plaintiff,	§	
VS.	§	_____ JUDICIAL DISTRICT
	§	
TEXAS DEPARTMENT OF	§	TRAVIS COUNTY, TEXAS
STATE HEALTH SERVICES,	§	
JOHN HELLERSTEDT, in his official	§	
capacity as Commissioner of the Texas	§	
DSHS,	§	
Defendants.	§	

**PLAINTIFF’S ORIGINAL PETITION AND APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND TEMPORARY AND PERMANENT INJUNCTION**

Plaintiff, Sky Marketing Corp., doing business as Hometown Hero (“Hometown Hero” or “HTH”), files this Original Verified Petition against the Texas Department of State Health Services (“DSHS”) and its Commissioner, John Hellerstedt, in his official capacity.

Based on actual knowledge regarding themselves and their own acts and on information and belief regarding other persons and matters, Plaintiff respectfully alleges as follows:

I. Introduction and Nature of the Action

1. This lawsuit seeks a declaration that, with respect to the modified definitions of “*(31) Tetrahydrocannabinols” and “*(58) Marihuana extract” included in the 2021 Schedules of Controlled Substances (the “Schedules”), covertly published as a non-text image in the Texas Register on March 19, 2021, and any subsequent publications of the same (if any), are invalid pursuant to Commissioner Hellerstedt and DSHS’s failure to follow the specific procedures required to make such modifications set forth in Sections 481.034, 481.035, and 481.036 of the Texas Health & Safety Code, including its use of improper grounds to initiate such changes in the first place, its failure to adhere to its own published objection and decision order rejecting

modifications, its failure to properly notify the public of the secret modifications it actually made, and its failure to follow the law with respect to the procedure required for modifying the Schedules in the manner in which it did, including failure to hold a proper public hearing.

2. This lawsuit seeks to enjoin Defendants and any other state or local agency from any enforcement action against any business or individual in possession of any product or substance that meets the definition of “hemp” as defined by Sec. 121.001 of the Texas Agriculture Code, including any tetrahydrocannabinols (“THCs”) in hemp, both of which were expressly removed from being “controlled substances” by the Texas Legislature in 2019.

II. Jurisdiction

3. The damages sought in this suit are within the jurisdictional limits of the Court. As required by Rule 47, Texas Rules of Civil Procedure, Plaintiff states that Plaintiff seeks non-monetary equitable relief only.

III. Venue

4. Venue is proper in this County as the acts giving rise to this suit occurred in whole or in part in Travis County.

IV. Parties

5. Sky Marketing Corporation, doing business as Hometown Hero, Plaintiff, is a Texas Corporation whose address is 11190 Circle Drive, Suite 440, Austin, Texas 78736.

6. Texas Department of State Health Services (“DSHS”), Defendant, is the state agency charged with and responsible for administering, executing, and enforcing the Texas Health and Safety Code. Texas DSHS shall be served through its general counsel, Barbara Klein, at 1100 W 49th Street, Mail Code 1919, Austin, Texas 78756-3101.

7. Defendant John Hellerstedt is the Commissioner of Texas DSHS. He is being sued in his official capacity. He shall be served at 1100 W. 49th Street, Mail Code 1919, Austin, Texas 78756-3101.

8. The Attorney General of the State of Texas, Ken Paxton, shall be served at 209 W. 14th Street, Austin, Texas 78701. *See* Tex. Civ. Prac. & Rem. Code § 37.006.

V. Discovery Control Plan

9. Under Texas Rule of Civil Procedure 190.4, Plaintiff intends to conduct discovery under Level 3 and affirmatively plead this suit is not governed by the expedited actions process under Rule 169 of the Texas Rules of Civil Procedure because Plaintiff seek non-monetary, injunctive relief.

VI. Plaintiff's Property Interest

10. Sky Marketing Corporation, doing business as Hometown Hero, is a Texas Corporation that is located in Travis County, Texas at 11190 Circle Drive, Suite 440, Austin, Texas 78736.

11. Plaintiff also contends that a protected property interests exists in the form of its right to be free from prosecution for what was formerly considered an entirely legal business venture.

VI. Introductory Facts

12. Hemp, or *Cannabis sativa* L., is a plant that has been used for thousands of years and is grown for both industrial and commercial purposes. The plant contains many cannabinoids (including various forms of THCs), terpenes and flavonoids, which are all naturally occurring chemicals in the plant, and several of which are found in a variety of other plants as well.

13. For more than 60 years, hemp was banned in the United States, but in 2014 Congress passed the 2014 Farm Bill which authorized the research of hemp, and under the 2018 Farm Bill, subsequently designated hemp as an ordinary agricultural commodity and removed hemp and

tetrahydrocannabinols in hemp from control under the federal drug control laws, paving the way for the emergence of a new industry nationwide, providing farmers and businesses with vast opportunity to participate and access to countless new products for consumers.

14. To allow this market to flourish, Congress intentionally defined the term “hemp” broadly, allowing every part of the plant, including all of its derivatives, extracts and cannabinoids, growing or not, to be cultivated and processed into industrial and consumable products that would easily move through commerce, intrastate, interstate and even internationally.

15. The plant and every part of it, including processed products, are all deemed “hemp” under the law. The only limitation in the federal definition of hemp was that these plants and products may not exceed 0.3% delta-9 THC, a particular form of THC found in abundance in some species of *Cannabis sativa L.* It is important to note that no other forms of THC are associated with the definition of hemp, as the only form Congress limited was delta-9 THC. All other forms of THC in hemp, including those in hemp products (which are also “hemp”) were simultaneously removed from being deemed controlled substances.

16. Under the 2018 Farm Bill, Congress legalized hemp federally and delegated primary authority over its production to each state that elected to participate, granting extensive power to states to create and manage their local markets, create jobs, and generate revenue. The State of Texas quickly embraced this opportunity.

17. Months after the passage of the 2018 Farm Bill, DSHS accepted the removal of hemp and THC in hemp from being controlled substances and modified the Schedules to mirror the federal action and removed hemp from the definitions of “marihuana” and “tetrahydrocannabinols.”

18. Texas legislators took up more expansive action during the 86th Legislative Session, and on June 10, 2019, Governor Greg Abbott signed into law Texas House Bill 1325 (“H.B. 1325”). H.B. 1325 established a hemp program in Texas and delegated regulatory authority over consumable hemp products to DSHS. H.B. 1325 also formalized by law what DSHS did in the interim – it defined hemp in Texas the same as it was defined federally and removed hemp and THC_s in hemp from the definition of “controlled substances” under the Texas Controlled Substances Act, Chapter 481 of the Texas Health & Safety Code.

19. H.B. 1325 directed the Texas Department of Agriculture (“TDA”) to submit a hemp production plan (the “Texas Hemp Plan”) to the United States Department of Agriculture (“USDA”) for approval and required the Plan to comply with the 2018 Farm Bill as well as the hemp laws it created under Chapter 122 of the Agriculture Code and Chapter 443 of the Health & Safety Code. The Texas Hemp Plan received USDA approval in January 2020, and TDA adopted rules governing hemp production in March 2020 and began issuing producer licenses shortly thereafter. Newly licensed Texas farmers then immediately began planting their first hemp crops.

20. One provision of H.B. 1325, as codified under § 443.051 of the Texas Health & Safety Code, requires the executive commissioner of DSHS to adopt rules and procedures relating to consumable hemp products (“CHPs”) that must be consistent with the USDA-approved Texas Hemp Plan and the 2018 Farm Bill. These rules were adopted by DSHS in August 2020.

21. As a result of the 2018 Farm Bill and the Texas Legislature’s adoption of the new Congressional definitions pursuant to H.B. 1325, an entirely new market for these products emerged, and was able to quickly grow without issue, in Texas. Several thousand Texans have started hemp businesses all across the supply chain, from cultivation to sale, and all areas in

between and ancillary, including processing, manufacturing, distribution, lab testing, packaging, transportation, advertising, consulting, and other professional services, to name just a few. CHPs make up a large portion of the industry in Texas, and DSHS has issued licenses for hundreds of CHP processors and manufacturers, and has registered thousands of CHP retailers since they began a little over a year ago.

22. The definition of hemp and the concept that hemp and THC in hemp have been removed from the Controlled Substances Act and the Schedule of Controlled Substances at both the federal and state level is well settled. All fifty states have since legalized hemp since the passage of the 2018 Farm Bill and the vast majority use the same language in defining hemp as is used under federal law.

23. Hometown Hero is a Texas corporation established in 2015 in Austin, Texas for the purpose of selling and distributing vape products. It expanded into the newly legalized hemp market in 2019.

24. Hometown Hero is operated by CEO Lukas Gilkey, and was established with the idea of helping veterans at the forefront of its mission. Gilkey, himself a Veteran, sees this as his primary motivation in owning and operating Hometown Hero. Hemp products have been shown to alleviate symptoms associated with PTSD, seizures, and chronic pain.

25. After operating legally and consistent with Texas law for several years, Plaintiff and other similarly situated businesses and individuals now find themselves in potential legal jeopardy, and their businesses and livelihood with an uncertain future.

26. On Friday, October 15, 2021, DSHS updated its Consumable Hemp Program webpage to state that H.B. 1325 allows for CHPs that do not exceed 0.3% Delta-9 THC, which is accurate, but then goes on to state that “[a]ll other forms of THC, including Delta-8 in any concentration

and Delta-9 exceeding 0.3%, are considered Schedule I controlled substances.” It then points to a Schedule of Controlled Substances on its website that included modifications to the definition of “tetrahydrocannabinols” and “marihuana extract” that effectively flip the federal and state definition of “hemp” on its head, reversing the impact of the carefully drafted and specific language.

27. Until this website update, businesses and consumers operated under the assumption that hemp and THC in hemp were not controlled substances, with the common understanding based on the law that concentrations of delta-9 THC in excess of 0.3% were illegal. No other forms of THC in hemp were illegal in any concentration, so long as the delta-9 THC levels were compliant. This is clear and unambiguous under the language of both federal and state law, and the hemp industry in Texas has blossomed fruitfully based on this clear language of the law.

28. After extensive investigation into how DSHS could make overnight potential felons out of several thousand businesses and consumers, it was uncovered that DSHS modified the Schedule of Controlled Substances in blatant violation of state law through multiple errors and in a manner that failed to properly notify the public of its significant positional change.

29. Under the Texas Controlled Substances Act, there are only two methods for modifying the Schedule: (1) under Tex. Health & Safety Code § 481.034(a) & (g), if federal law adds, deletes, or reschedules a substance, the commissioner must either do the same or promptly object; or (2) if additions, deletions, rescheduling *or other modifications* to the Schedule are desired by the commissioner, certain procedures must be followed, including the consideration of multiple factors and certain notice and public hearing requirements.

30. DSHS’s actions ignored all procedural and notice requirements as outlined in Section 481.034(b) of the Texas Health & Safety Code, and modified the definitions of

“tetrahydrocannabinols” and “marihuana extract” in a manner that reschedules certain consumable hemp products as Schedule I controlled substances, despite state (and federal) law to the contrary.

31. The practical effect of the actions of DSHS, and its failure to comply with the procedural requirements imposed upon it under the Texas Health & Safety Code, is to deprive individuals and businesses of a property interest without due course of law, and to turn lawful business owners and consumers into potential criminals.

32. In addition to failing to abide by the amendment process as outlined in Sections 481.034, 481.035, and 481.036 of the Texas Health & Safety Code, specifically those concerning hearing and time for objection, the “new definitions” for tetrahydrocannabinols and marihuana extract were buried in the Texas Register in a non-searchable image, thereby failing to provide all concerned parties with the requisite notice, yet again.

33. As a result of the impermissible actions of DSHS, Plaintiff seeks a declaration that the modifications to the definitions of “*(31) Tetrahydrocannabinols” and “*(58) Marihuana extract” included in the 2021 Schedules of Controlled Substances (the “Schedules”), and any subsequent publications of the same (if any), are invalid pursuant to the Commissioner and DSHS’s failure to follow the specific procedures required to make such modifications set forth in Sections 481.034, 481.035, and 481.036 of the Texas Health & Safety Code, including its use of improper grounds to initiate such changes in the first place, its failure to adhere to its own published objection and decision order rejecting modifications, its failure to properly notify the public of the secret modifications it actually made, and its failure to follow the law with respect to the procedure required for modifying the Schedules in the manner in which it did, including failure to hold a proper public hearing. Additionally, Plaintiff asks that the DSHS remove its new

definitions for the terms “tetrahydrocannabinols” and “Marihuana extract” from its Schedule of Controlled Substances and that the State of Texas be immediately enjoined from enforcing any law derived or based on the improperly modified terms, tetrahydrocannabinols and marihuana extract, as currently reflected in the DSHS 2021 Schedules of Controlled Substances.

VII. Background

34. On December 20, 2018, the 2018 Farm Bill was signed into law. The new law defined hemp and also removed hemp and THC's derived from hemp from the list of federally recognized controlled substances.

35. On March 15, 2019, in accordance with Texas Health & Safety Code § 481.034(g), the DSHS removed hemp and THC's in hemp from the list of controlled substances, mirroring the language in the 2018 Farm Bill.

36. On June 10, 2019, H.B. 1325 was passed by the Texas Legislature and signed by Governor Abbott, effective immediately. This law defines hemp using the same definition as contained in the 2018 Farm Bill. As a result, hemp and THC's in hemp were removed from the list of controlled substances via state legislative action.

37. On August 21, 2020, the Drug Enforcement Agency (“DEA”) published its Interim Final Rule (“IFR”) making conforming changes to the definitions of THC and Marihuana Extract, similarly removing hemp (as defined under the 2018 Farm Bill) from the definitions of those substances. The IFR did not designate, reschedule, or delete any substances. The publication reemphasizes that these changes are merely conforming and already in effect pursuant to the 2018 Farm Bill. Indeed, the Rule’s summary reads as follows:

The purpose of this interim final rule is to codify in the Drug Enforcement Administration (DEA) regulations the statutory amendments to the Controlled Substances Act (CSA) made by the Agriculture Improvement Act of 2018 (AIA), regarding the scope of regulatory controls over marihuana, tetrahydrocannabinols,

and other marihuana-related constituents. *This interim final rule merely conforms DEA's regulations to the statutory amendments to the CSA that have already taken effect, and it does not add additional requirements to the regulations.* (emphasis added).

38. On September 18, 2020, Texas DSHS filed a Notice of Objection in the Texas Register objecting to the DEA's modifications, purportedly pursuant to Tex. Health & Safety Code § 481.034(g), and stated its reasoning and that a public hearing would be scheduled to address this topic. However, under Tex. Health & Safety Code § 481.034(g), the only time this subsection (g) is triggered is when federal law *designates, reschedules, or deletes* a substance from being controlled. In those instances, the commissioner has 30 days to object to such modification or otherwise must make similar conforming changes to the Texas Schedule. The Notice of Objection improperly objected to the conforming modifications. Further, no stakeholders in the Texas hemp industry, including those licensed by DSHS, were made aware this objection was filed, and none knew about it.

39. On October 6, 2020, DSHS allegedly held that public hearing over Zoom on its above-referenced objection. This hearing concluded minutes after it began as there were no commenters. The hearing was less than six (6) minutes long and provided no indication of any alternative DSHS-proposed modifications, stating only that DSHS objects to the DEA's modifications. No Texas hemp industry stakeholders were aware of this public hearing prior to, during, or afterwards, until May 18, 2021.

40. On November 17, 2020, Commissioner Hellerstedt signed a "Decision" stating that the two DEA definition modifications were not adopted. At this point, there still had not been any publication of any alternative modifications proposed by DSHS, stating only that DSHS objected to the modification of the definitions, without offering any substantive or scientifically-backed

reasoning.¹ Still, no Texas hemp industry stakeholders were aware of this “Decision” though this memo was allegedly in existence, and it was not shared with any of the hemp license-holders or hemp retail registrants, both of which go through DSHS to obtain such licenses and registrations.

41. On January 29, 2021, a “Decision Order Regarding the Modification of the Definition of Tetrahydrocannabinols in Schedule I of the Schedules of Controlled Substances” was published in the Texas Register. This order was filed under non-rule miscellaneous action and merely reiterates the November 17, 2020 decision of the Commissioner, stating “the modifications of the two definitions above are not adopted.” Again, there were no further details of any alternatively proposed modifications that would apply to any of the definitions subject to these objections.

42. Under § 481.036 of the Tex. Health & Safety Code, within 5 business days of taking any action under Chapter 481, the commissioner is required to publish such changes in the Texas Register, including any changes made since the last publication of the Schedule. On March 19, 2021, almost two months after the above-referenced Decision issued, an image of the Schedule of Controlled Substances was published in the Texas Register for the first time reflecting significant changes to the definitions of “tetrahydrocannabinol” and “marihuana extract.” While most of these documents are published in text-searchable format (e.g., a searchable .pdf), this particular document was only publicized as an image and not searchable via keywords, thus disabling the public’s ability to search for specific text or language within it. As of the date of this filing, one can still not locate this Schedule when searching either the .pdf version or the html version of the Texas Register online under the terms “tetrahydrocannabinol,” “marihuana,” “hemp,” or any other relevant search terms people would use. It is buried 2/3 of the way through

¹ Instead, and without citation to any medical literature addressing the subject, Commissioner Hellerstedt objected “to the extent that the definitions allow for the presence or addition of tetrahydrocannabinols aside from the presence of delta-9-tetrahydrocannabinol[.]” as “[m]ultiple tetrahydrocannabinol isomers and variants may have pharmacological or psychoactive properties.”

the more than 90-page document. Further, the required annual publication of the complete Schedule of Controlled Substances has never before been published as a non-searchable image, ever.

43. Between the publication of the IFR and May 18, 2021, no stakeholders in the Texas hemp industry were aware of the above-referenced actions taking place.

44. On May 18, 2021, during a hearing of the Water, Agriculture & Rural Affairs Committee, 87th Legislative Session, on a bill that included language that would have prohibited certain consumable hemp products that contained forms of THC other than delta-9 THC, a representative from DSHS spoke as a resource witness and discussed the above-referenced Commissioner's objection on the record indicating that DSHS considers Delta-8 to be a marihuana extract. This caught industry stakeholders and some members of the public off guard and prompted further investigation, which ultimately uncovered the Decision Memo from DSHS, which again stated only that the DEA's modifications would not be adopted and did not reveal any other proposed modifications being considered.

45. On May 30, 2021, the 87th Legislative Session came to an end after multiple failed attempts to ban hemp that contained other forms of THC outside of 0.3% delta-9 THC. To be clear, the 87th Legislative Session did not ultimately vote on or pass any legislation that would have banned these consumable hemp products in Texas. Hemp businesses and consumers were under the impression that because attempted legislation had not passed, these products would remain legal.

46. Pursuant to § 481.034(a) of the Tex. Health & Safety Code, the State's annual schedule merely serves to reflect "the complete list of all controlled substances from the previous schedules and modifications in the federal schedules of controlled substances as required by

Subsection (g).” Importantly, the DEA’s IFR made explicit that its “interim final rule merely conforms DEA’s regulations to the statutory amendments to the CSA that have already taken effect, and it does not add additional requirements to the regulations[,]” and therefore did not constitute a new designation, rescheduling, or deletion under federal law that would trigger the Commissioner’s authority to object under § 481.034(g) of the Tex. Health & Safety Code. Texas previously adopted changes to its schedule of controlled substances to conform with the 2018 Farm Bill and State legislature’s subsequent adoption of the same. As a result, the DEA’s IFR could not now be used as the basis to support additional modifications to the Schedule of Controlled Substances as presently published by the DSHS.

47. Instead, if additions, deletions, rescheduling or *other modifications* to the Schedule outside of federal law changes are desired by the commissioner, certain procedures as set forth under § 481.034(a)-(f), and (h), of the Tex. Health & Safety Code must be followed, which never occurred.

48. Over the last two weeks, Zachary Maxwell, the president of an industry association by the name of Texas Hemp Growers, began publicizing that hemp with other forms of THC beyond 0.3% delta-9 THC were illegal in Texas after news outlets reported that a woman was arrested for possession in Bryan, Texas. After prodding DSHS and making multiple social media posts, DSHS subsequently posted information on their website indicating that Delta-8 is illegal in Texas. Although the document purports to be effective 21 days post-publication, there is no indication if or when it was ever actually published. This was only further complicated by the fact that DSHS only published a non-searchable image addressing this subject.²

² See ¶ 42 supra.

49. These recent developments have caught companies that sell hemp-derived products as well as their consumers off guard, immediately turning them into potential felons subject to arrest despite years of engaging in this same business without issue or law enforcement interference, and without having any knowledge of or intention to violate the law.

VIII. Cause of Action

A. Declaratory Judgment

50. The material facts alleged above are incorporated by reference.

51. Plaintiff, as a seller of hemp products, including delta-8 products, is threatened and directly impacted by the DSHS's newly modified Schedule of Controlled Substances, which interferes, impairs, threatens to interfere with or threatens to impair, the legal rights and privileges of Plaintiff, in addition to other similarly situated businesses and consumers in Texas.

52. An administrative agency is a creature of the legislature and only has power expressly provided by statute or necessarily implied to carry out the express powers the Legislature has given it. *See Pub. Util. Comm'n of Tex. v. GTE-Sw., Inc.*, 901 S.W.2d 401, 406 (Tex. 1995).

53. The above-described modification to the State's Schedule of Controlled Substances exceeds DSHS's (and the Commissioner's) authority under H.B. 1325 and the Texas Health & Safety Code. The Legislature expressed no intent to ban the retail sale or distribution of delta-8 products. Indeed, multiple bills were presented before the Texas Legislature proposing to do so presumably because of legislators' knowledge that the industry underlying delta-8 products was continuing to grow in Texas, but all attempts failed. "Ordinarily, the truest manifestation of what legislators intended is what lawmakers enacted, the literal text they voted on." *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006). *See also Russell v. Wendy's*

Int'l, Inc., 219 S.W.3d 629, 636 (Tex. App. – Dallas 2007, no pet.) (“We read every word as if it were deliberately chosen and presume that omitted words were excluded purposefully.”).

54. Moreover, the Commissioner and DSHS’s reference to § 481.034(g) of the Tex. Health & Safety Code is misplaced because the DEA’s IFR did not constitute a designation, rescheduling or deletion of any substance on the federal Schedule of Controlled Substances. Texas’s incorrect reliance on the DEA IFR and § 481.034(g) of the Tex. Health & Safety Code cannot justify its modification to the DSHS Schedule of Controlled Substances as recently published.

55. There exists a genuine controversy between the parties herein that would be terminated by the granting of declaratory judgment. Plaintiff therefore requests that declaratory judgment be entered as follows:

- a. Because the DEA’s August 20, 2020 IFR “merely conforms DEA’s regulations to the statutory amendments to the CSA that have already taken effect, and it does not add additional requirements to the regulations[,]” the Texas rule providing the Commissioner an opportunity to object under § 481.034(g) of the Tex. Health & Safety Code does not apply to the DSHS’s actions modifying the terms tetrahydrocannabinols and marihuana extract within the Schedule of Controlled Substances as reflected in its March 19, 2021 annual publication of the same.
- b. Because § 481.034(g) of the Tex. Health & Safety Code did not apply as outlined above, Commissioner Hellerstedt was statutorily required to “hold[] a public hearing on the matter in Austin and obtain[] approval from the executive commissioner” in accordance with § 481.034(b) of the Tex. Health & Safety Code before the DSHS implemented significant modifications to the terms tetrahydrocannabinols and marihuana extract in the DSHS annual Schedule of Controlled Substances.
- c. Prior to modifying the DSHS Schedule of Controlled Substances as outlined above, Commissioner Hellerstedt was statutorily obligated to comply with the rules underlying § 481.034(d)³ of the Tex. Health & Safety Code.

³ “In making a determination regarding a substance, the commissioner shall consider: (1) the actual or relative potential for its abuse; (2) the scientific evidence of its pharmacological effect, if known; (3) the state of current scientific knowledge regarding the substance; (4) the history and current pattern of its abuse; (5) the scope, duration, and significance of its abuse; (6) the risk to the public health; (7) the potential of the substance to produce psychological or physiological dependence liability; and (8) whether the substance is a controlled substance analogue, chemical

- d. Commissioner Hellerstedt’s “Decision Order Regarding the Modification of the Definition of Tetrahydrocannabinols in Schedule I of the Schedules of Controlled Substances” failed to comply with the requirements underlying §§ 481.034(d) and (e) of the Tex. Health & Safety Code and is thus insufficient to enact the recent modifications to the terms tetrahydrocannabinols and marihuana extract as recently published by the DSHS in its annual Schedule of Controlled Substances.⁴
- e. Prior to rendering the modifications related to tetrahydrocannabinols and marihuana extract of the DSHS Schedule of Controlled Substances, Commissioner Hellerstedt failed to provide “written notice of that action to the director and to each state licensing agency having jurisdiction over practitioners[]” in conformity with § 481.034(h) of the Tex. Health & Safety Code.
- f. Prior to modifying the DSHS Schedule of Controlled Substances, the DSHS and/or Commissioner Hellerstedt failed to issue determinations in accordance with § 481.034(a)(1)-(2) of the Tex. Health & Safety Code.⁵
- g. Commissioner Hellerstedt’s failure to comply with § 481.034(b) prior to modifying the terms tetrahydrocannabinol and marihuana extract in the DSHS Schedule of Controlled Substances was *ultra vires*.
- h. The Commissioner and DSHS’s failure to abide by the express written provisions contained within Chapter 481 of the Texas Health & Safety Code as outlined above render the DSHS’s recent modification of the terms, tetrahydrocannabinols and marihuana extract, in its annual Schedule of Controlled Substances null, void, and unenforceable as a matter of law.

IX. Application for Temporary Restraining Order

56. In light of the above-described facts, Plaintiff seeks injunctive relief from criminal and administrative enforcement derived from the DSHS Modified Schedule of Controlled

precursor, or an immediate precursor of a substance controlled under this chapter.” Tex. Health & Safety Code § 481.034(d).

⁴ The March 19, 2021 Schedule of Controlled Substances published by DSHS purports to serve as the State’s annual publication pursuant to § 481.034(a) of the Tex. Health & Safety Code.

⁵ “The commissioner shall place a substance in Schedule I *if* the commissioner finds that the substance: (1) has a high potential for abuse; and (2) has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.” Tex. Health & Safety Code §§ 481.0345(a)(1)-(2) (emphasis added).

Substances, specifically as it pertains to its revisions to (31) tetrahydrocannabinols and (58) marihuana extract.

57. Plaintiff's application for a specific temporary restraining order is statutorily authorized pursuant to § 65.011 of the Texas Civil Practice and Remedies Code.

58. Plaintiff is likely to recover from Defendants after a trial on the merits because Defendants failed to provide proper notice to affected businesses, like Plaintiff, as well as the State agencies involved in violation of § 481.034(b) of the Texas Health & Safety Code.

59. If this Court does not grant this request to restrain the Defendants, the Plaintiff will suffer imminent and irreparable harm in that law enforcement may continue to arrest and charge persons with felonies in accordance with the improper modifications to the terms "tetrahydrocannabinols" and "marihuana extract" in the DSHS Schedule of Controlled Substances. Furthermore, such enforcement will effectively ban Plaintiff from conducting further business related to its sale of certain legal hemp products.

60. Furthermore, Plaintiff cannot adequately be compensated in damages because there is no monetary relief that can be obtained from Defendants to compensate Plaintiff for the disruption to its business, costs incurred, and being subject to potential criminal liability. *See Combs v. Entm't Publications, Inc.*, 292 S.W.3d 712, 724 (Tex. App. – Austin 2009, no pet.).

61. Plaintiff has no adequate remedy at law because Defendants' failure to comply with the express terms underlying §§ 481.034, 481.035, and 481.036 of the Texas Health & Safety Code, in addition to the State's failure to issue findings in accordance with § 481.034(d) of the Texas Health & Safety Code, effectively deprived Plaintiff from receiving proper notice and an opportunity to be heard on the subject and further failed to adequately consider whether certain hemp-derived products truly warrant placement on the Schedule I list of controlled substances.

62. Defendants are state entities or state officers with no pecuniary interest in this suit and no monetary damages that would result from a temporary injunction.

63. There is insufficient time to serve notice on Defendants and to hold a hearing on this petition and application because arrests have already been made and continue to be made pursuant to the DSHS's improper modification of the terms "tetrahydrocannabinol" and "marihuana extract" in its Schedule of Controlled Substances, effectively designating delta-8 products under the list of Schedule I controlled substances.

64. The threat of immediate and irreparable injury to Plaintiff substantially outweighs the harm, if any, that the DSHS or Texas would suffer from having to forestall criminal enforcement derived from its modification of the Schedule of Controlled Substances, pending disposition of this action.

65. Plaintiff has no adequate remedy at law. Complying with the DSHS's new interpretation of federal and state rules will not only cause a significant loss of revenue and incur unrecoverable costs, but defying the rule subjects Plaintiff – and all other Texas manufacturers, processors, distributors, retailers, and consumers of certain hemp or hemp-derived products – to fines, felony charges, and possible shut down by the DSHS or state or local law enforcement. Defying such rules further risks Plaintiff being denied the manufacturing, distribution, or retail licenses and/or registrations from DSHS that are required in Texas.

66. Therefore, Plaintiff requests the Court enjoin enforcement of any criminal, civil, or administrative laws or regulations based or reliant upon the DSHS modified schedule of controlled substances, specifically its modification of the terms, tetrahydrocannabinols and marihuana extract, until a hearing on a motion for temporary injunction can be held.

X. Bond

67. Given the facts of this case, Plaintiff asks the Court to order that no bond is necessary. However, if the Court orders a bond is necessary, Plaintiff is willing to post a reasonable bond for the temporary restraining order and requests the Court to set the reasonable bond.

XI. Request for Temporary Injunction

68. Plaintiff further asks the Court to set this application for temporary injunction for hearing and to issue a temporary injunction against Defendant after hearing.

XII. Request for Permanent Injunction

69. Plaintiff further asks the Court to grant a permanent injunction against Defendants after a trial on the merits.

XIV. Conditions Precedent/Administrative Remedies Exhausted

70. Plaintiff confirms that all conditions precedent to Plaintiff's claim for relief have been performed or have occurred.

XV. Attorney's Fees

71. Pursuant to § 37.009 of the Texas Civil Practice and Remedies Code and Section 245.006 of the Texas Local Government Code, request is made for all costs and reasonable and necessary attorney's fees incurred by Plaintiff herein, as the Court deems equitable and just.

XVI. Prayer

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that:

- a. The Court cite Defendants to appear and answer herein;
- b. The Court grant declaratory judgment, and Plaintiff be awarded costs and reasonable and necessary attorney's fees, as outlined above;

- c. A temporary restraining order issue enjoining enforcement of any criminal law based or derived from the DSHS's modification of the terms tetrahydrocannabinols and marihuana extract in its March 19, 2021 Schedule of Controlled Substances;
- d. After notice and hearing, a temporary injunction issue enjoining Defendants in the manner outlined above;
- e. After a trial on the merits, a permanent injunction issue enjoining Defendants from further enforcement in connection with the DSHS modifications of the terms tetrahydrocannabinols and marihuana extract to its Schedule of Controlled Substances;
- f. The Court order no bond is required, or in the alternative set a reasonable bond for the temporary injunction;
- g. The Court award Plaintiff's costs and reasonable and necessary attorney's fees; and
- h. For such other and further relief, in law or in equity, to which Plaintiff may be justly entitled.

Respectfully submitted,
DAVID K. SERGI AND ASSOCIATES, P.C.
/s/ David Sergi _____
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Tel. (512) 392-5010
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COUNSEL FOR PLAINTIFF

CAUSE NO. _____

SKY MARKETING CORP., DBA
HOMETOWN HERO,

§
§

IN THE DISTRICT COURT

Plaintiff,

§

VS.

§

____ JUDICIAL DISTRICT

§

TEXAS DEPARTMENT OF
STATE HEALTH SERVICES,
JOHN HELLERSTEDT, in his official
capacity as Commissioner of the Texas
DSHS,

§

TRAVIS COUNTY, TEXAS

§

§

§

§

Defendants.

§

PLAINTIFF'S VERIFICATION

STATE OF OKLAHOMA

§

§

COUNTY OF Pottawatomie

§

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared the person known by me to be Lukas Gilkey, who, after being by me duly sworn, testified as follows:

“My name is Lukas Gilkey, I am over 18 years of age, and I am the Chief Executive Officer of Sky Marketing Corporation doing business as Hometown Hero. I am competent to testify to these matters. I have personal knowledge of all facts stated in the foregoing Petition and all such facts are true and correct.”

Lukas Gilkey
Lukas Gilkey Chief Executive Officer
Sky Marketing Corporation, Affiant

SUBSCRIBED AND SWORN TO before me on OCT 20, 2021.

K. CATER 6-25-2024
Notary Public

