FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

CASE NO. D-101-CV-2011-01127

BIOMED PRESCRIPTIONS, EVERGREEN, GLIDDEN AGRICULTURE, LA ISLA, NEW MEXICO MEDICAL HORTICULTURE, MEDICAL MARIJUANA, NATURE'S BEST, NEW MEXICO SUNSHINE, ORGANIZATION FOR ALTERNATIVE TREATMENT INFORMATION, SUMMIT RX, and VEGGIES,

Plaintiffs,

vs.

STATE OF NEW MEXICO, NEW MEXICO DEPARTMENT OF HEALTH, CATHERINE TORRES, Secretary, and WALLY VETTE, Deputy Secretary,

Defendants,

SECOND AMENDED COMPLAINT FOR VIOLATION OF CONSTITUTIONAL RIGHTS, BREACH OF CONTRACT, REQUEST FOR DECLARATORY JUDGMENT, AND PETITION FOR WRIT OF CERTIORARI

COME NOW PLAINTIFFS, applicants to become New Mexico licensed producers and distributers of medical cannabis, and present their Second Amended Complaint, clarifying the factual basis for due process and equal protection claims and incorporating a Petition for Certiorari to the Department of Health, stating as grounds:

I. PARTIES AND JURISDICTION

1. Plaintiffs are New Mexico Nonprofit Corporations that submitted formal applications to become licensed producers and distributors of medical cannabis.

2. Defendants are the State of New Mexico, The New Mexico Department of Health ("DOH"), Catherine Torres, Secretary, and Wally Vette, former Deputy Secretary. Catherine Torres and Wally Vette are sued in their official and individual capacities.

3. Jurisdiction over this matter is found in the original jurisdiction of the court as provided by Article VI, Section 13 of the New Mexico Constitution; Plaintiffs also bring their claims under 42 U.S.C. Sec. 1983; the New Mexico Declaratory Judgment Act, Sec. 44-6-1 to 44-6-15, NMSA, and the laws and constitutions of the United States and the State of New Mexico. Petitioners' Petition for Certiorari invokes the Court's appellate jurisdiction.

II. NEW MEXICO LAW

4. In 2007 the New Mexico Legislature enacted the Lynn and Erin Compassionate Use Act, §26-2B-1, et seq., NMSA, with the express purpose in §26-2B-2, "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments."

5. In order to carry out the beneficial purposes of the Act the Legislature intended that program participants needing medical cannabis would have a legal source of medicinal quality cannabis. Qualified patients could be licensed to grow it themselves, or they could purchase it from a "licensed producer."

6. The Act provides that a "licensed producer" is:

> *any person or association of persons* within New Mexico that the departnent determines to be qualified to produce, possess, distribute and dispense cannabis pursuant to the Lynn and Erin Compassionate Use Act and that is licensed by the department.

§26-2B-3(D), NMSA.

III. FACTS

7. Starting in 2009, the New Mexico DOH-MCP began licensing cannabis producers and by December 31, 2010, DOH had licensed 25 producers.

8. At the time of its initial promulgation of rules the Hearing Officer for DOH recommended a selection process that accepted all qualified producer applications under guidelines and requirements created by the DOH.

9. Instead, DOH promulgated rules vesting discretion in the Department Secretary to decide when, how many, and which applicants to select for licensing. The rules also limited the number of plants and limited and restricted other aspects of cannabis production and distribution.

10. More than 100 applicants have applied to be licensed producers.

11. In order to be considered for a license, an applicant must provide extensive documentation as set forth in §7.44.4.10 NMAC, meet numerous other requirements in the rules, and incur substantial expense to prepare the application for a license.

12. DOH application requirements mandated disclosure of the applicants' present and future plans; business and trade secrets; proprietary information; private and confidential data, policies, procedures and related materials; plus a "business plan showing how the private entity will fund operations during the first two years of licensing, including funding sources."

13. To start the application process, a New Mexico nonprofit corporation must be formed as the applicant entity and a board of directors must be identified and organized.

14. Plaintiffs have invested extensive time, effort, and resources in order to create applications consistent with DOH requirements as well as the potential ability to maintain and operate viable businesses capable of growing and distributing medical cannabis to qualified patients in New Mexico.

15. Following the checklist and format provided by the Department of Health, Plaintiffs submitted applications that were either received as submitted or, more generally, sent back one or more time for supplementation or modification.

16. All the Plaintiffs except La Isla and Evergreen completed applications that the Department of Health deemed complete.

17. With respect to the criteria identified by the Department of Health, the applications submitted by Plaintiffs were at least equivalent to and in many cases superior to the applications that previously resulted in issuance of licenses.

18. When the administration of Governor Martinez took office, Dr. Catherine Torres was selected and appointed Secretary of the Department of Health. At that time the selection criteria for the previously licensed producers were uncertain.

19. Plaintiffs filed their claims in this case on April 1, 2011. By that time the DOH was not acting to reject or accept any of the old applications and was not receiving any new applications.

20. At a mandatory, court-ordered settlement conference in this case, on January 23, 2012, Secretary Torres agreed to review the applications of the initial six plain-

tiffs and either accept or reject those applications, giving "specific reasons" for any rejected applications.

21. Secretary Torres implemented a "rating system" for rating applications. The was applied to *all* pending applications, with the reported result that only four were "approved" and 98 were "rejected because they purportedly did not meet the Department of Health's "criteria."

22. Defendants Torres and Vette "decided" to set the "passing" score at 75%. They did that so they could have a few accepted applicants in case they were needed at a later date.

23. No reasons or explanation was given for the rejections and Defendants have not announced any new rules, standards or qualifications for the licenses.

24. With respect to the 25 applicants who received licenses prior to January 1, 2011, Defendants had not established or enunciated any standards, qualifications, or other way of rating the applications, and the selections are at best arbitrary.

25. Prior to the agreement to provide reasons for rejected applications, DOH had not established or published any specific ratings, processes, or practices for evaluations of applications nor had it established or published any objective standards for determining ratings and evaluating the relative qualification of applicants.

26. Prior to February 29, 2012, no applicant had ever been rejected for licensing, and applicants who were simply *not approved* had not been informed of any reason for their non-selection.

27. On February 29, 2012, Secretary Torres personally hand-delivered the letters accepting 4 and rejecting 98 of the applicants to Plaintiffs' counsel. Of the six initial

Plaintiffs, five were rejected and one was accepted. None of the plaintiffs was given any explanation for the rejections.

28. New Mexico Medical Horticulture submitted a carefully drafted application; by her letter on February 29, 2012, Secretary Torress informed New Mexico Horticulture by letter that its application was rejected; no explanation was given for the rejection.

29. Plaintiff Nature's Best Inc., submitted its application in the fall of 2010. The application was corrected consistent with DOH instructions and resubmitted to the Department. The application was rejected on February 28, 2012. No reason was given for the rejection.

30. Plaintiff Summit Rx Inc. submitted an application in the fall of 2010 using language and proposals that were almost identical to previously accepted and licensed applications; the application was corrected and resubmitted; Department staff informed Summit Rx that their application was approved on December 22, 2010 and sent to Secretary Vigil noting approval. Secretary Torres rejected Summit Rx's application without explanation.

31. Plaintiff Evergreen submitted its application in the fall of 2011. At that time, the DOH did not have a "checklist" available for use by the applicant. Applicant's attorney created a checklist and submitted the application along with a $1000.00 check that was cashed by the Department. Secretary Torres denied Evergreen Inc.'s application on February 28, 2012 without any explanation.

32. Plaintiff La Isla submitted its application in April of 2012. The application was received by the Department and returned with a letter stating the Department was not accepting any more applications at this time.

33. By its rules, DOH has denied any recourse to applicants:

> An applicant whose initial application for a producer license was for any reason not approved by the secretary (rather than the program manager or designee) shall not be entitled to further review by the department, but may reapply at a later date.

§7.34.4.12(B).

34. Defendants have granted licenses to some applicants and have not approved other equally or more qualified applicants.

35. At the same time the Defendants purported to rate the entire applicant pool of over one hundred applicants, they also "determined" that the supply of medical marijuana was sufficient to meet patient needs in the "foreseeable future."

36. Defendants' evaluation of sufficiency of supply and the conclusion that patient needs were being met was arbitrary and without any reasonable basis in fact.

37. Without public notice or actual notice to the applicants, Defendants have established policies related to the applicants and applications that are inconsistent and with a meritorious selection process and not in conformance with the due process rights of the applicants. For example, DOH established a policy of putting any amended or supplemented applications "at the bottom of the pile." In addition, Defendants have arbitrarily determined when they would or would not receive applications and application fees.

38. Secretary Torres and former Deputy Secretary Vette knew or should have known that their actions with respect to the rating and selection of applicants were in violation of the constitutional rights of Plaintiffs and that the law was clear and established.

39. Plaintiffs seek declaratory, injunctive, and compensatory relief.

WHEREFORE, Plaintiffs state the following causes of action and claims:

COUNT 1

DUE PROCESS AND EQUAL PROTECTION

40. Each and every allegation is incorporated as if fully set out herein.

41. Plaintiffs and their officers and directors are entities and persons that have a property interest in their applications such that they are entitled to be treated fairly, objectively, and in a manner that preserves and advances the public's interest and the Plaintiffs' interest in effectuating the Compassionate Use Act.

42. The Fifth and Fourteenth Amendment to the United States Constitution provide that Plaintiffs are entitled to due process and equal protection of the laws.

43. The people of New Mexico, through their legislators, have enacted a statute that provides for the compassionate use of marijuana grown by "individuals or associations of individuals within New Mexico that the department determines to be qualified to produce, possess, distribute and dispense cannabis."

44. By failing to establish standards and procedures for evaluating applications consistent with the Lynn and Erin Compassionate Use Act and failing to apply such procedures in a timely and objective manner, Defendants have unreasonably denied due process and equal protection of law to qualified applicants and the patients they would be serving.

45. By developing an arbitrary and inconsistent "rating" system for applications without referring to the prior experiences of the previously approved and licensed applicants and by rejecting all but four of 102 previously completed applications, Defendants violated Plaintiffs' rights to due process and equal protection of law.

46. By arbitrarily creating limits on the number of producers that will be licensed and by limiting the production capabilities of producers, Defendants have acted contrary to the Compassionate Use Act and in violation of the due process rights of patients, producers, and applicants.

47. Secretary Torres and Wally Vette acted in their individual capacities when they developed and applied a "system" for rating applicants that was arbitrary, irrational and without any valid standards or other basis for qualification. At the time they acted they knew or should have known they were acting in violation of Plaintiffs' constitutional rights.

48. Under the facts and circumstances in this case, Plaintiffs state claims for both substantive and procedural due process and equal protection violations.

49. Defendants are liable to Plaintiffs for damages resulting from the denial of their rights to due process and equal protection of the law in amounts to be determined at trial.

COUNT 2

BREACH OF CONTRACT AND DUTY OF GOOD FAITH

50. Each and every allegation is incorporated as if fully set out herein.

51. Plaintiffs have a reasonable expectation that they and their applications will be treated fairly and that the applications would be judged on the basis of the merit of the application, rather than some random, arbitrary, or biased determination.

52. Secretary Torres signed a written agreement promising to review the applications of the six initial Plaintiffs and either "accept" or "reject" those applications, giving "specific reasons" for any rejected applications.

53. Dr. Torres and Mr. Vette purported to rate all 102 applicants and only "accepted" four of the applicants, "rejecting" 98 applicants. No reasons were given for any of the rejections.

54. Defendants, including Catherine Torres and Wally Vette breached their agreement by failing to give any reasons for the application determinations.

55. Defendants, including Dr. Torres and Mr. Vette, also breached their duty of good faith and fair dealing by their conduct described herein.

56. Plaintiffs are entitled to damages for breach of contract and the duty of good faith in an amount to be determined at trial.

COUNT 3

PETITION FOR WRIT OF CERTIORARI

57. Each and every allegation is incorporated as if fully set out herein.

58. Plaintiff New Mexico Medical Horticulture and the six initial Plaintiffs filed Petitions for Certiorari pursuant to Rule 1-075 of the New Mexico Rules of Civil Procedure to challenge the State's arbitrary "rating" system on behalf of other similarly situated persons and entities.

59. The denial of Petitioners' applications without reference to processes, practices, or standards for evaluations of applications and without established objective standards for rating and evaluating the qualifications of applicants was arbitrary and capricious.

60. The rejection of Petitioners' applications was unaccompanied by process and was not supported by any evidence in the record.

61. Petitioners request that the Court issue its Writ of Certiorari, receive and review the record, and reverse the DOH's rejection of Petitioners' applications.

COUNT 4

DECLARATORY JUDGMENT

62. Each and every preceding allegation is incorporated herein.

63. The issues in this case are novel and of substantial importance to the patients and the public, as well as to the applicants for licensing and the Cannabis Program itself.

64. The licensing of applicants to become licensed cannabis producers raises issues and concerns about the rights and obligations of the parties and the role of both State and Federal law which require determination and clarification by the Court.

65. Included in the issues that are ripe for a declaratory judgment are the issues of due process rights and constitutional matters which are disputed and of substantial concern to Plaintiffs and the public.

66. The New Mexico Declaratory Judgment Act, Sec. 44-6-1 to 44-6-15, NMSA, permits the court “to settle and to afford relief from uncertainty and insecurity

with respect to rights, status and other legal relations, and is to be liberally construed and administered." Sec. 44-6-14, NMSA.

67. The denial of due process to applicants is a matter of substantial public concern and importance; the controversy involves the rights and legal relations of the parties seeking declaratory relief; the interests of the parties are real and adverse, and the issues are ripe for judicial determination.

68. Denial of equal protection of the laws to the Plaintiffs by an agency of the State of New Mexico is likewise a matter of grave public concern requiring immediate action to remedy this abuse of power and discriminatory treatment.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request the Court grant the following relief:

A. Declaratory, injunctive and compensatory relief for violations of the right to due process and equal protection of law;

B. Relief for breach of contract and duty of good faith;

C. Declaratory relief pursuant to the Declaratory Judgment Act;

D. Nominal, exemplary, and punitive damages;

E. Reasonable costs and attorneys' fees as provided by law;

F. Such other and further relief as the Court deems just.

Respectfully submitted,

s/ Paul Livingston

Paul Livingston
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I hereby certify that I filed the
foregoing electronically and
I concurrently sent a copy by
e-mail attachment to all counsel
on November 13, 2012.

s/ Paul Livingston

_____

Paul Livingston

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

CASE NO. D-101-CV-2011-01127

BIOMED PRESCRIPTIONS, et al.,

Plaintiffs,

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STATE OF NEW MEXICO, et al.,

Defendants,

REQUEST FOR TRIAL BY JURY OF 6 PERSONS

Plaintiffs hereby request trial by a jury of six persons of all matters that may properly be decided by a jury.

Respectfully submitted,

s/ Paul Livingston

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I hereby certify that I sent a copy of the foregoing by e-mail attachment to all counsel on November 13, 2012.

s/ Paul Livingston

Paul Livingston