

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

**ENDORSED**  
First Judicial District Court

APR - 1 2011

Santa Fe, Rio Arriba &  
Los Alamos Counties  
PO Box 2268  
Santa Fe, NM 87504-2268



**BIOMED PRESCRIPTIONS, INC.,  
GLIDDEN AGRICULTURE, INC.,  
MEDICAL MARIJUANA, INC.,  
NEW MEXICO SUNSHINE, INC.,  
ORGANIZATION FOR ALTERNATIVE  
TREATMENT INFORMATION, INC.,  
VEGGIES, INC.,  
and  
A CLASS OF SIMILARLY SITUATED APPLICANTS**

**Plaintiffs,**

**vs.**

**STATE OF NEW MEXICO ,  
GOVERNOR SUSANA MARTINEZ,  
NEW MEXICO DEPARTMENT OF HEALTH,  
CATHERINE TORRES, Secretary,  
ALFREDO VIGIL, Former Secretary,  
and DOMINICK ZURLO,**

**Defendants,**

B20101-CV-2011-1127

**CLASS ACTION COMPLAINT FOR  
VIOLATION OF CONSTITUTIONAL RIGHTS**

APPLICANTS to become New Mexico Licensed Producers and Distributors of medical cannabis present the following complaint:

**I. PARTIES AND JURISDICTION**

1. Plaintiffs are Biomed Prescriptions, Inc.; Glidden Agriculture, Inc.; Medical Marijuana, Inc.; New Mexico Sunshine, Inc.; Organization for Alternative Treatment Information, Inc.; and Veggies, Inc., all of which are New Mexico Nonprofit Corporations and applicants to become licensed producers and distributors of medical cannabis and a class of similarly situated applicants.

2. Defendants are the State of New Mexico, Governor Susana Martinez, The New Mexico Department of Health (“DOH”), Catherine Torres, Secretary, Alfredo Vigil, former Secretary, and Dominick Zurlo, Harm Reduction Manager and Acting Director of the Medical Cannabis Program (“MCP”).

3. Pursuant to statute, the New Mexico Department of Health oversees and operates the New Mexico Medical Cannabis Program. The former and present Secretaries of the Department of Health have held sole and exclusive decision-making authority over the applicants and their applications. Dominick Zurlo is the State administrator who is responsible for the day-to-day operations of the DOH-MCP. Mr. Zurlo is generally believed to be the person who selects or recommends applicants for licensing.

4. Jurisdiction over this matter is found in the federal question jurisdiction of the court; Plaintiffs 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.

## **II. NEW MEXICO LAW**

5. 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."

6. 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.”

7. The Act provides that a “licensed producer” is:

*any person or association of persons* within New Mexico that the department 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

8. Starting in 2009, the New Mexico DOH-MCP began licensing cannabis producers and by December 30, 2010, DOH had licensed 25 producers.

9. 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.

10. Instead, DOH promulgated rules vesting absolute discretion in the Department Secretary to decide when, how many, and which applicants to select for licensing.

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

12. 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.

13. DOH application requirements mandate disclosure of virtually every aspect 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."

14. To even start the application process, the individuals involved must form a New Mexico nonprofit corporation as the applicant entity, organize a board of directors, and arrange to form, manage, and operate a business at substantial cost and risk to the entrepreneurs.

15. Preparing an application package is an expensive process involving legal and accounting expenses in addition to the expenses associated with preparing the various policies, procedures, and training materials, plus a non-refundable application fee of \$1,000.

16. 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.

17. DOH has granted itself unlimited discretion to examine, investigate, and use the information the applicants are required to submit.

18. DOH has not established or published any specific ratings, processes, or practices for evaluations of applications nor has it established or published any objective standards for determining ratings and evaluating the relative qualification of applications.

19. No applicant has ever been rejected for licensing, and applicants who are *not approved* have not been informed of any reason for their non-selection.

20. 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)

21. DOH grants licenses to some applicants and chooses not to approve other equally or more qualified applicants.

22. Without public notice or actual notice to the applicants, DOH has established from time to time "cut-off" dates such that applications received after that arbitrary date would not be reviewed for an extended period.

23. Plaintiffs seek declaratory, injunctive, compensatory, and class action relief.

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

**COUNT 1  
FOURTEENTH AMENDMENT VIOLATIONS**

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

25. 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 interest in effectuating the Compassionate Use Act.

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

27. 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.”

28. 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.

29. 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  
CLASS ACTION**

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

31. Plaintiffs bring this action pursuant to Rule 1-023 of the New Mexico Rules of Civil Procedure on behalf of other similarly situated persons and entities.

32. The class that Plaintiffs seek to represent in this action consists of applicants for the cannabis producers' license who have not been approved for the license.

33. The class is so numerous that joinder of all members of the class is impractical and there are questions of law and fact common to the class.

34. Defendants have acted or refused to act and will continue to act or refuse to act on grounds generally applicable to the class, thereby making injunctive and declaratory relief appropriate with respect to the class as a whole.

35. Questions of law and fact common to the members of the class predominate over any questions affecting only an individual member or members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy in this case.

36. The claims of the named-Plaintiffs are typical of the claims of the class and Plaintiffs and their attorney will competently and zealously represent the interests of the class.

**COUNT 3  
DECLARATORY JUDGMENT**

37. Each and every preceding allegation is incorporated herein.

38. The treatment of applicants to become licensed cannabis producers raises issues and concerns about the rights and obligations of the parties which require determination and clarification by the Court.

39. 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.

40. 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.

41. 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.

42. 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 Fourteenth Amendment to the United States Constitution;
- B. Certification of a class of similarly situated applicants;
- C. Declaratory relief pursuant to the Declaratory Judgment Act;
- D. Such other and further relief as the Court deems just;
- E. Reasonable costs and attorneys' fees as provided by law.

Respectfully submitted,



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