

FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

RV

BIOMED PRESCRIPTIONS, EVERGREEN,
GLIDDEN AGRICULTURE, LA ISLA,
MEDICAL MARIJUANA, NEW MEXICO
MEDICAL HORTICULTURE, NATURE'S BEST,
NEW MEXICO SUNSHINE, ORG. FOR
ALTERNATIVE TREATMENT INFO,
SUMMIT RX, and VEGGIES
and
A CLASS OF SIMILARLY SITUATED APPLICANTS,

Plaintiffs,

No. D-101-CV-2011-01127

v.

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

Defendants,

and

BIOMED PRESCRIPTIONS, INC.,
GLIDDEN AGRICULTURE, INC.,
MEDICAL MARIJUANA, INC.,
NEW MEXICO SUNSHINE, INC.,
ORGANIZATION FOR ALTERNATIVE
TREATMENT INFORMATION, INC.,
and VEGGIES, INC,

Petitioners,

No. D-101-CV-2011-01127

v.

STATE OF NEW MEXICO,
NEW MEXICO DEPARTMENT OF HEALTH,
CATHERINE TORRES, Department Secretary,

Respondents,

and

NEW MEXICO MEDICAL HORTICULTURE, INC.,

Petitioner,

v.

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

Respondents.

**DEFENDANTS' STATE OF NEW MEXICO
AND NEW MEXICO DEPARTMENT OF HEALTH'S
ANSWER TO FIRST AMENDED AND SUPPLEMENTED COMPLAINT
FOR VIOLATION OF CONSTITUTIONAL RIGHTS,
BREACH OF CONTRACT AND REQUEST FOR DECLARATORY JUDGMENT**

COME NOW Defendants, the State of New Mexico and the New Mexico Department of Health, by and through their counsel of record, Civerolo, Gralow, Hill & Curtis, A Professional Association, (Megan Day Hill, Esq.) and hereby submit their Answer to Plaintiffs' First Amended and Supplemented Complaint for Violation of Constitutional Rights, Breach of Contract and Request for Declaratory Judgment ("Plaintiffs' Complaint") and state as follows:

1. Defendants State of New Mexico and New Mexico Department of Health admit that Biomed Prescriptions, Inc., Glidden Agriculture, Inc., Medical Marijuana, Inc., New Mexico Sunshine, Inc., Organization for Alternative Treatment Information, Inc., and Veggies, Inc., all previously applied to become licensed producers and distributors of medical cannabis. Defendants State of New Mexico and New Mexico Department of Health cannot state whether or not these Plaintiffs are still viable non-profit corporations and point out that Plaintiffs have recently changed the caption and are pursuing their causes of action under different names than

in the Class Action Complaint. With respect to the remainder of the allegations contained in Paragraph 1 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health deny that there are any pending applications and so deny those allegations.

2. Defendants State of New Mexico and New Mexico Department of Health admit the allegations in Paragraph 2 of Plaintiffs' Complaint, but deny that these Plaintiffs were timely named or properly added.

3. Defendants State of New Mexico and New Mexico Department of Health deny the allegations contained in Paragraph 3 of Plaintiffs' Complaint.

4. Defendants State of New Mexico and New Mexico Department of Health admit the allegations in Paragraph 4 of Plaintiffs' Complaint, but allege that the individually named Defendants were named in violation of this Court's Order. (*See* Order Granting Defendants' Motion to Dismiss Based on Qualified Immunity, filed on December 11, 2011). Defendants State of New Mexico and New Mexico Department of Health further state that the individually named Defendants are immune from suit based on the doctrine of qualified immunity and the law of the case.

5. With respect to the allegations contained in Paragraph 5 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health agree that they entered into a written understanding with some of the parties to this lawsuit. That written understanding, although not attached to Plaintiffs' Complaint, is in writing and these answering Defendants reject Plaintiffs' characterization of the agreement.

6. With respect to Paragraph 6 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health admit that the Department implemented a scoring system and scored all the pending producer applications. Defendants State of New Mexico and New Mexico Department of Health deny all the remaining allegations in Paragraph 6 of Plaintiffs'

Complaint. These answering Defendants further point out that no “blank form” was attached to Plaintiffs’ Complaint, as referenced.

7. Defendants State of New Mexico and New Mexico Department of Health deny the allegations contained in Paragraph 7 of Plaintiffs’ Complaint.

8. Defendants State of New Mexico and New Mexico Department of Health deny the allegations contained in Paragraph 8 of Plaintiffs’ Complaint.

9. With respect to Paragraph 9 of Plaintiffs’ Complaint, Defendants State of New Mexico and New Mexico Department of Health deny that the cited statutes are applicable or confer jurisdiction as claimed by Plaintiffs. Defendants deny this is an appropriate 42 U.S.C. § 1983 action. Defendants deny violation of any of the Acts’ laws or constitutions as alleged in Plaintiffs’ Complaint. Defendants’ state there is no wavier of immunity under the Tort Claims Act for Plaintiffs’ suit. The Declaratory Judgment Act does not create subject matter jurisdiction or create a new cause of action. Section 1983 does not create a new cause of action against the State in this setting.

10. With respect to Paragraph 10 of Plaintiffs’ Complaint, Defendants admit that the New Mexico Legislature passed the Lynn and Erin Compassionate Use Act to help provide relief to individuals suffering from certain medical ailments. NMSA § 26-2B-1 *et. seq.* Specifically, the Legislature passed the Compassionate Use Act to “allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments.” NMSA § 26-2B-2.

11. With respect to Paragraph 11 of Plaintiffs’ Complaint, Defendants State of New Mexico and New Mexico Department of Health admit that the Legislature expressed an intent that the program be capable of regulation and that it be regulated. How many producers are licensed in this program relates directly (in part) to the question of whether the program can be regulated

and whether the Department of Health can prevent diversion of medical cannabis to individuals who are not qualified patients. Defendants admit that qualified patients may (pursuant to Department of Health regulations) become licensed to grow cannabis themselves or may purchase medical cannabis from a licensed producer. Defendants deny the remainder of the allegations contained in ¶ 10 of Plaintiffs' Complaint.

12. With respect to Paragraph 12 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health admit that NMSA § 26-2B-3 (D) 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."

13. Defendants State of New Mexico and New Mexico Department of Health admit the allegations in Paragraph 13 of Plaintiffs' Complaint.

14. Defendants State of New Mexico and New Mexico Department of Health deny the allegations in Paragraph 14 of Plaintiffs' Complaint. Defendants also deny that any recommendations or suggestions would necessarily be accepted by the Department of Health or the Secretary.

15. With respect to Paragraph 15 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health admit that DEPARTMENT OF HEALTH promulgated rules regarding the licensing process for licensed producers as alleged in Paragraph 15 of Plaintiffs' Complaint. Defendants admit the statute directs the Department of Health to determine who will be licensed as "licensed producer(s)." The rules vest in the Secretary the discretion to determine the number of licenses to be issued and which non-profit entities shall be licensed. Section 7.34.4.8 (B) (2) NMAC. Further, the Secretary shall consider the overall health needs of qualified patients and the safety of the public in determining the number of licenses to

be issued. The Secretary is to consider the sufficiency of the overall supply available statewide, service location of the applicant, applicant's plan to ensure purity, consistency of dose and various forms of application, applicant's skill and knowledge of organically grown methods, the quality of the security plan proposed, the location and security devices employed in staffing, quality assurance plans including provisions of periodic testing, the experience and expertise of the non-profit board members and other relevant factors. The Secretary considers all of these factors when deciding which applicants and the number of applicants to license. Defendants deny the remainder of the allegations contained in Paragraph 15 of Plaintiffs' Complaint inconsistent with this response.

16. Defendants State of New Mexico and New Mexico Department of Health admit the allegations in Paragraph 16 of Plaintiffs' Complaint.

17. With respect to Paragraphs 17, 18 and 19 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health admit that pursuant to NMAC 7.34.4.10, non-profit private applicants are required to provide information along with their application, including organizational information and materials; production and distribution information and materials; facility information; educational information and other materials. Defendants State of New Mexico and New Mexico Department of Health deny that any individual must form a non-profit corporation in order to start the application process, as alleged by Plaintiffs and deny the remaining allegations in Paragraphs 17, 18 and 19 of Plaintiffs' Complaint.

18. With respect to Paragraphs 20 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health admit that preparing an application involves expense. Defendants State of New Mexico and New Mexico Department of Health deny that all these applicants paid a \$1,000.00 application fee as claimed or incurred the other expenses alleged, as well as the remaining allegations in Paragraph 20 of Plaintiffs' Complaint

19. Defendants State of New Mexico and New Mexico Department of Health deny the allegations contained in Paragraphs 21 and 22 of Plaintiffs' Complaint.

20. With respect to Paragraphs 23 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health state the NMAC 7.34.4.8 C lists factors to be considered by the Secretary. Defendants further state that the Lynn and Erin Compassionate Use Act, in its purpose at NMSA § 26-2B-2, states that the purpose "is to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." The Legislature expressed an intent that the program be capable of regulation and that it be regulated. How many producers are licensed in this program relates directly (in part) to the question of whether the program can be regulated and whether the Department of Health can prevent diversion of medical cannabis to individuals who are not qualified patients. Defendants State of New Mexico and New Mexico Department of Health deny the remaining allegations contained in Paragraphs 23 of Plaintiffs' Complaint.

21. With respect to Paragraphs 24 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health admit that prior to February 28, 2012, no applicant had ever been rejected for licensing. Defendants State of New Mexico and New Mexico Department of Health deny the remaining allegations contained in Paragraphs 24 of Plaintiffs' Complaint.

22. With respect to the allegations contained in Paragraph 25 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health agree that they entered into a written understanding with some of the parties to this lawsuit. That written understanding, although not attached to Plaintiffs' Complaint, is in writing and these answering Defendants reject Plaintiffs' characterization of the agreement.

23. With respect to the allegations contained in Paragraph 26 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health state none of the

named Plaintiffs was granted a producer license. Defendants State of New Mexico and New Mexico Department of Health deny the remaining allegations contained in Paragraphs 26 of Plaintiffs' Complaint.

24. Defendants State of New Mexico and New Mexico Department of Health deny the allegations contained in Paragraphs 27, 28, 29, 30, and 31 of Plaintiffs' Complaint.

25. Defendants admit that the language contained in Paragraph 32 of Plaintiffs' Complaint is set forth at NMAC 7.34.4.12B but deny that Department of Health has denied any recourse to applicants.

26. Defendants State of New Mexico and New Mexico Department of Health deny the allegations contained in Paragraph 33 of Plaintiffs' Complaint.

27. With respect to the allegations contained in Paragraph 34 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health admit that they performed an audit to determine the sufficiency of the medical cannabis supply. Defendants State of New Mexico and New Mexico Department of Health deny the remaining allegations contained in Paragraphs 34 of Plaintiffs' Complaint.

28. Defendants State of New Mexico and New Mexico Department of Health deny the allegations contained in Paragraphs 35, 36 and 37 of Plaintiffs' Complaint.

29. With respect to the allegations contained in Paragraph 38 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health deny that Plaintiffs have stated a cause of action or are entitled to any relief.

COUNT 1
DUE PROCESS VIOLATIONS

30. Defendants State of New Mexico and New Mexico Department of Health reallege their responses to Paragraphs 1 through 38 of Plaintiffs' Complaint as though the same were restated herein.

31. Defendants State of New Mexico and New Mexico Department of Health deny the allegations contained in Paragraph 40 of Plaintiffs' Complaint.

32. With respect to Paragraph 41 of Plaintiff's Complaint, Defendants State of New Mexico and New Mexico Department of Health admit that the Fifth and Fourteenth Amendment of the United States Constitution provide that all citizens are entitled to due process and equal protection of the laws, but deny that Plaintiffs have stated a claim for due process or equal protection violations.

33. With respect to Paragraph 42 of Plaintiff's Complaint, Defendants State of New Mexico and New Mexico Department of Health admit that the New Mexico Legislature passed the Lynn and Erin Compassionate Use Act to help provide relief to individuals suffering from certain medical ailments. NMSA § 26-2B-1 *et. seq.* Specifically, the Legislature passed the Compassionate Use Act to "allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." NMSA § 26-2B-2. Defendants State of New Mexico and New Mexico Department of Health deny the remaining allegations contained in Paragraphs 42 of Plaintiffs' Complaint.

34. Defendants State of New Mexico and New Mexico Department of Health deny the allegations contained in Paragraph 43, 44, 45 and 46 of Plaintiffs' Complaint.

COUNT 2
BREACH OF CONTRACT AND DUTY OF GOOD FAITH

35. With respect to Paragraph 47, Defendants State of New Mexico and New Mexico Department of Health re-allege their responses to Paragraphs 1 through 46 of Plaintiffs' Complaint as though the same were restated herein.

36. Defendants State of New Mexico and New Mexico Department of Health admit the allegations contained in Paragraph 48 of Plaintiffs' Complaint.

37. With respect to the allegations contained in Paragraph 49 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health agree that they entered into a written understanding with some of the parties to this lawsuit. That written understanding, although not attached to Plaintiffs' Complaint, is in writing and these answering Defendants reject Plaintiffs' characterization of the agreement.

38. With respect to the allegations contained in Paragraph 50 of Plaintiffs' Complaint, Defendants State of New Mexico and New Mexico Department of Health state that the Department of Health reviewed all pending applications. Defendants State of New Mexico and New Mexico Department of Health deny the remaining allegations contained in Paragraphs 50 of Plaintiffs' Complaint.

39. Defendants State of New Mexico and New Mexico Department of Health deny the allegations contained in Paragraph 51, 52 and 53 of Plaintiffs' Complaint.

COUNT 3
CLASS ACTION

40. With respect to Paragraph 54, Defendants State of New Mexico and New Mexico Department of Health re-allege their responses to Paragraphs 1 through 53 of Plaintiffs' Complaint as though the same were restated herein.

41. With respect to Paragraphs 55 and 56, Defendants State of New Mexico and New Mexico Department of Health deny that the class proposed by Plaintiffs meets the criteria for class action certification under 1-023 NMRA.

42. Defendants State of New Mexico and New Mexico Department of Health deny the allegations contained in Paragraph 57, 58, 59, and 60 of Plaintiffs' Complaint.

COUNT 4
DECLARATORY JUDGMENT

43. With respect to Paragraph 61, Defendants State of New Mexico and New Mexico Department of Health re-allege their responses to Paragraphs 1 through 60 of Plaintiffs' Complaint as though the same were restated herein.

44. Defendants State of New Mexico and New Mexico Department of Health deny the allegations contained in Paragraphs 62 and 63 of Plaintiffs' Complaint.

45. With respect to Paragraph 64, Defendants admit that Plaintiffs have quoted the Declaratory Judgment Act, in part, correctly. However, Defendants deny that the Declaratory Judgment Act creates a waiver of immunity under the Tort Claims Act for Plaintiffs to bring this suit. The Declaratory Judgment Act is inapplicable and does not create subject matter jurisdiction or a new cause of action.

46. With respect to Paragraph 65, Defendants State of New Mexico and New Mexico Department of Health deny that they have denied due process of law. Defendants deny a controversy involving the rights and relations of the parties exists. Defendants State of New Mexico and New Mexico Department of Health deny the remainder of the allegations contained in Paragraph 65 of Plaintiffs' Complaint.

47. With respect to Paragraph 66, Defendants State of New Mexico and New Mexico Department of Health deny that they have denied equal protection of laws to the Plaintiffs and

that there is a matter of grave public concern requiring immediate action by the Court. Defendants State of New Mexico and New Mexico Department of Health deny the remainder of the allegations contained in Paragraph 66 of Plaintiffs' Complaint.

DEFENSES

Discovery and investigation may reveal that any one or more of the following defenses and/or affirmative defenses (hereinafter "Defenses") should be available to Defendants in this matter. Defendants, therefore, assert said Defenses in order to preserve the right to assert them. Upon completion of discovery and if the facts warrant, Defendants may withdraw any of these Defenses as may be appropriate. Further, Defendants reserve the right to amend this answer to assert additional defenses, cross-claims, counterclaims and other claims and defenses as discovery proceeds. Further answering and by way of defense, Defendants State of New Mexico and New Mexico Department of Health state as follows:

FIRST AFFIRMATIVE DEFENSE *(No Waiver of Immunity)*

There is no waiver of immunity under the Tort Claims Act for Plaintiffs' claims. The Declaratory Judgment Act does not create subject matter jurisdiction, a new cause of action or waiver of immunity. Section 1983 does not create a new cause of action against the State.

SECOND AFFIRMATIVE DEFENSE *(Failure to State a Claim)*

Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE *(Not Met Requirements for Class Action Certification)*

Plaintiffs have not met the requirements of Rule 1-023 for class action certification.

FOURTH AFFIRMATIVE DEFENSE *(Good Faith)*

Defendants have, at all times, acted in good faith.

FIFTH DEFENSE

(Notice)

Plaintiffs failed to provide the required written notice to Defendants under the New Mexico Tort Claims Act and, as a result, their claims are barred.

SIXTH DEFENSE

(Statute of Limitations)

Plaintiffs causes of action are untimely and are barred by the applicable statute of limitations.

SEVENTH DEFENSE

(Qualified Immunity)

The actions of the individually named defendants were lawful and in good faith, entitling them to qualified immunity.

EIGHTH DEFENSE

(Monell Defense)

As a separate and affirmative defense, Defendants state that the individually named defendants have no liability under the doctrine of *Monell v. Dept. of Social Services*, 436 U.S. 658, 690-91 (1978).

NINTH DEFENSE

(Standing)

Plaintiffs lack standing to challenge the determination of the sufficiency of the overall supply available to qualified patients statewide under NMAC 7.34.4.8C.

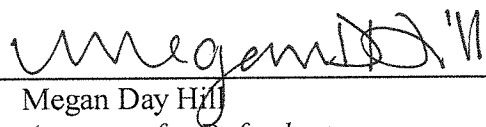
AMENDMENTS

Defendants specifically reserve the right to amend their Answer by adding defenses, counterclaims, cross-claims, or by instituting third-party actions as additional facts are obtained through further investigation and discovery.

WHEREFORE, Defendants the State of New Mexico and the New Mexico Department of Health, having fully answered Plaintiffs' First Amended and Supplemented Complaint for Violation of Constitutional Rights, Breach of Contract and Request for Declaratory Judgment, request that this Court dismiss the same with prejudice and assess costs incurred by Defendants in answering the Complaint, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

CIVEROLO, GRALOW, HILL & CURTIS
A Professional Association

By: 
Megan Day Hill
Attorneys for Defendants
State of New Mexico and
New Mexico Department of Health
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(505) 842-8255

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this 11th day of July, 2012, a copy of the foregoing was submitted for electronic filing with the Court and the following parties or counsel were served by electronic means through the Court's Odyssey electronic filing and service system as follows:

Counsel for Plaintiffs

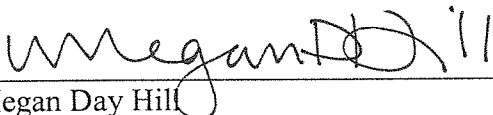
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