

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

C.D.

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,

Plaintiffs,

No. D-101-CV-2011-01127
(Consolidated with D-101-CV-2012-01868)

v.

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

Defendants,

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,

and

MEDICAL GOING GREEN, INC.,

Plaintiff,

v.

SUSANA MARTINEZ, GOVERNOR; and
CATHERINE D. TORRES, SECRETARY OF
THE DEPARTMENT OF HEALTH,

Defendants.

**DEFENDANTS STATE OF NEW MEXICO AND
NEW MEXICO DEPARTMENT OF HEALTH'S
ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT
FOR VIOLATION OF CONSTITUTIONAL RIGHTS, BREACH OF CONTRACT,
REQUEST FOR DECLARATORY JUDGMENT,
AND PETITION FOR WRIT OF CERTIORARI**

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, P.A. (Megan Day Hill, Esq. and Ellen M. Kelly, Esq.), and hereby submit their *Answer to Plaintiffs' Second Amended Complaint for Violation of Constitutional Rights, Breach of Contract, Request for Declaratory Judgment, and Petition for Writ of Certiorari* ("the *Second Amended Complaint*") and state as follows:

I. PARTIES AND JURISDICTION

1. Defendants admit that Plaintiffs previously applied to become licensed producers and distributors of medical cannabis, but they cannot state whether or not these Plaintiffs are still viable non-profit corporations: Defendants also point out that Plaintiffs have changed the caption of the *Second Amended Complaint* in pursuing their causes of action under different names than in the original *Complaint*.

2. Defendants admit the allegations of paragraph 2 of the *Second Amended Complaint*, and further state that the individually named Defendants are immune from suit based on the doctrine of qualified immunity and the law of the case.

3. With respect to paragraph 3 of the *Second Amended Complaint*, Defendants deny that the cited provisions are applicable or confer jurisdiction as claimed by Plaintiffs. Defendants further 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' *Second Amended Complaint* and state there is no waiver of immunity under the Tort Claims Act for Plaintiffs' *Second Amended Complaint*. The Declaratory Judgment Act does not create subject matter jurisdiction or create a new cause of action, and Section 1983 does not create a new cause of action against the State or the Department in this setting.

II. NEW MEXICO LAW

4. Defendants admit the allegations of paragraph 4 of the *Second Amended Complaint*.

5. With respect to paragraph 5 of the *Second Amended Complaint*, Defendants admit that the Legislature expressed an intent that the medical cannabis program be capable of regulation and that it be regulated. How many producers are licensed by the 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 further 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 paragraph 5 of the *Second Amended Complaint*.

6. With respect to paragraph 6 of the *Second Amended Complaint*, Defendants 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.”

III. FACTS

7. Defendants admit the allegations of paragraph 7 of the *Second Amended Complaint*.

8. Defendants deny the allegations in paragraph 8 of the *Second Amended Complaint*. Defendants also deny that any recommendations or suggestions of any hearing officer would necessarily be accepted by the Department of Health or the Secretary.

9. With respect to paragraph 9 of the *Second Amended Complaint*, Defendants admit that the Department of Health promulgated rules regarding the licensing process for licensed producers; that the Compassionate Use Act directs the Department of Health to determine who will be licensed as “licensed producer(s)”; that 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. Defendants also admit that the rules direct the Secretary to consider the overall health needs of qualified patients and the safety of the public in determining the number of licenses to be issued: the sufficiency of the overall supply available statewide; the service location of the applicant, the applicant’s plan to insure purity; the consistency of dose and various forms of application; the applicant’s skill and knowledge of organically grown methods; the quality of the security plan proposed; the location and security devices employed in staffing; the quality assurance plans including provisions of periodic testing; the experience and expertise of the non-profit board members, and other relevant factors in determining which applicants and the number of applicants to license. Defendants also admit the rules limit the number of plants which may be cultivated by licensed producers and that the rules effect

certain aspects of the production and distribution of cannabis by licensed producers, but they deny all remaining allegations of paragraph 9 of the *Second Amended Complaint*.

10. Defendants admit the allegations of paragraph 10 of the *Second Amended Complaint*.

11. With respect to paragraphs 11, 12, and 13 of the *Second Amended Complaint*, Defendants admit that pursuant to NMAC § 7.34.4.10 [incorrectly referred to as 7.44.4.10 in the *Second Amended Complaint*], non-profit private applicants are required to provide information along with their application to produce medical cannabis, including organizational information and materials; production and distribution information and materials; facility information; educational information and other materials. Defendants deny that any applicant must form a non-profit corporation in order to start the application process, as alleged by Plaintiffs, but Defendants deny the remaining allegations in paragraphs 11, 12, and 13 of the *Second Amended Complaint*.

12. Defendants deny the allegations of paragraph 14 of the *Second Amended Complaint*.

13. With regard to the allegations of paragraph 15 of the *Second Amended Complaint*, Defendants admit that Plaintiffs submitted applications and that in some cases, Plaintiffs submitted more than one version of the application and/or submitted supplementation or modifications, but they deny all remaining allegations of paragraph 15 of the *Second Amended Complaint*.

14. Defendants deny the allegations of paragraphs 16 and 17 of the *Second Amended Complaint*.

15. With regard to the allegations of paragraph 18 of the *Second Amended Complaint*, Defendants admit that Dr. Catherine Torres was appointed as Secretary of the Department of Health by Governor Martinez, but they deny all remaining allegations of paragraph 18 of the *Second Amended Complaint*.

16. Defendants deny the allegations of paragraph 19 of the *Second Amended Complaint*.

17. With regard to paragraph 20 of the *Second Amended Complaint*, Defendants admit that as a result of a Court-ordered settlement conference, by January 27, 2012, Plaintiffs were to submit copies of their applications for licenses with any changes to counsel for Defendants, with the understanding that some circumstances have changed and that new site visits/inspections may be required for the applications; that the parties at the mediation agreed the Secretary of Health could make a decision as to the granting or denial of the applications of the original six Plaintiffs, using appropriate discretion, by February 29, 2012; and that the Secretary would inform any Plaintiffs whose license application might be denied as to the specific reason or reasons why such denial occurred, in order that such "denied" party might pursue any appropriate remedies available, but Defendants deny all remaining allegations of paragraph 20 of the *Second Amended Complaint*.

18. Defendants admit the Department determined a method for rating the applications which was applied to all pending applications, that four of the applicants were told by letter that their applications met the criteria to be a producer and that the others were told by letter their applications did not meet the criteria to be a producer, but Defendants all remaining allegations of paragraph 21 of the *Second Amended Complaint*.

19. With regard to paragraph 22 of the *Second Amended Complaint*, Defendants admit that the applications with scores of 75 or higher out of 100 were determined by the Department to meet the criteria, but they deny all remaining allegations of paragraph 22 of the *Second Amended Complaint*.

20. With respect to paragraph 23 of the *Second Amended Complaint*, Defendants admit the current rules pertaining to producer licenses have been in effect since December 2010, but they deny all remaining allegations of paragraph 23 of the *Second Amended Complaint*.

21. Defendants deny the allegations of paragraph 24 of the *Second Amended Complaint*.

22. With regard to paragraph 25 of the *Second Amended Complaint*, Defendants state that NMAC § 7.34.4.8C lists factors to be considered by the Secretary and further state that the Compassionate Use Act, at NMSA § 26-2B-2 states that the purpose of the Act “is to allow the beneficial use of medical cannabis and a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments.” They further state that in the Compassionate Use Act, the Legislature expressed an intent that the medical cannabis program be capable of regulation and that it be regulated, and that the number of producers licensed in the program relates, in part, directly 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, but Defendants deny all remaining allegations of paragraph 25 of the *Second Amended Complaint*.

23. With respect to paragraph 26 of the *Second Amended Complaint*, Defendants admit that prior to February 28, 2012, no non-profit applicant for a producer license had been

rejected, but they deny the remaining allegations of paragraph 26 of the *Second Amended Complaint*.

24. With regard to paragraph 27 of the *Second Amended Complaint*, Defendants admit that Secretary Torres personally hand-delivered letters relating to some of the applicants to Paul Livingston and that of the six original Plaintiffs, one was told its application met the criteria but that no new licenses were being issued, and the other five received letters saying their applications did not meet criteria, but Defendants deny all remaining allegations of paragraph 27 of the *Second Amended Complaint*.

25. Defendants deny the allegations of paragraphs 28, 29, 30, 31, and 32 of the *Second Amended Complaint*.

26. Defendants admit that the language contained in paragraph 33 of the *Second Amended Complaint* is set forth at NMAC § 7.34.4.12B but deny that the Department of Health has denied any recourse to applicants.

27. Defendants deny the allegations contained in paragraph 34 of the *Second Amended Complaint*.

28. With regard to paragraph 35 of the *Second Amended Complaint*, Defendants admit they performed an analysis to determine the sufficiency of the medical cannabis supply, but Defendants deny all remaining allegations of paragraph 35 of the *Second Amended Complaint*.

29. Defendants deny the allegations of paragraphs 36, 37, and 38 of the *Second Amended Complaint*.

30. With respect to the allegations contained in paragraph 39 of the *Second Amended Complaint*, Defendants deny that Plaintiffs have stated any cause of action or are entitled to any relief.

**COUNT 1
DUE PROCESS AND EQUAL PROTECTION**

31. With respect paragraph 40 of the *Second Amended Complaint*, Defendants reallege their answer to paragraphs 1 through 39 of the *Second Amended Complaint* as though the same were restated herein.

32. Defendants deny the allegations contained in paragraph 41 of the *Second Amended Complaint*.

33. With respect to paragraph 42 of the *Second Amended Complaint*, Defendants admit that the Fifth and Fourteenth Amendments to 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.

34. With respect to paragraph 43 of the *Second Amended Complaint*, Defendants admit that the New Mexico Legislature passed the Compassionate Use Act to help provide relief to individuals suffering from certain medical ailments at NMSA § 26-2B-1 et. seq. Defendants specifically admit 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 deny the remaining allegations contained in paragraph 43 of the *Second Amended Complaint*.

35. Defendants deny the allegations of paragraphs 44, 45, 46, 47, 48, and 49 of the *Second Amended Complaint*.

COUNT 2
BREACH OF CONTRACT AND DUTY OF GOOD FAITH

36. With respect paragraph 50 of the *Second Amended Complaint*, Defendants reallege their answer to paragraphs 1 through 49 of the *Second Amended Complaint* as though the same were restated herein.

37. Defendants admit the allegations of paragraph 51 of the *Second Amended Complaint*.

38. With respect to paragraph 52 of the *Second Amended Complaint*, Defendants agree they entered into a written understanding with some of the Plaintiffs to this lawsuit: that the written understanding, although not attached to the *Second Amended Complaint*, is in writing, but these Defendants reject Plaintiffs' characterization of the agreement and therefore deny the remaining allegations of paragraph 52 of the *Second Amended Complaint*.

39. With respect to paragraph 53 of the *Second Amended Complaint*, Defendants state that personnel of the Department of Health reviewed all pending applications, but Defendants deny the remaining allegations of paragraph 53 of the *Second Amended Complaint*.

40. Defendants deny the allegations contained in paragraphs 54, 55, and 56 of the *Second Amended Complaint*.

COUNT 3
PETITION FOR WRIT OF CERTIORARI

41. With respect paragraph 57 of the *Second Amended Complaint*, Defendants reallege their answer to paragraphs 1 through 56 of the *Second Amended Complaint* as though the same were restated herein.

42. With regard to paragraph 58 of the *Second Amended Complaint*, Defendants admit Plaintiff New Mexico Medical Horticulture and the six initial Plaintiffs filed *Petitions for*

Writs of Certiorari pursuant to Rule 1-075 of the New Mexico Rules of Civil Procedure, but Defendants deny all remaining allegations of paragraph 58 of the *Second Amended Complaint*.

43. Defendants deny the allegations of paragraphs 59 and 60 of the *Second Amended Complaint*.

44. With regard to the allegations of paragraph 61 of the *Second Amended Complaint*, Defendants deny that Plaintiffs have stated a cause of action or are entitled to any relief.

COUNT 4 DECLARATORY JUDGMENT

45. With respect paragraph 62 of the *Second Amended Complaint*, Defendants reallege their answer to paragraphs 1 through 61 of the *Second Amended Complaint* as though the same were restated herein.

46. Defendants deny the allegations contained in paragraphs 63, 64, and 65 of the *Second Amended Complaint*.

47. With respect to paragraph 66 of the *Second Amended Complaint*, Defendants admit that Plaintiffs have correctly quoted part of the Declaratory Judgment Act, but Defendants deny that the Declaratory Judgment Act creates a waiver of immunity under the Tort Claims Act for Plaintiffs to bring this suit. Defendants also state the Declaratory Judgment Act is inapplicable, it does not create subject matter jurisdiction or a new cause of action.

48. With respect to paragraph 67 of the *Second Amended Complaint*, Defendants deny they have denied due process of law and that any controversy involving the rights and relations of the parties exist. Defendants also deny the remainder of the allegations contained in paragraph 67 of the *Second Amended Complaint*.

49. With respect to paragraph 68 of the *Second Amended Complaint*, Defendants deny they have denied equal protection of laws to the Plaintiffs and deny that there is a matter of grave public concern requiring immediate action by the Court. Defendants also deny the remaining allegations of paragraph 68 of the *Second Amended 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’ *Second Amended 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.

**TENTH DEFENSE
(Ripeness)**

The claims asserted by Plaintiffs are not ripe for determination by the Court.

ELEVENTH DEFENSE
(Failure to File in a Timely Fashion)

Plaintiffs New Mexico Medical Horticulture and the six initial Plaintiffs failed to file their *Petitions for Writ of Certiorari* pursuant to Rule 1-075 within the 30 days required by Rule 1-075D.

TWELFTH DEFENSE
(Declaratory Judgment Barred)

Plaintiffs cannot assert a claim or declaratory relief under the doctrine of *Smith v. City of Santa Fe*, 2007 NMSC 055, 142 NM 786.

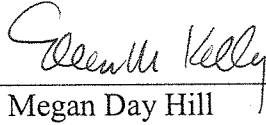
AMENDMENTS

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' *Second Amended Complaint for Violation of Constitutional Rights, Breach of Contract, Request for Declaratory Judgment, and Petition for Writ of Certiorari*, request that this Court dismiss the same with prejudice and assess costs incurred by Defendants in answering the *Second Amended 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:  _____

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Ellen M. Kelly
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this 28th day of November, 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:

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