

1 Steven M. White (#020061)  
2 **WHITE BERBERIAN PLC**  
3 60 E. Rio Salado Pkwy., Suite 900  
4 Tempe, Arizona 85281  
5 Tel: (480) 626-2783  
6 Fax: (480) 718-8368  
7 E-mail: [swhite@wbazlaw.com](mailto:swhite@wbazlaw.com)  
8 *Attorney for Intervenor-Plaintiff*

9  
10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
11 **IN AND FOR THE COUNTY OF MARICOPA**

12 TOTAL HEALTH & WELLNESS, INC., an  
13 Arizona non-profit corporation; TOTAL  
14 ACCOUNTABILITY PATIENT CARE, INC., an  
15 Arizona non-profit corporation; TOTAL  
16 ACCOUNTABILITY SYSTEMS I, INC., an  
17 Arizona non-profit corporation; NON PROFIT  
18 PATIENT CENTER, INC., an Arizona non-profit  
19 corporation; GREEN HILLS PATIENT CENTER,  
20 INC., an Arizona non-profit corporation;  
21 HERBAL PHARMACY OF CENTRAL  
22 ARIZONA, INC., an Arizona non-profit  
23 corporation; HERBAL WELLNESS CENTER,  
24 INC., an Arizona non-profit corporation;  
25 NATURE'S HEALING CENTER, INC., an  
26 Arizona non-profit corporation; NATURE'S  
27 WONDER, INC., an Arizona non-profit  
28 corporation; PREFERRED HERBS, INC., an  
Arizona non-profit corporation; KIND MEDS,  
INC., an Arizona non-profit corporation,

Plaintiffs,

vs.

ARIZONA DEPARTMENT OF HEALTH  
SERVICES, an agency of the State of Arizona,

Defendant,

NO. CV2013-005901

**MOTION TO INTERVENE**

(Assigned to the Hon. Randall Warner)

1  
2 BYERS DISPENSARY, INC.,  
3 Intervenor-Plaintiff.

4  
5 Byers Dispensary, Inc. (“Byers”) herby moves to intervene as a plaintiff in this case (the  
6 “Action”). Pursuant to Ariz. R. Civ. P. 24(a)(2), Byers moves this Court for leave to intervene  
7 of right in this action. Because Byers received a Dispensary Registration Certificate  
8 (“Certificate”) from the Arizona Department of Health Services (“AZDHS”), it also has one  
9 year to qualify for and then obtain from AZDHS an “Approval to Operate.” As a result, Byers  
10 has an interest in the subject matter of this Action. Additionally, existing parties will not  
11 adequately represent Byers interests because it has a novel issue, which is separate and distinct  
12 from those raised in this Action. Lastly, this Motion is timely because Byers’s intervention  
13 will not prejudice any party, as the Court has yet to take action. Alternatively, Byers seeks an  
14 order permitting it to intervene in the Action permissively, pursuant to Rule 24(b). Because  
15 Byers is also requesting to enjoin AZDHS to extend the “Approval to Operate” date, there  
16 exists a question of law and fact in common with this Action. Accordingly, this Court should  
17 allow Byers to intervene in this action either of right or permissively.

18 **I. FACTUAL BACKGROUND**

19 **A. Byers Was Awarded a Dispensary Registration Certificate for**  
20 **Round Valley CHAA 24.**

21 Byers is an Arizona non-profit corporation formed under Title 10 of the Arizona  
22 Revised Statutes (“ARS”). Byers was awarded a Certificate from AZDHS for Round Valley  
23 CHAA 24. The Certificate, by its express terms, does not by itself allow Byers to open and  
24 operate a medical marijuana dispensary (“MMD”). Once the Dispensary Registration  
25 Certificate was awarded on August 7, 2012, Byers has approximately one year to qualify for  
26 and then obtain an “Approval to Operate” from AZDHS. To obtain an “Approval to Operate,”  
27 Byers must complete the remaining requirements, including, local municipality approvals on  
28

1 all of the construction, use permits (if applicable) and an appropriate location within its  
2 designated Round Valley CHAA 24, as determined by AZDHS.

3 To that end, Byers must apply for the “Approval to Operate” on or before **June 7, 2013**.  
4 By **August 7, 2013** AZDHS must issue a decision for that application. If a non-profit  
5 corporation allocated a Dispensary Registration Certificate does not timely apply for and  
6 timely receive its “Approval to Operate” from AZDHS and begin operation, then all of the  
7 officers and directors of that non-profit corporation are barred from future participation in the  
8 Arizona medical marijuana program.

9 **B. AZDHS Arbitrarily Continues to Use Google Maps as Byers**  
10 **Location.**

11 Byers has identified a willing seller of a building and has negotiated the material terms  
12 of the purchase of that building for its MMD. The location is actually in the Round Valley  
13 CHAA, but the AZDHS uses Google maps to determine whether a location is within its  
14 appropriately designated CHAA. When Byers’ location is inputted into Google Maps, the  
15 “pin” incorrectly places the building in the middle of a street, and the street appears to be  
16 located in St. Johns CHAA. But when you view the satellite version of Google maps, the  
17 location of the building is actually located within Round Valley’s CHAA. In fact,  
18 Springerville’s Planning and Zoning Commission (the “Commission”) has carefully analyzed  
19 the satellite version of the AZDHS CHAA map and concluded that the Google “pin” places the  
20 location in the wrong place. [Exhibit 3]. Furthermore, the Commission agrees that the location  
21 is actually a block west of the Google “pin” and in the Round Valley CHAA. [*Id.*]. Lastly,  
22 Exhibit 4 is a satellite version of Google maps that shows where the Google “pin” incorrectly  
23 places 224 E. Main Street and where it is actually located. [Exhibit 4]. Furthermore, Google  
24 has been notified that 224 E. Main Street is not in the proper location. However, it usually  
25 takes Google at least six months to correct the issue. By that time, the “Approval to Operate”  
26 window will be closed.

27 Despite the foregoing, AZDHS has arbitrarily chosen not to acknowledge the correct  
28 location of 224 E. Main Street and considers it part of the St. Johns CHAA. AZDHS has

1 unjustly suggested that Byers find a new location. This suggestion was issued via email on  
2 April 11, 2013. A Byers board member actually travelled to the AZDHS offices and met with  
3 an AZDHS employee. That employee acknowledged that the building is not in the middle of  
4 the town's busiest street and acknowledged that according to tax records and the maps  
5 presented, the Google "pin" is incorrect. But AZDHS has refused, despite numerous  
6 opportunities, to change its position, even though AZDHS may have taken the opposite  
7 position during the application process.

8 The problem is that Byers, as part of the "Approval to Operate," must have a location  
9 that AZDHS says is within Byers' CHAA no later than **June 7, 2013**. Byers has expended  
10 substantial time and capital for its location, which is in the correct CHAA. The window is  
11 swiftly closing on Byers' opportunity to obtain its "Approval to Operate."

#### 12 **C. The "White Mountain Lawsuit."**

13 On June 20, 2012, White Mountain Health Center, Inc. ("White Mountain") brought a  
14 lawsuit against various defendants including AZDHS and the Maricopa County, CV2012-  
15 053585 (the "White Mountain lawsuit"). The State of Arizona intervened in the White  
16 Mountain Suit. White Mountain is a non-profit corporation seeking permission to open a  
17 MMD in Sun City CHAA 49. In that litigation, the Maricopa County Attorney asked  
18 Maricopa County Superior Court Judge Michael D. Gordon to determine whether federal law  
19 preempted the Arizona Medical Marijuana Act ("AMMA"). Maricopa County took its  
20 position after AZDHS adopted its rules for the medical marijuana program and after AZDHS  
21 began its implementation.

22 On December 3, 2012, Judge Gordon issued his ruling in the White Mountain lawsuit; a  
23 true and correct copy is attached hereto as Exhibit 2. The ruling is presently on appeal so the  
24 matters addressed therein have not been finally determined as a matter of law. The White  
25 Mountain lawsuit will not be resolved before **June 7, 2013**, which is the "Approval to  
26 Operate" deadline. In essence, the White Mountain lawsuit will determine the constitutionality  
27 of the AMMA, and therefore, the future of the program.

1 **II. BYERS MUST BE PERMITTED TO INTERVENE AS A MATTER OF RIGHT**  
2 **PURSUANT TO RULE 24(a), ARIZONA RULES OF CIVIL PROCEDURE.**

3 Rule 24(a) of the Arizona Rules of Civil Procedure states, in pertinent part:

4 [u]pon timely application anyone shall be permitted to intervene in an action . . .  
5 (2) [w]hen the applicant claims an interest relating to the property or transaction  
6 which is the subject of the action and the applicant is so situated that the  
7 disposition of the action may as practical matter impair or impede the applicant's  
8 ability to protect that interest, unless the applicant's interest is adequately  
represented by existing parties.

9 Ariz. R. Civ. P. 24(a)(2). Byers has satisfied the three requirements to demonstrate  
10 intervention of right. Byers has (1) filed its application to intervene timely; (2) it has an  
11 interest relating to the subject of the action; and (3) disposition of the matter will impede its  
12 ability to protect that interest. *See Weaver v. Synthes, Ltd.*, 784 P.2d 268, 272 (Ariz. Ct. App.  
13 1989). "It is well settled in Arizona that Rule 24 'is remedial and should be liberally construed  
14 with the view of assisting parties in obtaining justice and protecting their rights'." *Bechtel v.*  
15 *Rose*, 722 P.2d 236, 240 (Ariz. 1986) (quoting *Mitchell v. City of Nogales*, 320 P.2d 955, 958  
16 (Ariz. 1958). Because Byers has satisfied all three requirements for intervention as of right,  
17 this Court should allow Byers to intervene in this Action.

18 **A. Byers Has Timely Moved to Intervene.**

19 By filing this Motion, Byers intervention is timely. In ruling on a motion to intervene,  
20 the court must consider the stage to which the action has progressed before intervention is  
21 sought and whether the applicant was in a position to seek intervention earlier in the  
22 proceedings. *Winner Enter., Ltd. v. Superior Court*, 756 P.2d 116, 119 (Ariz. Ct. App. 1988).  
23 And "[t]he most important consideration in deciding whether a motion is untimely is *whether*  
24 *the delay in moving for intervention will prejudice the existing parties* to the case." *Id.* at 119  
25 (citing 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1916 at 435 (1986)  
26 (emphasis added). Timeliness is flexible and its existence should be determined in the trial  
27 court's discretion. *Id.* Because an intervenor of right may be seriously harmed if not permitted  
28 to intervene, the *court should be reluctant to dismiss a request for intervention as untimely.*

1 *Id.* (emphasis added). In *Winner*, the plaintiff moved to intervene thirty days (30) after the  
2 action was filed and twenty-one (21) days after the court entered a preliminary injunction. *Id.*  
3 The court held that the Plaintiff acted timely under the circumstances. *Id.*

4 Here, Plaintiffs filed the Complaint on May 22, 2013, 8 days ago [Total Health &  
5 Wellness, Inc., Complaint]. Under these circumstances, there is no question that the Motion is  
6 timely. None of the parties will be prejudiced because the Court has taken no action. More  
7 specifically, there have been no hearings or rulings on substantive matters. *See e.g. Idaho*  
8 *Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1396 (9<sup>th</sup> Cir. 1995) (“[t]he intervention  
9 motion was filed at a very early stage, before any hearings or rulings on substantive matters”  
10 and thus timely). In fact, the first hearing, an order to show cause, is scheduled to take place  
11 May 31, 2013. And Byers promptly dispatched counsel to intervene in the Action to protect its  
12 interest. Therefore, Byers’ Motion to Intervene is timely.

13 **B. Byers Has an Interest In the Action That Will Be Impeded**  
14 **Absent Intervention.**

15 As a Medical Marijuana Dispensary Registration Certificate holder, Byers  
16 unquestionably has a protectable interest in this action. It is well established in Arizona that,  
17 “the interest which an intervenor must have is a direct and immediate interest in the case, so  
18 that the judgment to be rendered would have a direct and legal effect upon his rights, and not  
19 merely a possible contingent equitable effect.” *Weaver*, 784 P.2d at 274 (quoting *Miller v. City*  
20 *of Phoenix*, 75 P.2d 1033, 1037 (Ariz. 1938); *see also Sw. Sav. & Loan Ass’n*, 449 P.2d 301,  
21 304 (Ariz. Ct. App. 1969). Byers has a protectable interest in this action for two reasons.  
22 First, there exists the novel issue regarding AZDHS’s incorrect location of its MMD. And  
23 Second, Byers has an interest in the White Mountain lawsuit’s outcome.

24 **1. AZDHS Must Recognize Byers Appropriate Location Within the**  
25 **Round Valley CHAA.**

26 Here, Byers received its Certificate from AZDHS on or around August 7, 2012 for  
27 Round Valley CHAA 24. As such, Byers has a direct and legal interest in the Action because  
28 the injunction would have a severe effect upon his rights. More specifically, Byers must

1 submit its “Approval to Operate” by **June 7, 2013**, which is a week away. To that end, Byers  
2 has identified a willing seller of a building and has negotiated the material terms of the  
3 purchase for its MMD. Even though Byers has essentially secured a proper location within its  
4 designated CHAA, an issue remains unresolved because AZDHS incorrectly located Byers  
5 building in the neighboring St. Johns CHAA. AZDHS arbitrarily continues to use Google  
6 maps incorrect “pin” site as Byers location even though the Springerville Commission stated  
7 otherwise, which was brought to AZDHS’s attention. Furthermore, Byers has fully co-  
8 operated and attempted to resolve this dispute with AZDHS. Lastly, Byers has notified Goggle  
9 and any resolution would take up to six (6) months, which is significantly past the “Approval  
10 to Operate” deadline.

11 Despite the fact that Byers has secured a proper location, AZDHS suggested that Byers  
12 find a different location. This suggestion creates a unique and unfair hardship because the  
13 deadline for the “Approval to Operate” is quickly approaching. If Byers does not secure a  
14 proper location, in AZDHS’s opinion, then it will forever be barred from participating in  
15 Arizona’s Medical Marijuana Program. This result would not only be unfortunate from a  
16 patient’s perspective but it would leave Byers with a substantial amount of capital investment  
17 and time that it will never recover. Lastly, like the existing plaintiffs in this action, Byers is  
18 subject to an immediate risk of irreparable harm. Therefore, Byers has a direct interest in this  
19 action and not a mere contingent equitable effect.

20 **2. The White Mountain Lawsuit Has the Same Effect on Byers as It**  
21 **Does on the Existing Plaintiffs.**

22 Here, as a Certificate holder, Byers has a direct interest in the determination of the  
23 White Mountain lawsuit. Because the White Mountain lawsuit is still pending and unresolved,  
24 the consequences of complying with the deadlines can be significant. More specifically, state  
25 law legal protections may disappear. If state law protections disappear, then Byers, like the  
26 other plaintiffs, will be unable to recoup substantial investment and time. Therefore, Byers has  
27 a direct interest in this Action.

1           **C.     The Existing Parties Will Not Adequately Represent Byers Interests.**

2           Because Byers has a separate and distinct issue with AZDHS, the existing plaintiffs will  
3 not adequately protect its interest. More specifically, AZDHS is unwilling to accept the fact  
4 that Byers' location is in the Round Valley CHAA. Without a ruling on this issue, Byers will  
5 undoubtedly miss the window for its "Approval to Operate." And as stated above, once the  
6 window is closed, it is closed forever. To that end, Byers will never be able to participate in  
7 Arizona's Medical Marijuana Program, which would create an unjust result and irreparable  
8 injury. Therefore, the existing parties will not adequately represent Byers interest in the  
9 Action.

10 **III. IN THE ALTERNATIVE, BYERS MUST BE PERMITTED TO**  
11 **INTEVENE BASED ON COMMON QUESTIONS OF LAW AND FACT**  
12 **PURSUANT TO RULE 24(b), ARIZONA RULES OF CIVIL**  
13 **PROCEDURE.**

14           If this Court concludes that Byers may not intervene as of right, then the Court should  
15 exercise its discretion and grant them the right to intervene under Ariz. R. Civ. P. 24(b)(2),  
16 which provides in relevant part:

17           [u]pon timely application anyone may be permitted to intervene in an action . . .  
18           (2) [w]hen an applicant's claim or defense and the main action have a question of  
19           law or fact in common. In exercising its discretion the court shall consider  
20           whether the intervention will unduly delay or prejudice the adjudication of the  
21           rights of the original parties.

22           Ariz. R. Civ. P. 24(b)(2). As the United States Supreme Court has held, and Arizona courts  
23 have echoed, the permissive intervention rule "plainly dispenses with any requirement that the  
24 intervenor shall have a direct personal or pecuniary interest in the subject of the litigation."  
25 *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459; *Bechtel*, 722 P.2d at 236.

26           Here, like the other plaintiffs in this Action, Byers is seeking an injunction against the  
27 "one-year deadline rule." Because Byers is asserting the same claim and seeking the same  
28 remedy, it unquestionably has a common issue of fact or law in this Action. Furthermore,  
since the Court has yet to take action and Byers is appearing at tomorrow's hearing,

1 intervention will not unduly delay or prejudice the existing plaintiffs' rights. Additionally, the  
2 uncertainty of the White Mountain lawsuit creates commonality amongst the parties.  
3 Therefore, the Court should grant Byers' Motion.

4 **IV. CONCLUSION**

5 For the foregoing reasons, Byers respectfully requests this Court to allow it to intervene  
6 in the Action as of right or permissively. Because Byers is a Certificate holder and subject to  
7 the "one-year deadline rule," it has a direct interest in this Action. And because Byers has a  
8 novel issue with AZDHS, the existing plaintiffs will not adequately protect its interest. Also,  
9 Byers motion is timely because the court as yet to take action, as the first hearing is scheduled  
10 for May 31, 2013. Undeniably a common question of fact or law exists as all the plaintiff's are  
11 MMD owners and seeking a similar remedy to the remedy Byers' requests.

12  
13 RESPECTFULLY SUBMITTED this 30th day of May, 2013.

14 **WHITE BERBERIAN PLC**

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16  
17 By           /s/Steven M. White            
18 Steven M. White  
19 60 East Rio Salado Pkwy., Ste. 900  
20 Tempe, Arizona 85281  
21 Attorney for Intervenor-Plaintiff

22 **ORIGINAL** of the foregoing e-filed  
23 this 30th day of May, 2013:

24 Clerk of the Court  
25 Maricopa County Superior Court

26 **COPY** of the foregoing mailed *hand delivered*  
27 this ~~30th~~<sup>31<sup>st</sup></sup> day of May, 2013 to:

28 Gregory W. Falls, Esq.

1 Sherman & Howard  
2 201 E. Washington St., Ste. 800  
3 Phoenix, AZ 85004  
4 Attorney for Defendant

5 Paul A. Conant  
6 Conant Law Firm, PLC  
7 2398 E. Camelback Rd., Ste. 925  
8 Phoenix, AZ 85016  
9 Attorney for Plaintiffs

10 /s/Marsha Marcinkowski

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