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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

**VERIFIED COMPLAINT**

(Assigned to the Hon. Randall Warner)

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

4  
5 **I. The Parties.**

6 1. Plaintiffs are Arizona non-profit corporation formed under Title 10 of the  
7 Arizona Revised Statutes ("ARS"):

- 8 a. Total Health & Wellness, Inc. (CHAA 80)  
9 b. Total Accountability Patient Care, Inc. (CHAA 119)  
10 c. Total Accountability Systems I, Inc. (CHAA 27)  
11 d. Non Profit Patient Center, Inc. (CHAA 3)  
12 e. Green Hills Patient Center, Inc. (CHAA 21)  
13 f. Herbal Pharmacy of Central Arizona, Inc. (CHAA 140)  
14 g. Herbal Wellness Center, Inc. (CHAA 60)  
15 h. Nature's Healing Center, Inc. (CHAA 70 and CHAA 78)  
16 i. Nature's Wonder, Inc. (CHAA 92)  
17 j. Preferred Herbs, Inc. (CHAA 38)  
18 k. Kind Meds, Inc. (CHAA 69)

19 2. Intervenor-Plaintiff Byers Dispensary, Inc. ("Byers") is an Arizona non-profit  
20 corporation formed under Title 10 of the ARS.

21 3. Defendant is a political subdivision and agency of the State of Arizona  
22 established pursuant to ARS Section 36-102(A).

23 **II. Jurisdiction and Venue.**

24 4. This Court has jurisdiction in this matter pursuant to ARS Section 12-123 and  
25 Article 6, Section 14 of the Arizona Constitution.

26 5. Venue is proper pursuant to ARS Section 12-401.  
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1 **III. General Allegations.**

2 6. In November 2012, Arizona Voters passed the Arizona Medical Marijuana Act  
3 (the "Act") by adopting proposition 203, a citizen initiative authorized as a reserved power by  
4 the Arizona Constitution at Article 4, Part 1, Section 1(2).

5 7. The Governor of the State of Arizona signed the Act into law in December 2010,  
6 making Arizona the fourteenth state to adopt a medical marijuana program.

7 8. The Arizona Department of Health Services ("AZDHS") was required by the Act  
8 to, within 120 days after the effective date of the Act, adopt rules implementing Arizona's  
9 medical marijuana program.

10 9. On December 16, 2010, the Director of AZDHS issued a call to Arizonans for  
11 public comment concerning development of rules for Arizona's medical marijuana program.

12 10. On December 17, 2010, ADHS issued its first set of draft rules for Arizona's  
13 medical marijuana program.

14 11. During the initial public comment period between December 17 and January 7,  
15 2011, AZDHS received comments from the public to its initial draft set of rules and published  
16 those comments.

17 12. On January 29, 2011, the Director of AZDHS issued a second call to Arizonans  
18 for public comment concerning development of rules for Arizona's medical marijuana  
19 program.

20 13. On January 31, 2011, AZDHS issued a second set of draft rules for Arizona's  
21 medical marijuana program.

22 14. Between January 31, 2011 and February 18, 2011, AZDHS accepted further  
23 public comments on a revised draft of the rules for Arizona's medical marijuana program.

24 15. Between February 14 and 17, 2011, AZDHS held four public meetings to receive  
25 comments about the draft rules for Arizona's medical marijuana program.

26 16. On March 28, 2011, AZDHS published the final rules for the Arizona medical  
27 marijuana program, which are embodied in Arizona's Administrative Code at R9-17-101 to  
28 R9-17-323.

1           17.    On April 13, 2011, AZDHS filed its rules implementing Arizona’s medical  
2 marijuana program with the Arizona Secretary of State.

3           18.    Certain events then delayed the implementation of the Act, which were litigated  
4 as detailed below.

5           19.    On May 2, 2011, Dennis K. Burke, then United States Attorney for the District of  
6 Arizona, wrote to the Director of AZDHS concerning the implementation of the Arizona  
7 medical marijuana program stating, among other things: “The United States Attorney’s Office  
8 for the District of Arizona. . . will continue to vigorously prosecute individuals and  
9 organizations that participate in unlawful manufacturing, distribution and marketing activity  
10 involving marijuana, even if such activities are permitted under state law.”

11           20.    On May 27, 2011, as it had a legal right to do, the State of Arizona filed a  
12 Complaint for Declaratory Judgment in the United States District Court for the District of  
13 Arizona seeking a declaration whether the Act should be deemed preempted because of an  
14 irreconcilable conflict with federal law.

15           21.    More specifically, the State of Arizona’s Complaint for Declaratory Judgment  
16 embodied the concern that state employees might be subjected to potentially criminal  
17 prosecution under federal law, namely the Controlled Substance Act (“CSA”).

18           22.    On January 4, 2012, United States District Court Judge Susan R. Bolton  
19 dismissed the State of Arizona’s Complaint for Declaratory Judgment as unripe.

20           23.    On January 13, 2012, Arizona Governor Jan Brewer advised the acting United  
21 States Attorney for the District of Arizona, Ann Birmingham Scheel, in writing that Arizona  
22 would implement the Act.

23           24.    But other similar issues then later arose concerning the implementation of the  
24 Act, which were also litigated as described below.

25           25.    On June 20, 2012, White Mountain Health Center, Inc. brought a lawsuit against  
26 various defendants including AZDHS and Maricopa County CV2012-053585 (the “White  
27 Mountain Lawsuit”). The State of Arizona intervened in the White Mountain Lawsuit.  
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1           26. White Mountain is a non-profit corporation seeking permission to open a MMD  
2 in Sun City CHAA 49, which is located within the boundaries of Maricopa County, Arizona.

3           27. In White Mountain Lawsuit, the Maricopa County Attorney asked Maricopa  
4 County Superior Court Judge Michael D. Gordon to determine whether federal law preempted  
5 the Arizona Medical Marijuana Act (“AMMA”).

6           28. Maricopa County took its position after AZDHS adopted its rules for the medical  
7 marijuana program and after AZDHS began its implementation.

8           29. In the White Mountain Lawsuit, Maricopa County asserted its position in Court  
9 after AZDHS had adopted its final rules for the medical marijuana program and after AZDHS  
10 had begun implementation.

11           30. The medical marijuana program rules promulgated by AZDHS established a  
12 specific schedule for Arizona non-profit corporations desiring to obtain approval to operate  
13 medical marijuana dispensary in the State of Arizona.

14           31. Specifically, between May 14 and 25, 2012, AZDHS accepted applications from  
15 dispensary license seekers for allocation of a dispensary registration certificate, a document  
16 required to operate a MMD within a given Community Health Analysis Area (“CHAA”)

17           32. On August 7, 2012, AZDHS conducted a random selection process (*i.e.*, lottery)  
18 for qualified applicants to receive an allocation of a dispensary registration certificate for each  
19 CHAA.

20           33. There are 126 CHAAs in the State of Arizona

21           34. Each CHAA would be allocated only one MMD.

22           35. A total of 98 Dispensary Registration Certificates were allocated by AZDHS on  
23 or about August 7, 2012.

24           36. A Dispensary Registration Certificate, by its express terms, does not by itself  
25 allow an applicant to open and operate a MMD.

26           37. Applicants that received a Dispensary Registration Certificate from AZDHS  
27 have approximately one year from receipt of the certificate to qualify for, further apply for, and  
28 then obtain from AZDHS an “Approval to Operate.”

1           38. During the approximate one year period provided to applicants allocated a  
2 Dispensary Registration Certificate to complete all of the remaining requirements needed to  
3 obtain from AZDHS an "Approval to Operate" and to request an inspection that would allow  
4 AZDHS to issue an "Approval to Operate," substantial work needs to be completed by the  
5 applicant, including for example, local municipality approvals on all of the construction work,  
6 use permits (if applicable), other local permits and approvals, and an appropriate location  
7 within its designated CHAA.

8           39. On December 3, 2012, Judge Gordon issued his ruling in the White Mountain  
9 Lawsuit.

10          40. That ruling is presently on appeal and so the matters addressed therein have not  
11 been finally determined as a matter of law.

12          41. The White Mountain Lawsuit is presently listed by the Arizona Court of Appeals  
13 as being "at issue," with the most recent docket entry showing that Judge Lawrence F.  
14 Winthrop issue an order granting the appellee's request for oral argument on May 15, 2013.

15          42. Numerous *amicus curiae* briefs have been filed in the White Mountain Lawsuit  
16 pending before the Arizona Court of Appeals.

17          43. It is apparent that White Mountain Lawsuit will not be resolved before June 7,  
18 2013, the date which license holders allocated a Dispensary Registration Certificate are  
19 required by AZDHS rules to apply for their "Approval to Operate," which must be issued by  
20 no later than August 7, 2013.

21          44. If an applicant allocated a Dispensary Registration Certificate does not timely  
22 apply for and timely receive its "Approval to Operate" from AZDHS and begin operation, then  
23 all of the officers and directors of that license holder are barred from future participation in the  
24 Arizona medical marijuana program.

25          45. Filings by the parties in the White Mountain Lawsuit have stated that the matters  
26 to be addressed therein present issues of "statewide impact."

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1           46.   Indeed, during the period of time that the White Mountain Lawsuit has been  
2 pending, Byers has been directly and or indirectly monitoring the progress and status of the  
3 case and the rulings in that case.

4           47.   The conflict for Byers created by the pending and presently unresolved legal  
5 situation addressed in the White Mountain Lawsuit, as the parties have the legal right to do, is  
6 as follows:

7           a.   On one hand, Byers relied on the ruling by Judge Bolton, the letter by  
8 Governor Brewer, the AZDHS implementation of the act through  
9 promulgation of the rules, and timely applied for an allocation of a  
10 dispensary registration certificate within the window of time specified for  
11 such applications by AZDHS, and all of them have, in fact, been allocated a  
12 Dispensary Registration Certificate for the Round Valley CHAA.

13           b.   On the other hand, given the legal issues which arose in the White Mountain  
14 Lawsuit after it timely submitted its application to AZDHS for a dispensary  
15 registration certificate, and the fact that the White Mountain Lawsuit issues  
16 have still not been finally resolved even at present time, Byers has been  
17 chilled from completing the process of applying for an “Approval to  
18 Operate” because if they obtain the “Approval to Operate” and then, as  
19 required, begin operations, and the White Mountain Lawsuit is finally  
20 resolved by a reversal of Judge Gordon’s decision, then the Act may be  
21 regarded as unconstitutional and its protections from criminal prosecution by  
22 state authorities will disappear, and their capital investments and time will all  
23 have been lost.

24           48.   While the preamble to the Act itself states, among other things, that “States are  
25 not required to enforce federal law or prosecute people for engaging in activities prohibited by  
26 federal law,” law enforcement and government officials have contended otherwise, citing  
27 various authorities, placing Byers and the municipalities in the Round Valley CHAA in an  
28 untenable position.

1           49.    A request for inspection to apply for an “Approval to Operate” must be filed with  
2 AZDHS no later than June 7, 2013.

3           50.    A dispensary must receive its “Approval to Operate” and begin operation by no  
4 later than August 7, 2013.

5           51.    On information and belief, at the present time, only about one-half of the  
6 qualified 98 applications who received Dispensary Registration Certificates are expected to  
7 receive an “Approval to Operate” by the deadline.

8           52.    If the selectees for around one-half of the CHAAs are unable to timely obtain an  
9 “Approval to Operate” from AZDHS, it will be required to conduct another selection process  
10 for those CHAAs at substantial expense to the State of Arizona, to the selectees, which were  
11 successfully awarded Dispensary Registration Certificates, and new interested parties.

12           53.    On information and belief, at the time that AZDHS promulgated its final  
13 regulations for the medical marijuana program, pursuant to the Act, it did not foresee that the  
14 1-year time frame would be insufficient for certificate holders that received a Dispensary  
15 Registration Allocation to request an “Approval to Operate” because AZDHS did not foresee  
16 that the White Mountain Lawsuit would have the chilling effect as alleged herein.

17           54.    Plaintiff-Intervenor, Byers Dispensary Inc has identified a willing seller of a  
18 building in the Round Valley CHAA and has negotiated the material terms of the building  
19 purchase for its MMD.

20           55.    According tax records, maps, and the Town of Springerville, where the building  
21 is located, the building is located in Round Valley CHAA 24.

22           56.    AZDHS claims to use a Google powered map to determine whether a location is  
23 within its appropriately designated CHAA.

24           57.    When Byers’ location is inputted into Google maps, the “pin” incorrectly places  
25 the location in the middle of E. Main Street, which is apparently located in the adjacent St.  
26 Johns CHAA.

27           58.    But Google’s satellite view map shows, and in reality, Byers’ actual location is in  
28 the appropriate CHAA, Round Valley.

1           59. Springerville's Planning and Zoning Commission (the "Commission") has  
2 carefully analyzed the satellite version of AZDHS's CHAA map and concluded that the "pin"  
3 location is wrong.

4           60. Instead of recognizing Byers' location as being in the Round Valley CHAA,  
5 AZDHS has suggested that it find a new location.

6           61. Byers accordingly requests that the Court enjoin defendant from: (a) requiring  
7 that these plaintiffs submit their requests for inspection by June 7, 2013, and (b) requiring that  
8 these plaintiffs obtain their "Approval to Operate" by August 7, 2013.

9           62. Byers also requests a Temporary Restraining Order providing for the foregoing  
10 relief.

11           63. Byers requests that the Court then issue a Preliminary Injunction to replace the  
12 Temporary Restraining Order, before the Temporary Restraining Order expires and that it issue  
13 a Permanent Injunction setting a new date for plaintiffs to submit their requests for inspection  
14 and to obtain an "Approval to Operate."

15           64. The balance of the hardships tips in favor of granting the requested relief  
16 because:

- 17           a. Byers has proceeded reasonably and diligently;
- 18           b. The uncertainty caused by the White Mountain Lawsuit is not of Byers'  
19           doing;
- 20           c. The difficulties encountered with the AZDHS failing to acknowledge  
21           Byers' actual location is not a situation Byers created;
- 22           d. The Act is new law in the State of Arizona, which has been surrounded by  
23           litigation since it was adopted by the voters of the State of Arizona,  
24           meaning that there is no established precedent for implementation of the  
25           Act;
- 26           e. The consequences of failing to timely comply with the deadlines of June  
27           7, 2013 and August 7, 2013 are significant, resulting in a barring of Byers  
28

1 and its officer and director from future participation in the Arizona  
2 medical marijuana program, as alleged herein above;

3 f. The consequences of complying with the deadlines (at least in the current  
4 legal climate with the White Mountain Lawsuit pending and unresolved)  
5 can be significant as well, as alleged herein above, because state law legal  
6 protections may disappear;

7 g. Byers has made substantial investments of capital and time in reliance on  
8 the legality of Arizona medical marijuana program under State law, and  
9 have acted reasonably in doing so;

10 h. When it promulgated the rules for the medical marijuana program  
11 pursuant to the Act, AZDHS did not, on information and belief,  
12 contemplate that one year would not be enough time for all (or mostly all)  
13 of the qualified applications successfully selected to receive a Dispensary  
14 Registration Certificate to complete all requirements to timely apply for  
15 and receive an "Approval to Operate;"

16 i. AZDHS's goal in implementing the medical marijuana program pursuant  
17 to the Act has been to have one qualified, non-profit individual or entity  
18 operating a medical marijuana dispensary in each CHAA within the State  
19 of Arizona, and to accomplish that as efficiently as possible and with the  
20 health of the qualified patients in each such CHAA in mind;

21 65. No significant bond should be required of Byers since it has already been  
22 determined to be qualified to receive from AZDHS a Dispensary Registration Certificate and  
23 has, therefore, fully paid all fees and otherwise complied with all requirements necessary to be  
24 deemed qualified for such a certificate, and it has already made a significant investment of both  
25 capital and time in connection with its performance.

26 66. There is an immediate risk of irreparable injury to Byers because, due to the  
27 uncertainty alleged herein above, it may be permanently barred from the Arizona medical  
28 marijuana program due to the chilling effect of the unresolved litigation surrounding the White

1 Mountain Lawsuit and AZDHS's position on a property's location, an injury that would not be  
2 compensable by damages.

3 67. Injunctive relief will serve the public interest as specified in the Act.

4 68. The current regulations and map use, unless modified or their operation enjoined,  
5 have the effect of operating contrary to the dictates of the Act, specifically the requirement that  
6 AZDHS "shall adopt rules governing nonprofit medical marijuana dispensaries without  
7 imposing an undue burden on non-profit medical marijuana dispensaries" including "the  
8 manner in which the department shall consider applications for and renewals of registration  
9 certificates." ARS Section 36-2803(4)(a).

10 69. While, on information and belief, the one year time limit to obtain an "Approval  
11 to Operate" after being allocated a Dispensary Registration Certificate was not known by  
12 AZDHS at the time of rule promulgation to impose an "undue burden" on non-profit medical  
13 marijuana dispensaries, the facts and circumstances now demonstrate that the one year time  
14 limit does, in fact, impose an "undue burden" on such organizations, including Byers, contrary  
15 to the dictates of the Act.

16 70. The current rules, with their one year limitation, do impose an "undue burden"  
17 on non-profit medical marijuana dispensaries, specifically Byers for the reasons stated herein,  
18 including that the one year time frame is not reasonable under the circumstances, and the  
19 substantial likelihood that enforcement of the one year limit will result in the inability of Byers  
20 to obtain its "Approval to Operate" and preclude it from any renewal.

21 71. There is a substantial likelihood that Byers will succeed on the merits of its claim  
22 demonstrating that the current one-year limitation imposes an "undue burden" on it in violation  
23 of ARS Section 36-2803(4)(a).

24 72. A reasonable time for the deadline for Byers to submit its application and to  
25 obtain an "Approval to Operate" should be determined by the resolution of the White  
26 Mountain Lawsuit and the resolution of the proper location of Byers' building (absent  
27 settlement or new regulations promulgated by AZDHS).

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Clerk of the Court  
Maricopa County Superior Court

**COPY** of the foregoing emailed  
this 30th day of May, 2013 and  
mailed this 31<sup>st</sup> day of May, 2013 to:

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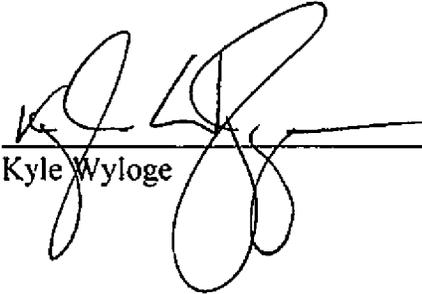
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**VERIFICATION**

I, Kyle Wyloge, on behalf of Byers Dispensary, Inc., hereby declare and state as follows:

I have read the foregoing Verified Complaint and declare under penalty of perjury that the allegations therein are true and correct to the best of my knowledge.

Executed this 30<sup>th</sup> day of May, 2013.

  
\_\_\_\_\_  
Kyle Wyloge