

MICHAEL K. JEANES
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Description	Amount
CASE# CV2013-005901	
CIVIL NEW COMPLAINT	319.00
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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF MARICOPA**

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

Case No. CV2013-005901

VERIFIED COMPLAINT

(Injunctive Relief)

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I. The Parties.

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

- a. Total Health & Wellness, Inc. (CHAA 80)
- b. Total Accountability Patient Care, Inc. (CHAA 119)
- c. Total Accountability Systems I, Inc. (CHAA 27)
- d. Non Profit Patient Center, Inc. (CHAA 3)
- e. Green Hills Patient Center, Inc. (CHAA 21)
- f. Herbal Pharmacy of Central Arizona, Inc. (CHAA 104)
- g. Herbal Wellness Center, Inc. (CHAA 60)
- h. Nature's Healing Center, Inc. (CHAA 70 and CHAA 78)
- i. Nature's Wonder, Inc. (CHAA 92)
- j. Preferred Herbs, Inc. (CHAA 38)
- k. Kind Meds, Inc. (CHAA 69)

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

II. Jurisdiction and Venue.

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

4. Venue is proper pursuant to ARS Section 12-401.

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III. General Allegations.

5. In November 2010, Arizona voters passed the Arizona Medical Marijuana Act (the "Act") by adopting Proposition 203, a citizen initiative authorized as a reserved power by the Arizona Constitution at Article 4, Part 1, Section 1(2).

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

7. The Arizona Department of Health Services ("AZDHS") was required by the Act to, within 120 days after the effective date of the Act, adopt rules implementing Arizona's medical marijuana program, as more fully set forth in ARS Section 36-2803.

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

9. On December 17, 2010, AZDHS issued its first set of draft rules for Arizona's medical marijuana program.

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

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

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

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

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

5 15. On March 28, 2011, AZDHS published the final rules for the Arizona medical
6 marijuana program.

7 16. On April 13, 2011, AZDHS filed its rules implementing Arizona's medical marijuana
8 program with the Arizona Secretary of State.

9 17. The rules implementing Arizona's medical marijuana program are embodied in
10 Arizona's Administrative Code at R9-17-101 to R9-17-323.

11 18. Certain events then delayed the implementation of the Act, which were litigated, as
12 follows.

13 19. On May 2, 2011, Dennis K. Burke, then United States Attorney for the District of
14 Arizona, wrote to the Director of AZDHS concerning the implementation of the Arizona
15 medical marijuana program stating, among other things: "The United States Attorney's
16 Office for the District of Arizona...will continue to vigorously prosecute individuals and
17 organizations that participate in unlawful manufacturing, distribution and marketing activity
18 involving marijuana, even if such activities are permitted under state law."

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

1 21. More specifically, the State of Arizona's Complaint for Declaratory Judgment
2 embodied the concern that state employees might be subjected to potentially criminal
3 prosecution under federal law, namely the Controlled Substances Act ("CSA").

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

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

9 24. But, other similar issues then later arose concerning implementation of the Act,
10 which were also litigated, as follows.

11 25. On June 20, 2012, a well-publicized lawsuit was brought by White Mountain Health
12 Center, Inc. against various defendants including AZDHS and the County of Maricopa,
13 CV2012-053585 (the "White Mountain lawsuit"). The State of Arizona intervened in the
14 White Mountain lawsuit.

15 26. White Mountain Health Center, Inc. is an Arizona non-profit corporation seeking
16 permission to open a medical marijuana dispensary in a CHAA which is located within the
17 boundaries of Maricopa County, Arizona.

18 27. In that litigation, the Maricopa County Attorney asked a Maricopa County Superior
19 Court Judge (Michael D. Gordon) to determine that the Act was preempted by federal law
20 prohibiting the possession, distribution and cultivation of marijuana.

21 28. As he had the legal right to do, Maricopa County Attorney Bill Montgomery issued a
22 News Release on August 23, 2012 indicating that: "It is the County's position that the

1 AMMA is in direct violation of the federal Controlled Substances Act and therefore cannot
2 be implemented without exposing County employees to the risk of federal
3 prosecution...The AMMA also runs afoul of the Supremacy Clause enshrined in the U.S.
4 Constitution by our Founding Fathers, which preempts state law that conflicts with federal
5 law.”

6 29. This position was similar to the position litigated by the State of Arizona and
7 determined to be unripe by Judge Bolton, as alleged herein above.

8 30. By contrast to the State of Arizona’s lawsuit decided by Judge Bolton, described
9 herein above, the claims and position taken by Maricopa County in the White Mountain
10 lawsuit were asserted in Court *after* AZDHS had adopted its rules for the medical marijuana
11 program and *after* AZDHS had begun implementation (*i.e.*, dispensary applications were
12 first accepted in May 2012).

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

16 32. Specifically, between May 14 and 25, 2012, AZDHS accepted applications from
17 Arizona non-profit corporations for allocation of a dispensary registration certificate, the
18 document required for an Arizona non-profit corporation to have permission to operate a
19 medical marijuana dispensary within a given Community Health Analysis Area (“CHAA”).

20 33. On August 7, 2012, AZDHS conducted a random selection process (*i.e.*, lottery) for
21 qualified applicants to receive an allocation of a dispensary registration certificate for each
22 CHAA.

1 34. There are 126 CHAAs in the State of Arizona.

2 35. Each CHAA may have only one medical marijuana dispensary.

3 36. A total of 98 Dispensary Registration Certificates were allocated by AZDHS on or
4 about August 7, 2012.

5 37. A Dispensary Registration Certificate, by its express terms, does not by itself allow
6 an Arizona non-profit corporation to open and operate a medical marijuana dispensary.

7 38. Non-profit corporations receiving a Dispensary Registration Certificate from AZDHS
8 have approximately one year from receipt of the certificate to qualify for, further apply for
9 and then obtain from AZDHS an "Approval to Operate."

10 39. During the approximate one year period provided to non-profit corporations allocated
11 a Dispensary Registration Certificate to complete all of the remaining requirements needed
12 to obtain from AZDHS an "Approval to Operate" and to request an inspection that would
13 allow AZDHS to issue an "Approval to Operate", substantial work needs to be completed
14 by the non-profit corporation, including, for example, local municipality approvals on all of
15 the construction work, use permits (if applicable) and other local permits and approvals.

16 40. On December 3, 2012, Judge Gordon issued his ruling in the White Mountain
17 Lawsuit, a true and correct copy of which is attached hereto as Exhibit 1.

18 41. That ruling is presently on appeal and so the matters addressed therein have not been
19 finally determined as a matter of law.

20 42. The White Mountain lawsuit is presently listed by the Arizona Court of Appeals as
21 being "at issue", with the most recent docket entry showing that Judge Lawrence F.
22 Winthrop issued an order granting the appellee's request for oral argument on May 15,

1 2013. A true and correct copy of the current docket listing at the Court of Appeals for the
2 White Mountain lawsuit is attached hereto as Exhibit 2.

3 43. Numerous *amicus curiae* briefs have been filed in the White Mountain lawsuit
4 pending before the Arizona Court of Appeals.

5 44. It is apparent that the White Mountain lawsuit will not be resolved before June 7,
6 2013, the date by which non-profit corporations allocated a Dispensary Registration
7 Certificate are required by AZDHS rules to apply for their "Approval to Operate", which
8 must be issued by no later than August 7, 2013.

9 45. If a non-profit corporation allocated a Dispensary Registration Certificate does not
10 timely apply for and timely receive its "Approval to Operate" from AZDHS *and begin*
11 *operation*, then all of the officers and directors of that non-profit corporation are barred
12 from future participation the Arizona medical marijuana program.

13 46. Filings by the parties in the White Mountain lawsuit have stated that the matters to be
14 addressed therein present issues of "statewide impact."

15 47. Indeed, during the period of time that the White Mountain lawsuit has been pending
16 (*i.e.*, since June 2012), plaintiffs have been directly and or indirectly monitoring the
17 progress and status of the case and the rulings in that case.

18 48. The conflict for plaintiffs created by the pending and presently unresolved legal
19 situation being addressed in the White Mountain lawsuit, as the parties in that case have the
20 legal right to do, is as follows:

- 21 a. On one hand, plaintiffs relied on the ruling by Judge Bolton, the letter by
22 Governor Brewer, the AZDHS implementation of the Act through promulgation

1 of the rules, and timely applied for an allocation of a dispensary registration
2 certificate within the window of time specified for such applications by AZDHS,
3 and all of them have, in fact, been allocated a Dispensary Registration Certificate
4 for a particular CHAA. If they fail to proceed with a request to AZDHS by June 7,
5 2013 for an "Approval to Operate", *and begin operations*, they and their officers
6 and directors will be barred from any and all future participation in the Arizona
7 medical marijuana program.

8 b. On the other hand, given the legal issues which arose in the White Mountain
9 lawsuit *after* they timely submitted their applications to AZDHS for a dispensary
10 registration certificate, and the fact that the White Mountain lawsuit issues have
11 still not been finally resolved even at the present time, plaintiffs have been chilled
12 from completing the process of applying for an "Approval to Operate" because if
13 they obtain the "Approval to Operate" and then, as required, *begin operations*, and
14 the White Mountain lawsuit is finally resolved by a reversal of Judge Gordon's
15 decision, then the Act may be regarded as unconstitutional, its protections from
16 criminal prosecution by state authorities will disappear, and their capital
17 investments and investments of time and effort will all have been lost.

18 49. While preamble to the Act itself states, among other things, that "States are not
19 required to enforce federal law or prosecute people for engaging in activities prohibited by
20 federal law", law enforcement and governmental officials have contended otherwise, citing
21 various authorities, placing plaintiffs and the municipalities in which they seek to operate in
22 an untenable position.

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

3 51. A dispensary must receive its "Approval to Operate" *and begin operation* by no later
4 than **August 7, 2013**.

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

8 53. 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
10 process for those CHAAs at substantial expense to the State of Arizona, to the selectees
11 which were successfully awarded Dispensary Registration Certificates, and new interested
12 parties

13 54. On information and belief, at the time that AZDHS promulgated its final regulations
14 for the medical marijuana program pursuant to the Act, it did not foresee that the 1 year time
15 frame would be insufficient for non-profit corporations which received a Dispensary
16 Registration Allocation to request an "Approval to Operate" because AZDHS did not
17 foresee that a lawsuit (*i.e.*, the White Mountain lawsuit) would have the chilling effect as
18 alleged herein.

19 55. In addition to and separately from the foregoing, plaintiffs have encountered
20 difficulties in obtaining the requisite approvals from municipal authorities needed to
21 operate, on information and belief, due in substantial part to, on information and belief, the
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1 lingering questions concerning the legality of the Act and the program implemented under
2 the Act by AZDHS.

3 56. Because of the how the Act is structured, non-profit corporations awarded a
4 Dispensary Registration Certificate are not governed by a statewide standard; municipalities
5 retain certain control over zoning related approvals in a manner which has not been applied
6 uniformly across the State.

7 57. Accordingly certain jurisdictions have been easier to deal with and from which to
8 obtain the required municipal approvals than others, having nothing to do with the
9 qualifications of the individual non-profit corporation involved, but instead the differences
10 in local ordinances and approval processes and local views about the legality of the Act,
11 resulting in unfairly disparate treatment of certain non-profit corporations seeking to open a
12 dispensary, depending on their locale.

13 58. While plaintiffs have at all times reasonably proceeded forward with their efforts to
14 obtain local approvals notwithstanding the uncertainties caused by the continued pendency
15 of the White Mountain lawsuit, because of these local issues, at least in part, on information
16 and belief, they have not obtained all of the necessary approvals required to obtain from
17 AZDHS an "Approval to Operate" and, given the circumstances, likely will not timely be
18 able to do so notwithstanding their efforts.

19 59. On information and belief, at the time that AZDHS promulgated its final regulations
20 for the medical marijuana program pursuant to the Act, it did not foresee that the 1 year time
21 frame would be insufficient for non-profit corporations to obtain the requisite approvals
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1 from certain municipal authorities, while others might grant approvals during that time, due
2 to disparate and non-uniform variations in the local approval processes.

3 60. Plaintiffs accordingly request that the Court enjoin defendant from: (a) requiring that
4 these plaintiffs submit their requests for inspection by June 7, 2013, and (b) requiring that
5 these plaintiffs obtain their "Approval to Operate" by August 8, 2013.

6 61. Plaintiffs request a Temporary Restraining Order providing for the foregoing relief.

7 62. Plaintiffs request that the Court then issue a Preliminary Injunction to replace the
8 Temporary Restraining Order, before the Temporary Restraining Order expires, and that it
9 issue a Permanent Injunction setting a new date for plaintiffs to submit their requests for
10 inspection and to obtain an "Approval to Operate."

11 63. The balance of the hardships tips in favor of granting the requested relief because:

- 12 a. Plaintiffs have proceeded reasonably and diligently;
- 13 b. The uncertainty caused by the White Mountain lawsuit is not of plaintiffs' doing;
- 14 c. The difficulties encountered with the local municipalities is not of plaintiffs'
15 doing;
- 16 d. The Act is a new law in the State of Arizona which has been surrounded by
17 litigation since it was adopted by the voters of the State of Arizona, meaning that
18 *there is no established history or precedent for implementation of the Act;*
- 19 e. The consequences of failing to timely comply with the deadlines of June 7, 2013
20 and August 7, 2013 are significant, resulting in a barring of the plaintiffs and their
21 officers and directors from future participation in the Arizona medical marijuana
22 program, as alleged herein above;

- 1 f. However, the consequences of complying with the deadlines (at least in the
2 current legal climate with the White Mountain lawsuit pending and unresolved)
3 can be significant as well, as alleged herein above, because state law legal
4 protections may disappear;
- 5 g. Plaintiffs have made substantial investments of capital and time in reliance on the
6 legality of the Arizona medical marijuana program under State law, and have
7 acted reasonably in doing so;
- 8 h. When it promulgated the rules for the medical marijuana program pursuant to the
9 Act, AZDHS did not, on information and belief, contemplate that one year would
10 not be enough time for all (or mostly all) of the qualified applications successfully
11 selected to receive a Dispensary Registration Certificate to complete all
12 requirements to timely apply for and receive an "Approval to Operate";
- 13 i. AZDHS's goal in implementing the medical marijuana program pursuant to the
14 Act has been to have one qualified, non-profit Arizona corporation operating a
15 medical marijuana dispensary in each CHAA within the State of Arizona, and to
16 accomplish that as efficiently as possible and with the health of the qualified
17 patients in each such CHAA in mind;

18 64. No significant bond should be required of plaintiffs since they have already been
19 determined to be qualified to receive from AZDHS a Dispensary Registration Certificate
20 and have, therefore, fully paid all fees and otherwise complied with all requirements
21 necessary to be deemed qualified for such a certificate, and because each has already made a
22 significant investment of both capital and time in connection with their performance.

1 65. There is an immediate risk of irreparable injury to plaintiffs because, due to the
2 uncertainty alleged herein above, they may be permanently barred from the Arizona medical
3 marijuana program, due to the chilling effect of the unresolved litigation surrounding the
4 White Mountain lawsuit, an injury that would not be compensable by damages.

5 66. There is no adequate remedy at law under the circumstances.

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

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

13 69. While, on information and belief, the one year time limit to obtain an “Approval to
14 Operate” after being allocated a Dispensary Registration Certificate was *not* known by
15 AZDHS at the time of rule promulgation to impose an “undue burden” on nonprofit medical
16 marijuana dispensaries, the facts and circumstances now demonstrate that the one year time
17 limit does, in fact, impose an “undue burden” on such organizations, including plaintiffs,
18 contrary to the dictates of the Act.

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

3 71. There is a substantial likelihood that plaintiffs will succeed on the merits of their
4 claim demonstrating that the current one year limitation imposes an "undue burden" on
5 nonprofit medical marijuana dispensaries in violation of ARS Section 36-2803(4)(a).

6 72. A reasonable time for the deadline for plaintiffs to submit their applications for
7 inspection and to obtain an "Approval to Operate" should be determined under the facts and
8 circumstances (absent a settlement or new regulation promulgated by AZDHS).

9 73. Without the requested injunctive relief, plaintiffs will have relied on the legality
10 under State law of the medical marijuana program to make investments of both capital and
11 time while subjecting themselves unfairly to the severe risk of loss that would result from a
12 final legal determination that the Act is illegal under State law, which loss can be avoided
13 by the injunctive relief requested herein.

14 WHEREFORE, for the foregoing reasons, plaintiffs request the following:

15 A. A Temporary Restraining Order as alleged herein;

16 B. A Preliminary Injunction as alleged herein;

17 C. A Permanent Injunction as alleged herein;

18 D. And, such other and or further relief as may be justified under the applicable facts
19 and circumstances.

20 RESPECTFULLY SUBMITTED this 20th day of May, 2013.

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