STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT COURT
SANTA FE COUNTY

NICOLE SENA, individually and as Next Friend to Child A.N., and NEW MEXICO TOP ORGANICS-ULTRA HEALTH, INC., a New Mexico non-profit Corporation,

Plaintiffs,

Case No.: D-101-CV-2016-01971

v.

NEW MEXICO DEPARTMENT OF HEALTH, and Dr. TRACIE C. COLLINS, in her official capacity as SECRETARY-DESIGNATE,

Defendants.

PLAINTIFFS' VERIFIED MOTION TO ENFORCE THIS COURT'S NOVEMBER 1, 2018 ORDER AND JANUARY 4, 2019 JUDGMENT AND VERIFIED APPLICATION FOR DECLARATORY JUDGMENT

COME NOW, Plaintiffs Nicole Sena, individually and as Next Friend to Child A.N., and New Mexico Top Organics-Ultra Health, Inc., a New Mexico non-profit Corporation, by and through their undersigned counsel of record, CANDELARIA LAW LLC (Jacob R. Candelaria, appearing), and hereby request the Court enforce the orders previously entered in this case and award further declaratory relief. In the alternative, Plaintiffs request the Court order that the parties proceed to discovery on the issues presented by this *Motion* and *Application.*

This *Motion* and *Application* arises from the Court's November 1, 2018 Order, which the Court entered after a four-day bench trial conducted in August 2017. The November 1, 2018 Order was also affirmed by the January 4, 2019 Final Order and Judgment. A copy of the Court's

November 1, 2018 Order is attached hereto in Exhibit A. In that Order, the Court held that Defendants have an affirmative duty, pursuant to the Lynn and Erin Compassionate Use Act, NMSA 1978 § 26-2B-1, *et seq.*, to "ensure that patients can obtain an adequate supply of medical cannabis products." [Order at 4.]

Specifically, the Court held that "DOH has a duty/obligation to ensure that patients can obtain an 'adequate supply' of medical cannabis products, and therefore DOH has a duty to adequately study and evaluate whether patients can obtain such an adequate supply." [Judgment at 8]. The Court additionally mandated how Defendants must carry out their duty to ensure that patients can obtain an adequate supply: 1) DOH "must make sure its decision is neither arbitrary nor capricious;" 2) DOH "may not use a statutory grant of the power to regulate to impede the fundamental duty under the act which is to ensure an adequate supply;" and 3) DOH's regulation must "have a reasonable nexus in law or fact to adequate supply." [Order at 8 and 56.]

Defendants' duties under the Compassionate Use Act thus include the obligation to study and evaluate, on an ongoing and proactive basis, whether patients can obtain an adequate supply of medicine. Id. In discharging this function, Defendants must "make sure [their] decision is neither arbitrary or capricious" and that Defendants' administrative rulemaking does not frustrate the purpose of the Compassionate Use Act, which is to ensure that New Mexicans can access an adequate supply of medical cannabis sufficient to achieve "beneficial use." § 26-2B-2 and § 26-2B-4(A).

As set forth below, Defendants have breached the duties imposed upon them by the Court's November 1, 2018 Order and January 4, 2019 Judgment and by the Compassionate Use Act. In violation of the Court's specific mandates, Defendants have promulgated, and are enforcing, a plant count limit that is arbitrary and capricious, that frustrates the purpose of the

Compassionate Use Act, that fails to provide for adequate supply, and that has no nexus to law or fact. The plant count limit is codified at 7.34.4.8(A)(2) NMAC.

Plaintiffs bring this *Motion* and *Application* at this time in light of the consistent and dramatic growth in the number of patients enrolled in the Medical Cannabis Program and Defendants' adoption, subsequent to entry of the January 2019 Judgment, of the 1,750 plant count limit. Although there are more plants available for cultivation now than there were at the time of the 2017 trial in this matter, supply is continually stretched by ever-increasing demand. The past two years have seen dramatic increases in patient enrollment and usage without corresponding increases in plant availability. Continual increases in demand, without continual increases in supply, have resulted in a Medical Cannabis Program that remains in perpetual crisis.

Defendants have further breached their obligation under the November 1, 2018 Order and January 4, 2019 Judgment to develop a reliable, data driven, and forward-looking method for estimating and projecting medical cannabis supply, demand, and price. Instead, Defendants continue to base their backward-looking estimates of medical cannabis supply on flawed assumptions and unreliable or simply incorrect data.

I. DEFENDANTS REMAIN IN BREACH OF THEIR DUTY TO REGULATE THE MEDICAL CANNABIS PROGRAM IN A WAY THAT GUARANTEES AN ADEQUATE SUPPLY OF MEDICAL CANNABIS TO MEET THE MEDICAL NEEDS OF NEW MEXICO'S NOW 104,000+ MEDICAL CANNABIS PATIENTS

1. This Court retains jurisdiction to enforce its own judgments. That jurisdiction includes broad equitable powers to order that Defendants carry out the provisions of this Court's November 1, 2018 Order and January 4, 2019 Judgment. See *Mendoza v. Mendoza*,

1985-NMCA-088, ¶ 28, 103 N.M. 327, 706 P.2d 869, 875 ("As long as a judgment remains in force, the trial court which rendered the judgment retains the authority to enforce its judgment where the court has originally acquired jurisdiction."); *Hall v. Hall*, 1992-NMCA-097, ¶ 41, 114 N.M. 378, 838 P.2d 995, 1005 (Internal citation and quotation omitted) (Emphasis added) (a trial court properly enforced, rather than modified, its original judgment because "enforce" "means to compel obedience to, or to cause the provisions to be executed").

2. Defendants did not appeal the November 1, 2018 Order and January 4, 2019 Judgment. Although Defendants did attempt to stay the effect of the Court's rulings in spring 2019, the Court rejected Defendants' efforts. Defendants have not attempted to further stay the rulings. As such, Defendants remain legally bound to comply with the provisions of the November 1, 2018 Order and January 4, 2019 Judgment.
3. Defendants have breached the duties imposed upon them in several important ways. Chief among these, however, is Defendants' breach of their duty to use their regulatory authority in a manner which ensures that New Mexico's now 104,000+ medical cannabis patients can, at any time, access an adequate supply of medical cannabis at an affordable price in accordance with the Compassionate Use Act's purpose of "beneficial use." § 26-2B-2.
4. New Mexico's medical cannabis supply has continued to erode since the Court entered its November 1, 2018 Order and January 4, 2019 Judgment:
    a. In its November 1, 2018 Order, this Court observed that, as of the time the case went to trial in August 2017, the Medical Cannabis Program provided about one-third of a medical cannabis plant per qualified patient. [November 1, 2018

Order at 23]. At the time, there were roughly 45,000 patients enrolled in the Medical Cannabis Program, 35 licensed producers, and a limitation of 450 plants per producer. It was this amount of supply—a supply effectively rationed by the Department—that the Court found violated Defendants' duty to ensure an adequate supply of medical cannabis.

b. By November 30, 2019, there were 78,810 patients enrolled in the Medical Cannabis Program. Exhibit B. By this point, Defendants had adopted a revision to NMAC 7.34.4.8(A)(2) to increase the limitation on the number of medical cannabis plants that a licensed producer may grow at any given time from 450 to 1,750 per producer.

c. There are currently 34 licensed producers in New Mexico, which means that the maximum number of medical cannabis plants is 59,500 (34 times 1,750).

d. However, Defendants' regulations allow a producer to subscribe to less than the maximum number of plants. *See* 7.34.4.8(W)(2) NMAC.

e. Some licensed producers subscribe to the maximum number of 1,750 plants, but other producers cultivate a lower number of plants. As a result, in September 2019, Defendants had licensed only 39,400 medical cannabis plants.

f. The number of plants divided by the number of patients enrolled in November 2019 resulted in a supply ratio of 0.49 plants per patient (39,400 plants divided by 78,810 patients) in the last quarter of 2019. Exhibit B.

g. The number of medical cannabis patients enrolled in the program as of November 2019 represented a 31% increase from the same period in November 2018 (N+=18,836 patients).

h. The number of medically fragile persons enrolled in the Medical Cannabis Program has continued to increase dramatically with the onset of the COVID-19 Pandemic and following Defendants' adoption of rules implementing the provisions of NMSA 1978, § Section 26-2B-7 [Registry identification cards; department rules; duties; reciprocity], wherein the Legislature authorized reciprocal enrollment into the New Mexico Medical Cannabis Program.

i. By December 2020, the number of qualified medical cannabis patients had increased 28% over the same period in 2019 to a record-setting 104,655 patients.

j. Based upon information obtained from Defendants pursuant to the New Mexico Inspection of Public Records Act ("IPRA"), Defendants licensed approximately 51,950 medical cannabis plants for the 2020-2021 licensure period, which is still below the theoretical maximum of 59,500. This translates to a medical cannabis supply ratio of approximately 0.49 medical cannabis plants per patient (51,950 plants divided by 104,655 patients) in the last quarter of 2020.

5. Due to Defendants' arbitrary and capricious use of its regulatory authority, the supply of medical cannabis available to qualified and reciprocal patients is substantially less that what is available to patients with a Personal Production License ("PPL") that allows them to home-grow an individual supply of medical cannabis.

6. Pursuant to 7.34.4.8(A)(1) NMAC, a PPL patient is authorized to possess, at any one time, up to **four** mature cannabis plants as well as twelve seedlings and male plants. As noted above, as of November 2020, Department rules have limited the supply of medical cannabis available to qualified and reciprocal patients to 0.49 medical cannabis plants per patient.

7. The striking disparity in the supply of medical cannabis available to qualified and reciprocal patients, relative to PPL patients, under Defendants' rules further evinces the arbitrary and capricious way that Defendants have used their rule making authority since entry of this Court's November 1, 2018 Order and January 4, 2019 Judgment.
8. There is no compelling or important state interest that justifies Defendants' discrimination with respect to the supply of medical cannabis available to qualified and reciprocal patients vs. PPL patients. As such, on its face, 7.34.4.8(A)(2) NMAC violates the equal protection and substantive due process rights afforded to qualified and reciprocal patients by the New Mexico and United States Constitutions.
9. The amount of medical cannabis available to PPL patients also undermines any defense by Defendants that a supply ratio of 0.49 medical cannabis plants per qualified and reciprocal patients constitutes an adequate supply for these classes of patients, but not for PPL patients. If Defendants have concluded that four mature medical cannabis plants is an adequate supply for PPL patients, then Defendants should be required to exercise their rulemaking authority to guarantee that qualified and reciprocal patients have access to at least the same amount of medicine.
10. Defendants' own patient enrollment and medical cannabis plant licensure data confirms that Defendants have failed to meaningfully increase New Mexico's medical cannabis supply since entry of the January 2019 Judgment. The supply ratio has increased by only a marginal amount in almost two years—from 0.3 plants-per-patient to 0.49 plants-per-patient. The static supply ratio is the result of dramatic increases in patient enrollment and usage without corresponding increases in plant availability. Defendants have also failed to adopt reliable methods to determine what constitutes an adequate

supply of medical cannabis in light of the rapid and dramatic growth in the number of patients enrolled in the Medical Cannabis Program.

11. Defendants' failure to respond to increasing patient enrollment has provoked a crisis in the Medical Cannabis Program overall: producers are unable to consistently meet patient demand for products.

12. Producers are attempting to meet the needs of 104,000+ patients with the same supply intended for 75,000 patients.

13. The lack of supply means that special orders are not filled, specific products take longer to restock, some strains are out of stock entirely, and patients can purchase only smaller amounts at a time.

14. Upon information and belief, the lack of supply also means patients travel to other states, including Colorado, to purchase medical cannabis, thus placing themselves in unnecessary legal jeopardy.

The 1,750 plant count limit at NMAC 7.34.4.8(A)(2) is arbitrary and capricious and violates this Court's Order that Defendants ensure an adequate supply of medical cannabis

15. Plaintiffs direct the Court to the Complaint in D-101-CV-2019-02577, in which several licensed producers, including Plaintiff New Mexico Top Organics, Inc., explained how and why 7.34.4.8(A)(2) NMAC violates this Court's November 1, 2018 Order and January 4, 2019 Judgment and Defendant's duty to guarantee an adequate supply of medical cannabis. A copy of the Complaint is included in Exhibit C.

16. In addition to the reasons set forth in that pleading, Plaintiffs contend that 7.34.4.8(A)(2) NMAC is arbitrary and capricious both because it was not based on reliable data, and also

because it appears to have been motivated, at least in part, by retaliatory animus toward Plaintiff New Mexico Top Organics.

17. Following Defendants' adoption of amendments to 7.34.4.8(A)(2) NMAC in August 2019, Plaintiff New Mexico Top Organics submitted an IPRA request to the Office of Governor Michelle Lujan Grisham for copies of all correspondence between that office and Defendants regarding Defendants' adoption of permanent amendments to 7.34.4.8(A)(2) NMAC following this Court's January 2019 Judgement.
18. The responsive emails, which are attached as Exhibit D, document the arbitrary and capricious, and apparently retaliatory, way that Defendants used their rulemaking authority with respect to adoption of the fall 2019 revisions to 7.34.4.8(A)(2) NMAC.
19. In the attached correspondence, former Medical Cannabis Program Director Kenny Vigil admits in an email, dated February 23, 2019, that no other jurisdiction, apart from New Mexico, uses a static plant count limit to regulate the supply of medical cannabis. Exhibit D.
20. In response to Mr. Vigil's email, then-Secretary Kathyleen Kunkel sent an email to Jane Wishner, a member of the Governor's senior staff whose portfolio includes health policy, in which Secretary Kunkel admits that Defendants timed the hearing on their amendments to 7.34.4.8(A)(2) NMAC to "control the plant expansion of Ultra." Secretary Kunkel is referring here to Plaintiff New Mexico Top Organics-Ultra Health which is often referred to as simply "Ultra Health." Id.
21. Far from being driven by a desire to ensure an adequate supply of medical cannabis for medically fragile persons, the February 2019 email chain evidences that when it came to the adoption of amendments to 7.34.4.8(A)(2) NMAC, Defendants were in fact more

interested in using their regulatory power to retaliate against Plaintiff New Mexico Top Organics-Ultra Health and to obstruct the growth of Plaintiff.

22. The purpose of the Compassionate Use Act is set out at § 26-2B-2: "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments."

23. Rather than using their regulatory power to further the purpose of "beneficial use," Defendants have used their regulatory power to constrain the growth of Plaintiff's business.

24. As more fully set forth in the attached Complaint in D-101-CV-2019-02577, Defendants also based their 1,750 plant count limit on unreliable, outdated, and baseless data and analysis by the firm of Freedman and Koski. In addition to relying on bad data and faulty assumptions, the authors of the Freedman and Koski report also distorted the data and findings presented by Dr. Kelly O'Donnell, plaintiffs' expert witness, in order to conform with Defendants' own incorrect assumptions about how New Mexico's medical cannabis should be accurately measured.

25. Contrary to the Court's own mandates, Defendants also continue to rely almost exclusively on unreliable patient and producer survey data to determine what constitutes an "adequate supply" of medical cannabis.

26. The erosion of the medical cannabis supply available to medical cannabis patients in New Mexico is the end result of Defendants' failure to comply with this Court's November 1, 2018 Order and January 4, 2019 Judgment.

27. The rapid erosion in the medical cannabis supply will continue absent action by this Court to enforce the provisions of the November 1, 2018 Order and January 4, 2019 Judgment.

28. Contrary to this Court's November 1, 2018 Order and January 4, 2019 Judgment, Defendants continue to make reactionary, backward-looking estimates of medical cannabis demand that are based on outdated and unreliable data.

29. Defendants have also failed to establish a data-driven, proactive, or reliable method for analyzing whether patients' needs are being met and what constitutes an adequate supply overall. Without an effective method for analyzing the entire Medical Cannabis Program's functionality, Defendants can only respond to, and not prevent, crises brought on by collapses in the supply of medical cannabis or market-wide increases in the price of medical cannabis.

Defendants failed to consider what impact an arbitrary plant count limit of 1,750 would have on the price of medical cannabis and thus patient access

30. By continuing to limit the supply of medical cannabis using arbitrary and capricious methods, Defendants have also kept the price of medical cannabis higher in New Mexico relative to prices found in the medical cannabis programs of other jurisdictions.

31. Multiple portions of the Compassionate Use Act indicate that price is a relevant aspect of Defendants' regulatory authority. The Compassionate Use Act's purpose Section, NMSA 1978, § 26-2B-2, speaks of "beneficial use." Cannabis that is unavailable or that is too expensive for patients to afford is not "beneficial." It is axiomatic that "beneficial use" means that medical cannabis is actually available to patients at a price they can afford.

32. Additionally, NMSA 1978, § 26-2B-6.1(F) mandates that Defendants produce an "assessment report" annually that evaluates the "affordability of and accessibility to medical cannabis."

33. On information and belief, the Defendants have not conducted or published such an assessment report.

34. Despite price being an issue that is intimately associated with the ability of patients to *access* their medicine, the evidence that Defendants did not consider the impact that its 1,750 plant count limit would have on the market price for medical cannabis, and thus patient demand, is uncontroverted.

35. As this Court has already found, Defendants act in an arbitrary and capricious way in the exercise of their regulatory authority under the Compassionate Use Act when they promulgate rules which fail to consider issues important to the "problem" (i.e. plant count). [November 1, 2018 Order at 53, citing *Rio Grande Chapter of Sierra Club v. New Mexico Mining Com'n*, 2003-NMSC-005 (internal citation omitted) (ellipsis in original) ("[A]n agency rule would be arbitrary or capricious if the agency ... failed to consider an important aspect of the problem.")].

36. In addition to not considering the impact that the 1,750 plant count limit would have on the price of medical cannabis, Defendants have also failed to develop a systematic, data-driven, or reliable way of evaluating what the prevailing market price for medical cannabis in New Mexico even *is*.

37. Medical cannabis patients are particularly vulnerable and responsive to changes in the price of their medicine. Unlike other prescription medications, Medicare, Medicaid, and most if not all commercial health insurance plans, do not cover medical cannabis as a

benefit. These discriminatory practices mean that medical cannabis patients must, with rare exceptions, pay for their medicine out-of-pocket.

38. Additionally, medical cannabis patients, by definition, suffer from debilitating medical conditions, which means they are more likely to rely on public assistance, more likely to be underemployed, and more likely to face other healthcare costs.

39. Again, the evidence before the Court establishes that Defendant failed to even consider the issue of price in promulgating 7.34.4.8(A)(2) NMAC and setting the 1,750 plant count limit.

Defendants have taken no action to increase the supply of medical cannabis since promulgation of 7.34.4.8(A)(2) NMAC despite the rapid and consistent growth in the patient population

40. In other forums, Defendants and other patients and producers have questioned whether 7.34.4.8(A)(2) NMAC can yield an adequate medical cannabis supply overall, given program enrollment trends.

41. On December 4, 2020, at a public hearing regarding reciprocal enrollment into the New Mexico Medical Cannabis Program, Dr. Dominick Zurlo, current Medical Cannabis Program Director, admitted that there is a medical cannabis supply problem in New Mexico, and yet Defendants have taken no action to revisit 7.34.4.8(A)(2) NMAC and increase the plant count. New Mexico Department of Health. 2020, December 4. *7.34.4.28 Rule Hearing*. Youtube. www.youtube.com/watch?v=_QVCEqDMKwY.

42. Instead of addressing the supply problem by allowing producers to grow more plants, Dr. Zurlo proposed reducing the amount of medical cannabis that reciprocal participants can purchase, in order to leave more available for New Mexico-qualified patients. Id. at 7:50-9:30.

43. Zurlo also blames the supply program on producers not using all allotted plants or being inefficient, but this attempted shifting of blame ignores that it is DOH's actions—the plant count, high licensing fees, and slow agency management—that are the root cause of supply shortages.

44. Solutions like reducing reciprocal patients' share of medical cannabis are only bandages and also raise additional legal issues, such as whether dramatically different purchase limitations for reciprocal participants violates equal protection principles, and whether artificially low purchase limitations for reciprocal participants prevent effectuation of the Compassionate Use Act.

45. The New Mexico patient count is continuing to rise. For example, the patient enrollment statistics released January 5, 2021 show 104,655 active patients, while in November 2020 there were 100,021 active patients. With thousands of patients being added every month, stop-gap measures such as reducing reciprocal limitations will not fix the problem and will only exacerbate the Medical Cannabis Program's overall dysfunctionality.

46. Defendants' attempt to reduce the supply of medical cannabis accessible to reciprocal patients indicates that Defendants are aware there is not enough medical cannabis in the market to adequately supply all of the patients in the program. This approach, on its face, is also inconsistent with Defendants' duty to ensure that *all* patients may access an adequate supply of medical cannabis for their "beneficial use."

47. Defendants have also failed to heed the advice of the New Mexico Medical Cannabis Advisory Board ("MCAB") regarding the plant count limitation set forth at 7.34.4.8(A)(2) NMAC.

48. NMSA 1978, § 26-2B-7 requires that Defendants consult the MCAB regarding any new rules or proposed rule amendments regarding the Medical Cannabis Program.

49. On December 9, 2020, the MCAB advised Defendants to increase the medical cannabis supply by a "substantial amount."

50. Despite the MCAB's advice, and despite the rulings of this Court, Defendants have taken no action since promulgation of the Fall 2019 amendments to NMAC 7.34.4.8(A)(2) to study or analyze, in a reliable fashion, the demand for, or the supply of, medical cannabis in New Mexico. Defendants have also not developed any fact-finding capacity that would enable them to analyze, estimate, or predict the supply, demand, or price of medical cannabis in a systematic or reliable way.

51. In 2019, the Legislature emphasized Defendants' duty to develop a systematic and reliable method for analyzing the State's overall supply of medical cannabis in statutory revisions to the Compassionate Use Act.

52. To wit, the Legislature mandated at NMSA 1978, § 26-2B0-6.1(F) that Defendants "shall produce an assessment report annually, which shall be published to the public and that includes at a minimum an evaluation of: 1) the affordability of and accessibility to medical cannabis."

53. Contrary to the policy mandated by the Legislature, Defendants have not published any such analysis to date for either calendar year 2019 or 2020. This further evinces that Defendants, in violation of this Court's November 1, 2018 Order and January 4, 2019 Judgment, have failed to develop a proactive, data-driven, or fundamentally reliable method for analyzing or projecting the level of production necessary to guarantee an adequate supply of medical cannabis in New Mexico.

54. Defendants' other statements to the press confirm that they have not developed an accurate or reliable methodology to determine an adequate supply of medical cannabis in New Mexico and that Defendants lack a clear grasp or understanding of the data they do collect on medical cannabis supply.

55. On April 2, 2020, Dr. Zurlo commented that "as of last week" Defendants believed that producers had a collective 36,000 pounds of unsold cannabis in stock. Based upon this estimate, Dr. Zurlo claimed that "the way we look at it, we have more than an adequate supply." Andy Lyman, New Mexico Political Report, https://nmpoliticalreport.com/2020/04/02/nm-cannabis-business-group-forgoes-largest-sale-day-of-the-year/ (last visited, January 7, 2021).

56. Dr. Zurlo's statements to the press directly contradict the supply data that Defendants collect from producers and report publicly. Defendants reported that producers had 9,290 pounds of medical cannabis in stock at the end of the first quarter of 2020, the period ending a month before Dr. Zurlo's comments to the *New Mexico Political Report* on April 2, 2020. Exhibit E. At the end of the second quarter of 2020, producers reported having 9,378 pounds of medical cannabis in stock. Exhibit E.

Plaintiff New Mexico Top Organics-Ultra Health's September 2019 Declaratory Judgment Action has no collateral estoppel effect on this case

57. On September 26, 2019, Plaintiffs New Mexico Top Organics-Ultra Health, G&G Genetics, and Sacred Garden brought a separate Declaratory Judgment Action to declare unenforceable, as a matter of law, the plant count limitation set forth at 7.34.4.8(A)(2) NMAC (hereinafter referred to as "the September 2019 Declaratory Judgment Action"). This matter was numbered D-101-CV-2019-02577.

58. In the September 19 Declaratory Judgment Action, Plaintiffs New Mexico Top Organics-Ultra Health, G&G Genetics, and Sacred Garden cited the November 1, 2018 Order and January 4, 2019 Judgment in support of their claims, asserted under the Declaratory Judgment Act, that Defendants' arbitrary and capricious 1,750 plant count limit violates the rights of licensed cannabis producers and improperly alters the reach of the Compassionate Use Act.

59. Plaintiffs hereby incorporate all facts and Issues No. 1 to No. 6 as pled in Plaintiff Ultra Health's *Complaint for Declaratory Judgment* filed in matter D-101-CV-2019-02577, along with all supporting exhibits, as if fully set forth herein in support of this *Motion* and *Application*. Plaintiffs attach a copy of Plaintiff Ultra Health's *Complaint* along with its supporting Exhibits as Exhibit C.

60. In the September 2019 Declaratory Judgment Action, Defendants asked the District Court (Judge Mathew, Francis J., presiding) to dismiss the Declaratory Judgment Action on grounds that the District Court lacked jurisdiction to enforce another Court's orders, or in the alternative, that the Plaintiffs lacked standing to--on their own--assert a claim under the Declaratory Judgment Act. Plaintiffs attach a copy of the briefing on Defendant's *Motion to Dismiss* as Exhibit F.

61. Defendants' Reply in support of their Motion to Dismiss argued that the proper procedural mechanism to enforce this Court's January 4, 2019 Judgement would be a motion to enforce that judgment before the same Court, and not a separate Declaratory Judgment Action. Exhibit F, at 7 ("If Plaintiffs had good grounds for claiming that Defendants had violated the *Sena* judgment, they would bring a contempt proceeding, seek an order to show cause, or otherwise act to enforce the judgment.").

62. On April 14, 2020, the District Court entered an Order of Dismissal granting Defendants' *Motion to Dismiss* in case D-101-CV-2019-02577 on grounds that the Plaintiffs lacked standing to bring suit under the New Mexico Declaratory Judgement Act, NMSA 1978, § Section 44-6-1, *et seq.*, and for "lack of jurisdiction." Exhibit F.
63. The Plaintiffs in D-101-CV-2019-02577 appealed the dismissal.
64. Plaintiffs here do not concede any lack of standing in D-101-CV-2019-02577, and Plaintiffs do not concede that a contempt proceeding, an order to show cause, or a motion to enforce the judgment are the only proper methods to enforce the Court's order in *this* case. Plaintiffs maintain that D-101-CV-2019-02577 was a proper method to seek further relief, that the Plaintiffs in that case did have standing, and that the court in that case had jurisdiction.
65. Because the Medical Cannabis Program is in a current state of crisis, Plaintiffs here avail themselves of an additional remedial option: a motion to enforce the judgment.
66. Judge Mathew's dismissal in D-101-CV-2019-02577 was not an adjudication on the merits of the September 2019 Declaratory Judgement Action. As such, that order has no preclusive or estoppel effect in *this* case.

WHEREFORE, Plaintiffs respectfully ask the Court to enter grant their *Motion* and *Application for Declaratory Judgment* and enter an injunctive Order:

1) Directing Defendants to take immediate steps to comply with all provisions of this Court's November 1, 2018 Order and January 4, 2019 Judgment, including the development of reliable methods to analyze medical cannabis supply, demand, and price, assurance that all patients can access an adequate supply of medical cannabis, and

demonstration that the current version of 7.34.4.8(A)(2) NMAC ensures access to an adequate supply. This may include further ordering that Defendants submit regular status reports to the Court regarding implementation of the January 2019 Judgment so that the Court may evaluate Defendants' progress towards compliance;

2) Declaring that the current version of 7.34.4.8(A)(2) NMAC is arbitrary and capricious and otherwise unenforceable as a matter of law because it violates Defendants' duty to ensure that patients can obtain an adequate supply of medical cannabis products, and invalidating said rule; and,

3) Mandating that Defendants comply with this Court's November 1, 2018 Order and January 4, 2019 Judgment in the promulgation of any future rules or rule amendments that regulate New Mexico's medical cannabis supply.

4) In the alternative, Plaintiffs request the Court allow discovery for the purpose of ascertaining Defendants' compliance with the November 1, 2018 Order and January 4, 2019 Judgment.

WHEREFORE, Plaintiffs request judgment in their favor and against Defendants, injunctive relief, attorney fees, costs, and any other such relief as the Court deems proper.

DATED: January 12, 2021.

Respectfully submitted,

CANDELARIA LAW LLC

/s/ Jacob R. Candelaria

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NOTARY PUBLIC VERIFICATION

I hereby certify that Kylie Safa, Chairperson of New Mexico Top Organics-Ultra Health, Inc., appeared personally before me on January 11, 2021 and thereon testified to that the foregoing statements are true and correct to the best of her knowledge and belief.

Kylie Safa, Chairperson

NOTARY PUBLIC
My Commission Expires: 08/28/2021

VEDA M. GUILLORY
Notary Public - Arizona
Maricopa County
Commission # 533325
My Commission Expires August 28, 2021