STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT
COUNTY OF SANTA FE

NEW MEXICO TOP ORGANICS – ULTRA HEALTH, Inc., a New Mexico Non-Profit Corporation,
Plaintiff,

v. **No.** D-101-CV-2018-03519

Case assigned to Mathew, Francis J.

NEW MEXICO DEPARTMENT OF HEALTH, MEDICAL CANNABIS PROGRAM,
Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW New Mexico Top Organics-Ultra Health, Inc. ("Ultra Health" herein), by and through its counsel Egolf + Ferlic + Martinez + Harwood, LLC (Brian Egolf and Kristina Caffrey appearing) to complain against the Defendant for a declaratory judgment finding that the Defendant lacks the authority to license "manufacturers," as defined in NMAC 7.34.4 *et. seq*.

On or about February 27, 2015, the Defendant adopted new rules supposedly authorized by the Lynn and Erin Compassionate Use Act, NMSA 1978 § 26-2B-1 *et seq.* ("the Act" herein) that purport to allow the Defendant to issue a type of license which the Act neither explicitly nor implicitly envisions. This new form of license creates a category of licensees called "manufacturers" separate from and in addition to Licensed Non-Profit Producer licensees. The Department of Health's self-created license category purports to allow manufacturers to possess, distribute, handle, control, and work with regulated medical cannabis without the need for the "manufacturer" to be licensed as a Non-Profit Producer. Ultra Health respectfully requests that this Court declare that the Department of Health was without statutory authority to create a class

of "manufacturer" licensee and invalidate and enjoin the regulation purporting to license manufacturers. As ground for this request for relief, Ultra Health states the following:

JURISDICTION AND VENUE

1. At all times relevant to this case, Ultra Health has been a non-profit corporation in good standing organized and existing under the laws of the State of New Mexico, with a principal place of business in Sandoval County, New Mexico.

2. The Defendant is an agency of the State of New Mexico's Executive Branch with its principal place of business in Santa Fe County, New Mexico.

3. Venue in this Court is proper pursuant to NMSA 1978 § 38-3-1(A).

4. This Court has jurisdiction over this matter as a court of general jurisdiction in the State of New Mexico.

FACTS

5. All preceding paragraphs are incorporated and realleged herein.

6. The purpose of the Lynn and Erin Compassionate Use Act is "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." NMSA 1978 § 26-2B-2.

7. NMSA 1978 §26-2B-3 is the "definitions" section of the Act. It contains definitions for "licensed producer" and "qualified patient," but contains no definition for "manufacturer."

8. NMSA 1978 §26-2B-4 exempts certain classes of persons from criminal and civil penalties for cannabis-related activity. This section exempts "qualified patients" from penalties for possession or use of cannabis, it exempts "practitioners" from penalties for recommending or

certifying the use of cannabis by a patient, and it exempts "licensed producers" from penalties for production, possession, distribution, or dispensation of cannabis.

9. NMSA 1978 §26-2B-4 does not mention any class of entities called "manufacturers" and does not exempt them from criminal or civil penalties.

10. NMSA 1978 §26-2B-7 directs the Department of Health to create rules to govern medical cannabis use and production in the state.

11. NMSA 1978 §26-2B-7 directs the Defendant to develop rules in the following areas: "(1) govern the manner in which the department will consider **applications for registry identification cards and for the renewal of identification cards for qualified patients and primary caregivers**; (2) define the amount of cannabis that is necessary to constitute an adequate supply, including amounts for topical treatments; (3) identify criteria and set forth procedures for including additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis. Procedures shall include a petition process and shall allow for public comment and public hearings before the advisory board; (4) set forth additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis as recommended by the advisory board; (5) **identify requirements for the licensure of producers and cannabis production facilities and set forth procedures to obtain licenses**; (6) develop a distribution system for medical cannabis that provides for: (a) cannabis production facilities within New Mexico housed on secured grounds and operated by licensed producers; and (b) distribution of medical cannabis to qualified patients or their primary caregivers to take place at locations that are designated by the department and that are not within three hundred feet of any

school, church or daycare center; (7) determine additional duties and responsibilities of the advisory board; and (8) be revised and updated as necessary." (emphasis added).

12. The Act thus directs the Defendant to develop specific rules but does not include any catch-all provision allowing the Defendant to develop rules that it, in its discretion, believes are appropriate for regulation outside the provisions found in the Act.

13. The Act thus allows the Defendant to promulgate rules governing registration for only one class of persons: patients and their primary caregivers.

14. Further, the Act allows a rule governing licensing for one only class of entity, producers, and one type of physical location: cannabis production facilities.

15. NMSA 1978 §26-2B-7 does not direct the Defendant to develop rules regarding "manufacturers" or "manufacturing."

16. The Act grants the Defendant no authority to create new types of licenses.

17. No other type of entity other than "producer" is eligible to receive any type of licensure pursuant to the Act to produce or distribute cannabis.

18. The Act allows four, and only four, types of entities and persons to be protected from prosecution under the State of New Mexico's laws that generally prohibit the possession, use, manufacture, distribution, etc. of controlled substances, like cannabis: patients, the practitioners who certify patients to receive licenses from the state, patient caregivers, and licensed producers.

19. Patients, and patient caregivers are not subject to "arrest, prosecution or penalty, in any manner, for the production, possession, distribution or dispensing of cannabis pursuant to the Lynn and Erin Compassionate Use Act." NMSA 1978 § 26-2B-4 (A)-(B).

20. A practitioner who determines that the possible benefits of a patient's use of medical cannabis outweigh the possible risks of such use "shall not be subject to arrest or prosecution, penalized in any manner or denied any right or privilege for recommending the medical use of cannabis or providing written certification for the medical use of cannabis pursuant to the Lynn and Erin Compassionate Use Act." NMSA 1978 § 26-2B-4(E).

21. Producers of medical cannabis are not subject to "arrest, prosecution or penalty, in any manner, for the production, possession, distribution or dispensing of cannabis pursuant to the Lynn and Erin Compassionate Use Act." NMSA 1978 § 26-2B-4(F).

22. There is no catch-all or general provision in the Act granting the Defendant any authority whatsoever to create new types of licenses or to create new categories of licensure.

23. The regulations governing medical cannabis producers are set out at 7.34.4 NMAC.

24. Pursuant to these rules, "producers" of medical cannabis must be non-profit corporations, and their boards of directors must contain pre-selected quotas of certain individuals. 7.34.4.8(A)(2) and 7.34.4.8(I) NMAC.

25. Pursuant to these rules, "producers" must grow all their medical cannabis at one single location.

26. Pursuant to these rules, non-profit producers must pay between $30,000 and $90,000 per year for their licenses. 7.34.4.8(V).

27. On or about February 27, 2015, the Defendant adopted new administrative rules that purport to classify, create, and license a new class of entity not mentioned or envisioned in the Act: manufacturers.

28. 7.34.4.7(X) NMAC defines "manufacture" as "to make or otherwise **produce** cannabis-derived product or concentrate" (emphasis added).

29. 7.34.4.7(Y) NMAC defines "manufacturer" as a "business entity that manufactures cannabis-derived product that has been approved for this purpose by the medical cannabis program."

30. "Cannabis derived product" is itself defined as "a product, other than cannabis itself, which contains or is derived from cannabis, not including hemp."

31. Thus, "manufacture" means taking raw cannabis plant material (such as the flowers and leaves), combining it with materials, and combining the materials into finished products, such as edibles, tinctures, pills, capsules, oils, candies, balms, and lotions.

32. For example, a licensed producer grows the raw cannabis plant material, harvests the flowers and leaves, and transports the raw plant material to a "manufacturer." The manufacturer then takes possession and control of the cannabis to bake the flower material into a cookie to create a cannabis edible.

33. 7.34.4.12 NMAC is titled, "Department Approval of Manufacturers of Cannabis Derived Products; General Provisions."

34. This section purports to license manufacturers.

35. 7.34.4.12(A) states, "A manufacturer applicant shall submit an authorized application form to the program with each initial application and renewal application, together with a fee of one thousand dollars ($1,000) issued to the medical cannabis program," and the section goes on to describe a number of requirements for manufacturers.

36. The rule does not require licensed manufacturers to be non-profit entities, a requirement imposed on licensed producers.

37. The rule does not require any particular quotas for the composition of the board of directors of a manufacturer, a requirement imposed on licensed producers.

38. The rule does not require manufacturers to be subject to regular audits, quarterly reports on sales volume and other data, or extensive re-licensing procedures, requirements that are imposed on licensed producers.

39. The rule allows a licensed manufacturer to possess and distribute cannabis and cannabis-derived products.

40. The rule clearly contemplates that entities other than licensed producers will be among those licensed as manufacturers.

41. In fact, since the Defendant adopted this rule, it has licensed fourteen manufacturers.

42. None of the manufacturers licensed as such by the Defendant are licensed Non-Profit Producers, the type of entity allowed by the Act.

CAUSE OF ACTION ONE: DECLARATORY JUDGMENT

43. All allegations set out above are realleged and incorporated here by reference.

44. There exists an actual case and controversy between Ultra Health and the Defendant regarding the Defendants' creation and enforcement of rules and regulations governing medical cannabis in New Mexico.

45. 7.34.4.12 NMAC has been created and promulgated in contradiction of the Lynn and Erin Compassionate Use Act.

46. An administrative agency may only act according to the specific grant of authority given to it by statute.

47. An administrative agency may not act outside of, or contrary to, the statutory authority granted to it.

48. The New Mexico Legislature, in the Lynn and Erin Compassionate Use Act, NMSA 1978 § 26-2B-1 *et seq,* clearly and obviously intended that the Department of Health license two, and only two, classes of persons and entities: licensed producers, and patients/primary caregivers.

49. NMSA 1978 § 26-2B-7 gives a clear and obvious grant of authority to the Defendant to create regulations for the licensure of licensed producers and patients/primary caregivers.

50. NMSA 1978 § 26-2B-7 gives a clear and obvious description of the regulations the Defendant was to create.

51. NMSA 1978 § 26-2B-7 did not give the Defendant authority to create a class of licensed entities called "manufacturers."

52. No other part of the Lynn and Erin Compassionate Use Act grants to the Defendant the authority, either implicitly or explicitly, to create a class of licensed entities called "manufacturers."

53. In creating and licensing a class of "manufacturers," the Defendant has acted outside of and contrary to the specific grant of authority given to it by the statute.

54. In creating and licensing a class of "manufacturers," the Defendant has acted beyond the bounds of its agency authority and discretion.

55. In creating and licensing a class of "manufacturers," the Defendant has acted contrary to law.

56. Ultra Health is suffering direct and immediate injury as a result of Defendants' creation and enforcement of rules which are not in accordance with the statute.

57. Under the current rules, Ultra Health must be a non-profit entity, a requirement not imposed on manufacturers.

58. Under the current rules, Ultra Health must pay $90,000 per year in order to possess and distribute cannabis.

59. Under the rules, Ultra Health, which manufactures products under its license, does so at a competitive disadvantage as compared to manufactures that pay far lower fees to operate.

60. Defendant's promulgation and enforcement of the licensed-manufacturer scheme causes injury against Ultra Health by allowing a second class of entities to possess, manufacture, and process cannabis at a license fee far lower than the fee paid by Ultra Health.

61. The injuries to Ultra Health are ongoing.

62. This controversy is ripe for a decision by the Court because the rule at issue has been and is being enforced.

63. The administrative rulemaking that resulted in 7.34.4.12 NMAC has concluded.

64. The Court may declare, on facts that are fully developed and on purely legal grounds, that Defendant's rule is contrary to law and cannot be enforced.

65. No specialized fact-finding will be required for the Court to reach that determination.

66. There is no exclusive statutory remedy available to Ultra Health in this matter.

WHEREFORE, Ultra Health requests the Court enter judgment in its favor and against the Defendant, holding that 7.34.4.12 NMAC is contrary to law and may not be enforced. Ultra Health also requests costs and fees in this matter.

Respectfully Submitted,

Egolf + Ferlic + Martinez + Harwood, LLC

By: /s/ Brian Egolf

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