

**FIRST JUDICIAL DISTRICT COURT  
COUNTY OF SANTA FE  
STATE OF NEW MEXICO**

**CAROLA KIEVE, M.D.,**

**Plaintiff,**

v.

**No. D 101-CV-2014-00140**

**NEW MEXICO DEPARTMENT OF HEALTH,**

**Defendant.**

**ANSWER TO FIRST AMENDED COMPLAINT**

COMES NOW the Defendant, New Mexico Department of Health, and submits its Answer to the First Amended Complaint, stating as follows:

**I. GENERAL DENIAL**

Except as expressly admitted or otherwise answered herein, the State Defendants deny each and every matter, statement, characterization, and allegation in the Complaint.

**II. SPECIFIC RESPONSES**

1. In response to the allegations in Paragraph 1 of the First Amended Complaint, the Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegations and therefore denies the same.

2. In response to the allegations in Paragraph 2 of the First Amended Complaint, the Defendant admits the same.

3. In response to the allegations in Paragraph 3 of the First Amended Complaint, the Defendant admits the same.

4. In response to the allegations in Paragraph 4 of the First Amended Complaint, the Defendant admits the same.

5. In response to the allegations in Paragraph 5 of the First Amended Complaint, the Defendant admits the same.

6. In response to the allegations in Paragraph 6 of the First Amended Complaint, the Defendant admits the same.

7. In response to the allegations in Paragraph 7 of the First Amended Complaint, the Defendant admits the same.

8. In response to the allegations in Paragraph 8 of the First Amended Complaint, the Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegations and therefore denies the same.

9. In response to the allegations in Paragraph 9 of the First Amended Complaint, the Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the statement that the Plaintiff was at all times using her best medical judgment and therefore denies the same. The Defendant denies that the Plaintiff, in providing the Defendant with requested information, was “undertaking a good-faith effort to comply with the requirements of the Act.”

10. In response to the allegations in Paragraph 10 of the First Amended Complaint, the Defendant denies the same.

11. In response to the allegations in Paragraph 11 of the First Amended Complaint, the Defendant denies the same.

12. In response to the allegations in Paragraph 12 of the First Amended Complaint, the Defendant admits that the Plaintiff stated to Dr. Rosenberg that there were no commercial pharmaceuticals that would be appropriate for the patient. All other allegations are denied.

13. In response to the allegations in Paragraph 13 of the First Amended Complaint, the Defendant denies the same.

14. In response to the allegations in Paragraph 14 of the First Amended Complaint, the Defendant denies that Dr. Rosenberg made a “demand” of the Plaintiff. The Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations and therefore denies the same.

15. In response to the allegations in Paragraph 15 of the First Amended Complaint, the Defendant denies the same.

16. In response to the allegations in Paragraph 16 of the First Amended Complaint, the Defendant denies the same.

17. In response to the allegations in Paragraph 17 of the First Amended Complaint, the Defendant denies the same. The Defendant further submits that the allegations of this paragraph exceed the scope of the amendment permitted by the Court’s Order of July 31, 2014, which granted leave to the Plaintiff for the limited purpose of “address[ing] issues of third party standing”. The Defendant further submits that the Court, in ruling on the Defendant’s previous Motion to Dismiss, implicitly held that the Plaintiff lacked standing to pursue the claims of this case on her own behalf, and that this was clarified in e-mail communications from Judge Sarah Singleton to opposing counsel dated July 31, 2014. *See* Exhibit “A”.

18. In response to the allegations in Paragraph 18 of the First Amended Complaint, the Defendant denies the same.

19. In response to the allegations in Paragraph 19 of the First Amended Complaint, the Defendant denies the same.

20. In response to the allegations in Paragraph 20 of the First Amended Complaint, the Defendant denies the same. The Defendant further submits that the allegations of this paragraph exceed the scope of the amendment permitted by the Court’s Order of July 31, 2014, which granted

leave to the Plaintiff for the limited purpose of “address[ing] issues of third party standing”. The Defendant further submits that the Court, in ruling on the Defendant’s previous Motion to Dismiss, implicitly ruled that the Plaintiff lacked standing to pursue the claims of this case on her own behalf, and that this was clarified in e-mail communications from Judge Sarah Singleton to opposing counsel dated July 31, 2014. *See* Exhibit “A”.

21. In response to the allegations in Paragraph 21 of the First Amended Complaint, the Defendant denies the same.

22. In response to the allegations in Paragraph 22 of the First Amended Complaint, the Defendant admits that the Lynn and Erin Compassionate Use Act, NMSA 1978, § 26-2B-1 *et seq.*, does not specify requirements for applications submitted under the qualifying conditions that have been added by the Department of Health via regulation.

23. In response to the allegations in Paragraph 23 of the First Amended Complaint, the Defendant admits that the Lynn and Erin Compassionate Use Act, NMSA 1978, §26-2B-1 *et seq.*, created the New Mexico Medical Cannabis Program.

24. In response to the allegations in Paragraph 24 of the First Amended Complaint, the Defendant denies that the Compassionate Use Act “defines seven ‘debilitating medical condition[s]’” which are eligible for treatment with medical cannabis. The Act defines “debilitating medical condition” to include eight qualifying conditions, the eighth of which is identified as “any other medical condition, medical treatment or disease as approved by the department”. NMSA 1978, § 26-2B-3(B)(8),

25. In response to the allegations in Paragraph 25 of the First Amended Complaint, the Defendant admits that the Compassionate Use Act at NMSA 1978, §26-B-3(B)(8) gives the

Defendant the ability to add additional conditions that are eligible for treatment with medical cannabis.

26. In response to the allegations in Paragraph 26 of the First Amended Complaint, the Defendant admits that the Department has exercised its authority to promulgate rules pursuant to the Compassionate Use Act. The Defendant also admits that the Department, via regulation, has approved PTSD as a qualifying medical condition.

27. In response to the allegations in Paragraph 27 of the First Amended Complaint, the Defendant admits that Section 26-2B-3(H) of the Compassionate Use Act states that the Department of Health shall issue registry identification cards to a patient and to the primary caregiver for that patient, if any, who submits, “in accordance with the department's rules”, 1) a written certification, 2) the name, address and date of birth of the patient, 3) the name, address and telephone number of the patient’s practitioner, and 4) the name, address and date of birth of the patient’s primary caregiver, if any.

28. In response to the allegations in Paragraph 28 of the First Amended Complaint, the Defendant denies the same.

29. In response to the allegations in Paragraph 29 of the First Amended Complaint, the Defendant admits that Section 26-2B-3(H) of the Compassionate Use Act defines “written certification” as “a statement in a patient's medical records or a statement signed by a patient's practitioner that, in the practitioner's professional opinion, the patient has a debilitating medical condition and the practitioner believes that the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the patient”, which is not valid for more than one year from the date of issuance.

30. In response to the allegations in Paragraph 30 of the First Amended Complaint, the Defendant admits that the Compassionate Use Act does not specify a requirement for the submission of medical records or a requirement that other treatments or medications be attempted prior to the granting of a medical cannabis “license”, but submits that the Compassionate Use Act does not limit the Department’s ability to require such submissions with respect to qualifying conditions adopted by the Department via regulation pursuant to Section 26-2B-3(B)(8), and in accordance with the stated purpose of the Compassionate Use Act at NMSA 1978, § 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.” The Department further submits that the Department’s broad statutory authority to add (or decline to add) conditions to those approved for the use of medical cannabis necessarily encompasses the ability to adopt additional qualifying criteria for the conditions that it adds.

31. In response to the allegations in Paragraph 31 of the First Amended Complaint, the Defendant admits that the Compassionate Use Act does not specify a requirement that medical records be submitted to support a physician’s “written certification”, but submits that the Compassionate Use Act requires the Department to verify information submitted to it; and that the Act does not limit the Department’s ability to require such submissions with respect to qualifying conditions adopted by the Department via regulation pursuant to Section 26-2B-3(B)(8), and in accordance with the stated purpose of the Compassionate Use Act at NMSA 1978, § 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.” The Department further submits that the Department’s broad statutory authority to add (or decline to add) conditions to those

approved for the use of medical cannabis necessarily encompasses the ability to adopt additional qualifying criteria for the conditions that it adds.

32. In response to the allegations in the first sentence of Paragraph 32 of the First Amended Complaint, the Defendant admits the same. In response to the allegations in the second sentence of Paragraph 32 of the First Amended Complaint, the Defendant admits that the Department of Health's regulations do not contain a requirement that evidence be submitted to prove that therapies other than medical cannabis have been attempted, but that the Department's regulations require that a patient applying on the basis of having a Department-approved condition must submit written certification from the patient's practitioner that attests, among other things, that standard treatments have failed to bring adequate relief (7.34.3.8(B) NMAC), and the Department's regulations also provide that the department may verify the information in an application and in accompanying documentation by contacting either the applicant or the applicant's medical practitioner to obtain further documentation to verify the information submitted (7.34.3.10(A)(1) NMAC). In response to the allegations in the third sentence of Paragraph 32 of the First Amended Complaint, the Defendant denies the same.

33. In response to the allegations in Paragraph 33 of the First Amended Complaint, the Defendant denies the same.

34. In response to the allegations in Paragraph 34 of the First Amended Complaint, the Defendant denies the same.

35. In response to the allegations in Paragraph 35 of the Complaint, no response is required. To the extent a response is deemed required, the State Defendants deny any liability and deny that Plaintiff is entitled to any of the requested relief.

36. In response to the allegations in Paragraph 36 of the First Amended Complaint, the Defendant denies the same.

37. In response to the allegations in Paragraph 37 of the First Amended Complaint, the Defendant admits that the Compassionate Use Act allows the Defendant to add additional debilitating diseases to the list of those which may be treated with medical cannabis. All other allegations are denied.

38. In response to the allegations in Paragraph 38 of the First Amended Complaint, the Defendant denies the same.

39. In response to the allegations in Paragraph 39 of the First Amended Complaint, the Defendant denies the same, and further submits that the allegations of this paragraph exceed the scope of the amendment permitted by the Court's Order of July 31, 2014, which granted leave to the Plaintiff for the limited purpose of "address[ing] issues of third party standing". The Defendant further submits that the Court, in ruling on the Defendant's previous Motion to Dismiss, implicitly ruled that the Plaintiff lacked standing to pursue the claims of this case on her own behalf, and that this was clarified in e-mail communications from Judge Sarah Singleton to opposing counsel dated July 31, 2014. *See* Exhibit "A".

40. In response to the allegations in Paragraph 40 of the First Amended Complaint, the Defendant denies the same, and further submits that the allegations of this paragraph exceed the scope of the amendment permitted by the Court's Order of July 31, 2014, which granted leave to the Plaintiff for the limited purpose of "address[ing] issues of third party standing". The Defendant further submits that the Court, in ruling on the Defendant's previous Motion to Dismiss, implicitly ruled that the Plaintiff lacked standing to pursue the claims of this case on her own behalf, and that



this was clarified in e-mail communications from Judge Sarah Singleton to opposing counsel dated July 31, 2014. *See* Exhibit “A”.

41. In response to the allegations in Paragraph 41 of the First Amended Complaint, the Defendant denies the same.

42. In response to the allegations in Paragraph 42 of the First Amended Complaint, the Defendant denies the same.

43. In response to the allegations in Paragraph 43 of the First Amended Complaint, the Defendant denies the same.

44. In response to the allegations in Paragraph 44 of the First Amended Complaint, the Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegations and therefore denies the same.

45. In response to the allegations in Paragraph 45 of the First Amended Complaint, the Defendant admits the same.

46. In response to the allegations in Paragraph 46 of the First Amended Complaint, the Defendant submits that the allegations consist of citations to case law; that such argument is not appropriately raised via a Complaint; and that as such, no further response is required.

47. In response to the allegations in Paragraph 45 of the First Amended Complaint, the Defendant denies the same.

### **III. ADDITIONAL AND/OR AFFIRMATIVE DEFENSES**

1. The Complaint, and each of the identified claims independently, fail to state a claim upon which relief can be granted.

2. The service of process in this case was inadequate, insofar as the Plaintiff did not serve process in accordance with NMSA 1978, § 38-1-17.

3. The Defendant has, at all times, acted in good faith.
4. The Plaintiff lacks both standing to pursue the asserted claims on her own behalf, as well as standing to pursue claims on behalf of third parties.
5. The Court, in ruling on the Defendant's previous Motion to Dismiss, implicitly ruled that the Plaintiff lacked standing to pursue the claims of this case on her own behalf, and any claims predicated on such standing were dismissed.
5. The Complaint does not state a case or controversy regarding the alleged violation of the Compassionate Use Act, and no case or controversy exists in this case.

#### **IV. AMENDMENTS**

Defendant specifically reserves the right to amend the Answer by adding and supplementing defenses, counterclaims, or cross-claims as additional facts are obtained through further investigation and discovery.

WHEREFORE, the Defendant New Mexico Department of Health, having fully answered Plaintiff's First Amended Complaint, requests that the Court dismiss the same with prejudice, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Chris D. Woodward  
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Attorney for Defendant New Mexico Department of Health

CERTIFICATE OF SERVICE

I certify that on the 19th day of September, 2014, I served the foregoing document on the following persons via the New Mexico E-Filing system:

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/s/  
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Chris D. Woodward  
Assistant General Counsel