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COURT OF APPEALS
STATE OF NEW MEXICO

No. 27,992

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
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STARKO, INC., ET AL.,

Plaintiffs-Appellants,

vs.

**PRESBYTERIAN HEALTH PLAN, INC.
AND CIMARRON HEALTH PLAN, INC.,**

Defendants-Appellees.

**On Appeal from the Second Judicial District Court, County of Bernalillo
Hon. Linda Vanzi, No. CV-97-06599**

RESPONSE BRIEF OF DEFENDANT-APPELLEE CIMARRON HEALTH PLAN, INC.

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TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF PROCEEDINGS 2

Course of Proceedings 2

Summary of Facts 5

Standard of Review 6

ARGUMENT 7

I. SECTION 27-2-16(B) DOES NOT APPLY TO SALUD! 7

II. PLAINTIFFS HAVE NO CAUSE OF ACTION AGAINST THE MCOS UNDER §27-2-16(B) NMSA 1978 11

A. Plaintiffs Have No Right of Action Under §27-2-16(B) 11

B. There is No Joint and Several Liability Here 20

III. PLAINTIFFS WERE NOT THIRD-PARTY BENEFICIARIES OF CIMARRON'S CONTRACTS TO PROVIDE MEDICAID SERVICES 23

A. Plaintiffs Never Proved The Legislature's Intent In Enacting §27-2-16(B) 24

B. Incorporating §27-2-16(B) Into the Contracts Does Not Create An Intent by the Parties to Benefit the Pharmacies 27

C. The Incorporation of a Statute Into the Contract Does Not Supplant the Parties' Intent 30

D. Even If Plaintiffs Were Third-Party Beneficiaries, They Waived Their Rights By Entering Into Contracts for Rates Other Than Those They Now Claim 37

TABLE OF CONTENTS

Page

IV. THE DISTRICT COURT CORRECTLY REJECTED PLAINTIFFS' EQUITABLE CLAIMS 40

A. Plaintiffs Had No Claim for Unjust Enrichment..............................41

B. The District Court Properly Dismissed Plaintiffs' Claims For Injunctive and Declaratory Relief 44

CONCLUSION 46

CERTIFICATE OF COMPLIANCE 48

TABLE OF AUTHORITIES

Page

NEW MEXICO CASES

American Linen Supply v. Las Cruces,
73 N.M. 30, 385 P.2d 359 (1963) 41, 45

Atlixco Coalition v. Maggiore,
1998-NMCA-134, 925 P.2d 370 10

Baca v. New Mexico State Highway Dep't,
82 N.M. 689, 486 P.2d 625 (Ct. App. 1971) 45

Callahan v. New Mexico Federation of Teachers – TVI,
2006-NMSC-10, 131 P.3d 51 23

Casias v. Continental Cas. Co.,
1998-NMCA-93, 960 P.2d 839,
cert. denied, 125 N.M. 322, 961 P.2d 167 (1998) 23

City of Sunland Park v. Harris News, Inc.,
2005-NMCA-128, 124 P.3d 566,
cert. quashed, 141 P.3d 1280 (2006) 45

Clear v. Patterson,
80 N.M. 654, 459 P.2d 358 (Ct. App. 1969) 22

Cockrell v. Bd. of Regents of New Mexico State Univ.,
2002-NMSC-009, 45 P.3d 876 .... 19, 20

Cooper v. Albuquerque City Commission,
85 N.M. 786, 518 P.2d 275 (1974) 39

Dellaira v. Farmers Insurance Exch.,
2004-NMCA-132, 102 P.3d 111 22

Elephant Butte Resort Marina, Inc. v. Wooldridge,
102 N.M. 286, 694 P.2d 1351 (1985) 39

TABLE OF AUTHORITIES

Page

Gallegos v. State Bd. of Educ.,
1997-NMCA-40, 940 P.2d 468,
cert. denied, 123 N.M. 215, 937 P.2d 76 (1997) 22

Gandy v. Wal-Mart Stores, Inc.,
117 N.M. 441, 872 P.2d 859 (1994) 19

J.R. Hale Contr. Co. v. Union Pac. R.R.,
2008-NMCA-37, 179 P.3d 579.. 43

J.R. Hale Contracting Co. v. United New Mexico Bank of Albuquerque,
110 N.M. 712, 799 P.2d 581 (1990) 39, 40

Juneau v. Intel Corp.,
2006-NMSC-2, 127 P.3d 548 6

Lovato v. City of Albuquerque,
106 N.M. 287, 742 P.2d 499 (1987) 19

Michaels v. Anglo American Auto Auctions, Inc.,
117 N.M. 91, 869 P.2d 279 (1994) 19

Montoya v. Mentor Corp.,
1996-NMCA-67, 919 P.2d 410.. 19

Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n,
120 N.M. 579, 904 P.2d 28 (1995) 10

Morris Oil Co., Inc. v. Rainbow Oilfield Trucking, Inc.,
106 N.M. 237, 741 P.2d 840 (1987) 40

National Trust for Historic Preservation v. City of Albuquerque,
117 N.M. 590, 874 P.2d 798 (Ct. App. 1994) 18, 19

New Mexico Right to Choose/NARAL v. Johnson,
1999-NMSC-005, 975 P.2d 841,
cert. denied, 526 U.S. 1020 (1999)... 19

TABLE OF AUTHORITIES

Page

Ontiveros Insulation Company, Inc. v. Sanchez,
2000-NMCA-051, 3 P.3d 695 .... 41, 42, 43

Payne v. Hall,
2006-NMSC-29, 137 P.3d 599 21

Permian Basin Investment Corp. v. Lloyd,
63 N.M. 1, 312 P.2d 533 (1957) 23

Ponder v. State Farm Mut. Auto. Ins. Co.,
2000-NMSC-033, 12 P.3d 960 6

Regents of Univ. of N.M. v. Hughes,
114 N.M. 304, 838 P.2d 458 (1992) 11

Saiz v. Belen School Dist.,
113 N.M. 387, 827 P.2d 102 (1992) 22

Scott d/b/a Rainbow Constr. Co. v. Board of Commissioners of County of Los Alamos,
109 N.M. 310, 785 P.2d 221 (1989) 16

Sedillo v. NM Dep't of Public Safety,
2007-NMCA-002, 149 P.3d 955,
cert. quashed, 2007 N.M. LEXIS 457 (Aug. 30, 2007) 6

Shaeffer v. Kelton,
95 N.M. 182, 619 P.2d 1226 (1980) 39

Starko, Inc. v. Cimarron Health Plan, Inc.,
2005-NMCA-40, 110 P.3d 526, *cert. denied*, 112 P.3d 1111 (2005) 4

Starko, Inc. v. Gallegos,
2006-NMCA-85, 140 P.3d 1085,
cert. denied, 142 P.3d 360 (2006) 4, 5, 8, 15, 19

Superior Concrete Pumping, Inc. v. David Montoya Constr., Inc.,
108 N.M. 401, 773 P.2d 346 (1989) 38

TABLE OF AUTHORITIES

Page

Winrock Enterprises, Inc. v. House of Fabrics of New Mexico, Inc.,
91 N.M. 661, 579 P.2d 787 (1978) 45

CASES FROM OTHER JURISDICTIONS

American Hospital Asso. v. Schweiker,
721 F.2d 170 (7th Cir. 1983) 36

Arkansas Medical Society, Inc. v. Reynolds,
6 F.3d 519 (8th Cir. 1993) 19

Bd. of Regents v. Roth,
408 U.S. 564 (1972) 13

Bio-Medical Applications of N.C., Inc. v. Elec. Data Sys. Corp.,
2006 U.S. Dist. LEXIS 4398 (E.D.N.C. Jan. 25, 2006) 17

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) 10, 11

Concilio de Salud Integral de Loiza, Inc. v. Dep't of Health & Human Services,
538 F. Supp.2d 139 (D.P.R. 2008) 15

County of Santa Clara v. Astra USA, Inc.,
2006 U.S. Dist. LEXIS 33047 (N.D. Cal. 2006) 32, 33

Flagstaff Medical Center, Inc. v. Sullivan,
962 F.2d 879 (9th Cir. 1992) 32

Flagstaff Medical Center, Inc. v. Sullivan,
1992 U.S. App. LEXIS 12152 (9th Cir. June 2, 1992) 32

Foundation Health v. Westside EKG Assocs.,
944 So.2d 188 (Fla. 2006) 35, 36

Gonzaga University v. Doe,
536 U.S. 273 (2002) 19, 20, 26, 30, 31

TABLE OF AUTHORITIES

Page

Great Plains Equip. v. Northwest Pipeline Corp.,
979 P.2d 627 (Idaho 1999) 34

Guardians Ass'n v. Civil Serv. Comm'n,
463 U.S. 582 (1983) 32

Harris v. Aero. Testing Alliance,
2008 U.S. Dist. LEXIS 1185 (E.D. Tenn. Jan. 7, 2008) 33

In re NYAHSA Litigation,
318 F. Supp. 2d 30 (N.D.N.Y. 2004),
affirmed by 444 F.3d 147 (2d Cir. 2006) 18

Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts,
954 F.2d 299 (5th Cir. 1992) 42, 43

K&V Scientific Co. v. Bayerische Motoren Werke Aktiengesellschaft,
164 F. Supp.2d 1260 (D.N.M. 2001),
reversed on other grounds, 314 F.3d 494 (10th Cir. 2002) 38, 39

Long Term Care Pharmacy Alliance v. Ferguson,
362 F.3d 50 (1st Cir. 2004) 17

Mandy R. v. Owens,
464 F.3d 1139 (10th Cir. 2006),
cert denied, 127 S. Ct. 1905 (2007) 17

Maynard v. Bonta,
2003 U.S. Dist. LEXIS 16201 (C.D. Cal. Sept. 3, 2003) 14

NLRB v. Catholic Bishop of Chicago,
440 U.S. 490 (1979) 27

Oberlander v. Perales,
740 F.2d 116 (2d Cir. 1984) 19

Oklahoma Chapter of the American Academy of Pediatrics v. Fogarty,
366 F. Supp. 2d 1050 (N.D. Okla. 2005) 17

TABLE OF AUTHORITIES

Page

Pennsylvania Pharmacists Ass'n v. Houstoun,
283 F.3d 531 (3rd Cir.),
cert. denied, 537 U.S. 821 (2002) 17, 18

Plucinski v. I.A.M. Nat. Pension Fund,
875 F.2d 1052 (3rd Cir. 1989) 43

Rendleman v. Bowen,
860 F.2d 1537 (9th Cir. 1988) 36

Rogers v. Speros,
580 P.2d 750 (Ariz. Ct. App. 1978) 35

Roob v. Fisher,
856 N.E.2d 723 (Ind. App. 2006) 30, 31

Sanchez v. Johnson,
416 F.3d 1051 (9th Cir. 2005) 17

Stockton v. Silco Constr. Co.,
877 P.2d 71 (Ore. 1994) 34

Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alternatives, Inc.,
832 A.2d 501 (Pa. Super. 2003),
appeal denied, 847 A.2d 1288 (Pa. 2004) 44

Three Rivers Center for Independent Living, Inc. v. Housing Authority of the City of Pittsburgh,
382 F.3d 412 (3rd Cir. 2004) 12, 41

Westside Mothers v. Olszewski,
454 F.3d 532 (6th Cir. 2006) 17

Wilder v. Virginia Hosp. Ass'n,
496 U.S. 498 (1990) 25, 26

TABLE OF AUTHORITIES

Page

STATUTES, RULES, REGULATIONS AND OTHER AUTHORITIES

§26-3-3 NMSA 1978 .... 2, 7, 14

§27-2-2(E) NMSA 1978 16

§27-2-4 NMSA 1978 12

§27-2-9(C) 16

§§27-2-12 *et seq.*, NMSA 1978 11

§27-2-12.5(B) 16

§27-2-16(A) NMSA 13

§27-2-16(B) NMSA .... passim

§27-3-3 16

§27-3-4 16

§41-3A-1(C) NMSA 21

N.M. Const. Art. IV, §26 26

Rule 1-023 NMRA 4

Rule 12-213(B) NMRA 2

42 U.S.C. §1983 .... 18, 19, 20, 25, 26, 31

§8.305.1.7(C)(1) NMAC 8

§8.305.1.7(M)(1) NMAC (2005) 8, 9

§8.305.11.9(A) NMAC 8, 9

§8.305.11.9(E) NMAC 8

TABLE OF AUTHORITIES

Page

§8.305.11.9(I) NMAC (2008) 10

§606.10.7, Special Payment Requirements,
New Mexico Register, Vol. VIII, No. 12 (June 30, 1997) 10

§8.305.11.9(H), Special Payment Requirements,
New Mexico Register, Vol. XII, No. 12 (June 29, 2001) 10

§8.305.11.9(I), Special Payment Requirements,
New Mexico Register, Vol. XV, No. 12 (June 30, 2004) 10

§8.305.11.9(I), Special Payment Requirements,
New Mexico Register, Vol. XVI, No. 12 (June 30, 2005) 10

6 CORBIN ON CONTRACTS, §§1293, 1296 (1962) 38

Restatement (Second) of Contracts §279 38

Restatement (Second) of Contracts §302 .... 29, 32, 33, 34

Restatement (Second) of Contracts §313 .... 32, 33, 34, 36

Restatement (Second) of Contracts §318 22

INTRODUCTION

Defendant-Appellee Cimarron Health Plan, Inc. ("Cimarron") respectfully requests this Court to affirm the Orders entered by the court below, dismissing Plaintiffs' claims against Cimarron. All of Plaintiffs' claims for relief were and are based on a series of illogical hypotheses:

- §27-2-16(B) NMSA 1978 was intended to benefit pharmacies;
- That legislative intent to benefit pharmacies carried forward into the later-adopted Medicaid managed care program (SALUD!) through boilerplate language in contracts between Managed Care Organizations ("MCOs") and the State;
- Plaintiffs have a protected interest in being paid the §27-2-16(B) rates, even after they negotiated contracts specifying other amounts;
- Because Plaintiffs have an interest in being paid §27-2-16(B) rates, they must have a cause of action to enforce that right, notwithstanding the fact that neither that statute, nor the Medical Assistance Act, nor Medicaid, gives them any such cause of action;
- Even if Plaintiffs have no cause of action under §27-2-16(B), they can recover from Cimarron as intended third-party beneficiaries of contracts between the State and Cimarron that do not mention them;
- Or, if Plaintiffs have neither a cause of action under §27-2-16(B) nor viable third-party beneficiary claims, then they should get to the same place through a claim of unjust enrichment or equitable relief.

Plaintiffs' convoluted and novel theory is wholly contrary to well-established New Mexico law and the applicable facts. Accordingly, the district court properly dismissed Plaintiffs' claims against Cimarron. That judgment should be affirmed.

STATEMENT OF PROCEEDINGS

Pursuant to NMRA, 12-213(B), Cimarron hereby submits its Summary of Proceedings, because Plaintiffs' Summary at pages 2-17 fails to provide this Court with an accurate description of the procedural and factual background of this case. Cimarron therefore provides this alternate statement.

Course of Proceedings

Two Plaintiff pharmacies originally chose to file this lawsuit in 1997[1] as a class action against state officials and HSD. Plaintiffs' original complaint did not mention managed care organizations but alleged a violation of state law, §27-2-16(B) NMSA 1978, which provides:

> If drug product selection is permitted by Section 26-3-3 NMSA 1978,[2] reimbursement by the medicaid program shall be limited to the wholesale cost of the lesser expensive therapeutic equivalent drug generally available in New Mexico plus a reasonable dispensing fee of at least three dollars sixty-five cents ($3.65).

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[1] In 1997, New Mexico initiated the SALUD! Medicaid program to provide medical and related services to Medicaid recipients under a managed-care program. New Mexico continues to provide Medicaid services under a traditional fee-for-service program.

[2] §26-3-3 NMSA 1978, the Drug Product Selection Act, allows pharmacists to substitute generic drugs ("therapeutically equivalent" drugs) for the specified prescribed drug, where multiple sources for that drug exist.

Thereafter, in 1999, Plaintiffs amended their Complaint, adding additional claims but still omitting the MCOs. (RP 0503-519). Within months, the District Court had granted Plaintiffs' motion for class certification. (RP 0609).

Plaintiffs then moved for partial summary judgment against the only (State) Defendants. On June 14, 2000 the court granted Plaintiffs' motion, and "ordered and declared" that: (1) the State "must comply with" §27-2-16(B); (2) the State "may not delegate or contract away" their responsibilities under §27-2-16(B) "by entering into contracts with managed care organizations"; and (3) the State "must set up the managed care system ... so that the MCO's comply with and the Department must make the MCO's comply with the provisions of NMSA 1978, §27-2-16(B)." (RP 0782).[3]

With those two critical victories in hand, Plaintiffs then filed their Second Amended Complaint in 2001, adding new defendants Presbyterian, Lovelace and Cimarron, and asserting new claims against them for violation of §27-2-16(B) NMSA, breach of contract, reformation of contract, breach of covenant of good faith and fair dealing, unjust enrichment, New Mexico Declaratory Judgment Act, injunctive relief, and violation of the Unfair Practices Act. Plaintiffs subsequently

[3] While ordering the State Defendants to comply with the statute, the court provided no guidance to the parties about what the statute meant. The statute's meaning is still being litigated in District Court.

filed a Third Amended and, ultimately, the operative Fourth Amended Complaint. (RP 5759-5793).

Once the MCOs entered this case, they first attempted to challenge the court's grant of class certification, but this Court rejected their appeal, holding that Rule 1-023(F) NMRA was a new rule that was not applicable to a pending case. *See Starko, Inc. v. Cimarron Health Plan, Inc.*, 2005-NMCA-40, 110 P.3d 526, *cert. denied*, 112 P.3d 1111 (2005). Meanwhile, the individual State Defendants successfully challenged the court's denial of qualified immunity. *Starko, Inc. v. Gallegos*, 2006-NMCA-85, 140 P.3d 1085, *cert. denied,* 142 P.3d 360 (2006). Once those appellate battles were concluded, the parties addressed the merits of Plaintiffs' claims.

Presbyterian filed two motions for judgment on the pleadings, addressing various claims. Meanwhile, although Cimarron joined in Presbyterian's motions, it also filed its own motion for summary judgment, directed to all the remaining claims that had not been dismissed on the prior motions. Plaintiffs filed their own cross-motion for summary judgment. Cimarron disputed most of Plaintiffs' 82 "Undisputed Facts" as unsupported by competent evidence and refuted by competent evidence; Plaintiffs "objected" to Cimarron's nine "Undisputed Facts" but generally cited to no evidence creating any genuine issue of material fact. (SR 12072-12079). Cimarron also moved to strike much of the bogus "legislative

history" on which Plaintiffs relied in their own summary judgment motion, and in opposition to Cimarron's summary judgment motion. (SR 12360-12366).

The Court heard arguments on the motions brought by Cimarron and Plaintiffs on August 15, 2007 and announced its oral ruling in favor of the MCOs that same day. All of these rulings were incorporated into the Orders from which Plaintiffs now appeal. (SR 12602, 12606, 12608-09).

Summary of Facts

New Mexico participates in Medicaid, a voluntary federal-state program providing medical services to the needy. *Starko, Inc. v. Gallegos*, 2006-NMCA-85, ¶2, 140 P.3d at 1088. In an effort to control costs, New Mexico adopted a type of managed care system, called SALUD! *Id.* The State neither provides nor directly reimburses services under SALUD!; "rather, HSD contracts with private managed care organizations (MCOs) which in turn provide health care to Medicaid recipients" in exchange for monthly payment on a capitated basis. *Id.*, ¶3, 140 P.3d at 1088.

Beginning in 1997, the State of New Mexico and the MCOs entered into Medicaid Managed Care Services Agreements ("MMCS Agreements"), in order to administer SALUD! The purpose of the MMCS Agreements was to benefit SALUD! enrollees. (SR 12061). Neither HSD nor Cimarron considered benefit to

pharmacists in entering into the MMCS Agreements and such benefit was not part of the purpose of such Agreements. (SR 12042, 12049-12051).

Thereafter, Plaintiffs negotiated and then entered into contracts with pharmacy benefits managers (PBMs) to provide pharmacy benefits to Cimarron SALUD! enrollees. (SR 12058). Since 1997, Plaintiffs have accepted payment at the reimbursement rates negotiated under those contracts. (SR 12058-12059).

Standard of Review

Although Plaintiffs repeatedly refer only to Presbyterian's motions for judgment on the pleadings in discussing the standard of review, Cimarron addressed the same issues in its motion for summary judgment, which was also granted by the district court. The "non-movant may not rest on the pleadings, but must demonstrate genuine issues of material fact by way of sworn affidavits, depositions, and similar evidence." *Juneau v. Intel Corp.*, 2006-NMSC-2, ¶15, 127 P.3d 548, 553. The standard of review of a grant of summary judgment is *de novo*. *Ponder v. State Farm Mut. Auto. Ins. Co.,* 2000-NMSC-033, ¶7, 12 P.3d 960, 963.

In reviewing the district court's rulings, however, this Court will address only the points actually argued by the appellant; points not briefed on appeal are deemed abandoned. *Sedillo v. NM Dep't of Public Safety*, 2007-NMCA-002, ¶24, 149 P.3d 955, 961, *cert. quashed*, 2007 N.M. LEXIS 457 (Aug. 30, 2007). Appellants' Brief fails to address the dismissal of their civil rights claims, their

claims for breach of covenant of good faith and fair dealing, reformation and Unfair Practices Act violation against the MCOs, as well as the court's grant of Cimarron's Motion to Strike Incompetent Evidence of Legislative Intent, and Plaintiffs have therefore abandoned those grounds for appeal.

ARGUMENT

I. SECTION 27-2-16(B) DOES NOT APPLY TO SALUD!.

Plaintiffs' entire case is predicated on the erroneous conclusion that §27-2-16(B) applies here, even though it is undisputed that:

- Plaintiffs have no contractual relationship with the State or HSD to provide prescription drug services for SALUD!; and
- Plaintiffs negotiated arms-length contracts to provide prescription drug services for SALUD! with the Pharmacy Benefits Managers for Cimarron.

The language of the statute does not support Plaintiffs' argument. The subsection provides:

> If drug product selection is permitted by Section 26-3-3 NMSA 1978, *reimbursement by the Medicaid program* shall be limited to the wholesale cost of the lesser expensive therapeutic equivalent drug generally available in New Mexico plus a reasonable dispensing fee of at least three dollars sixty five cents ($3.65).

(Emphasis added). Plaintiffs are not reimbursed by the Medicaid program. "Under the managed care system, services are neither provided nor reimbursed directly by HSD; rather HSD contracts with private managed care organizations

(MCOs) which in turn provide health care to Medicaid recipients." *Starko v. Gallegos,* 2006-NMCA-85, ¶3, 140 P.3d at 1088, citing §8.305.1.7(M)(1) NMAC (2005).

HSD pays the MCOs a per-member, monthly payment that covers contracted services and is paid in advance of service delivery. §8.305.1.7(C)(1) NMAC. Each MCO is responsible for providing services to its members during the month of capitation, and the nature of the MCO's contracts with the providers is up to each MCO. §8.305.11.9(A) NMAC. The MCO risks incurring losses if its costs of providing the managed care Medicaid benefit package exceed its capitation payment, as HSD does not provide any retroactive payment adjustments to the MCO to reflect the actual cost of services furnished by the MCO. §8.305.11.9(E) NMAC.

The MCOs enter into private contracts with providers to furnish medical services, including pharmacy services. (SR 12018-12022). The contracts between HSD and the MCOs do not set nor do they require a MCO to reimburse its subcontractors, such as pharmacies, any specified amount to fill a prescription. (RP 767). Instead of being dictated by the contracts between the MCOs and HSD, pharmacy charges for filling SALUD! prescriptions are bargained-for amounts determined by negotiations between the MCO and the individual provider of pharmacy services or, in Cimarron's case, the pharmacy benefits manager. (RP

767; SR 12058-12059). Thus, unlike the fee-for-service model, where providers are reimbursed directly by the Medicaid program for services rendered, SALUD! program services are not reimbursed by HSD. Accordingly, because HSD is not involved in "reimbursing" the pharmacies for SALUD! prescriptions, the statute has no application to these private contracts.

Indeed, any other conclusion is illogical. As Plaintiffs acknowledge, the present version of §27-2-16(B) was passed in 1984, long before the federal government decided to attempt efficiencies and cost-savings in Medicaid by involving managed care organizations. New Mexico's Medicaid regulations acknowledge that MCOs are paid on a capitated (per member, per month) basis, *see* §8.305.1.7(M)(1) NMAC (2005), and also acknowledge that the MCOs will, in turn, enter into sub-contracts to arrange for the provision of required services. *E.g.,* §8.305.11.9(A)(3) NMAC. HSD understood, from the outset of this arrangement in 1997, that the MCOs would negotiate such sub-contracts to obtain competitive rates from medical providers. (RP 3427). Pharmacy services were never exempted from that competitive market-place, and the continued presence of a statute with limited application to fee-for-service did not change that fact.

HSD's own interpretation of the statute is consistent with this view. HSD has interpreted §27-2-16(B) as applying only to its payment for pharmacy services to an individual provider and not a managed care organization. (RP 766). If a

Medicaid recipient is not served by an MCO, HSD complies with the statute when reimbursing a provider for prescription services for generic drugs because the provider is being reimbursed under the Medicaid program, not pursuant to terms of a contract between private parties. (RP 768). HSD simply did not get involved in the payment to pharmacies under SALUD!. Indeed, HSD's regulations have always listed special payment requirements for some SALUD! providers, even specifying the rates for those providers, but pharmacies have never even been mentioned. *See, e.g.,* §8.305.11.9(I) NMAC (2008). *See also* §606.10.7, Special Payment Requirements, New Mexico Register, Vol. VIII, No. 12 (June 30, 1997); §8.305.11.9(H), Special Payment Requirements, New Mexico Register, Vol. XII, No. 12 (June 29, 2001); §8.305.11.9(I), Special Payment Requirements, New Mexico Register, Vol. XV, No. 12 (June 30, 2004); §8.305.11.9(I), Special Payment Requirements, New Mexico Register, Vol. XVI, No. 12 (June 30, 2005).

It is well-established that a court should defer to the agency's interpretation of a statute to resolve ambiguities if the agency is charged with administering the statute. *Atlixco Coalition v. Maggiore,* 1998-NMCA-134, ¶30, 925 P.2d 370, 381. *See also Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995) ("When an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency's interpretation."); *Chevron, U.S.A., Inc. v. Natural*

Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."); *Regents of Univ. of N.M. v. Hughes*, 114 N.M. 304, 312, 838 P.2d 458, 466 (1992) ("it is hornbook law that an interpretation of a statute by the agency charged with its administration is to be given substantial weight, and is entitled to judicial deference" (citations omitted)). It is undisputable that HSD is charged with administering the Medicaid program in New Mexico. §§27-2-12 *et seq.*, NMSA 1978. Thus, HSD's interpretation of the statute is entitled to deference and this Court should conclude that the statute does not apply where, as here, the MCOs are paying for the pharmacy services provided to SALUD! enrollees. The district court's decision entering judgment in favor of the MCOs should be affirmed.

II. PLAINTIFFS HAVE NO CAUSE OF ACTION AGAINST THE MCOS UNDER §27-2-16(B) NMSA 1978.

A. Plaintiffs Have No Right of Action Under §27-2-16(B).

Plaintiffs admit that the Public Assistance Act does not contain a private right of action. Brief at 21. Nevertheless, they insist that the court erred in refusing to *imply* a private right of action for pharmacies under the New Mexico Public Assistance Act. Plaintiffs are wrong.

First, Plaintiffs misread §27-2-16, without even acknowledging the two larger contexts in which that statute rests. That section is part of the New Mexico

Public Assistance Act, which is exclusively concerned with delivery of medical services to eligible low-income New Mexico residents, "consistent with the federal [Medicaid] act." §27-2-4 NMSA 1978. Thus, to ascertain whether §27-2-16(B) can be enforced through a private right of action, the Court must look, first, at the language of the statute itself, and, second, at the entire statutory scheme of the New Mexico Public Assistance Act, within the context, finally, of the federal Medicaid Act.

The language of the statute itself does not assist Plaintiffs. "A court must look to the text of the statute to see if it states, by its terms, that a private party may bring suit to enforce it." *Three Rivers Center for Independent Living, Inc. v. Housing Authority of the City of Pittsburgh*, 382 F.3d 412, 420 (3rd Cir. 2004). Nothing in §27-2-16(B) expressly authorizes, or even hints at, a private enforcement action, and Plaintiffs have never claimed that it does.

Plaintiffs argue, however, that because §27-2-16(B) "creates a specific right but does not express a remedy," the courts must "imply a remedy," reasoning that an injury to a statutorily-created right must be redressable somehow. Brief at 21. This argument suffers from at least two major weaknesses: First, it is far from clear that §27-2-16(B) "creates a specific right," even when the statute is looked at in isolation, as Plaintiffs persist in doing. Second, even if the statute *did* give Plaintiffs some kind of property interest in having pharmacies enriched at the

expense of all the other providers of medical services under Medicaid, and Cimarron obviously does *not* agree that it does, Plaintiffs never established that they could satisfy the requirements for an implied right of action.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (finding that an untenured professor had no property interest in renewal of his one-year teaching contract). Plaintiffs repeatedly assert that they have a property interest "in a fixed rate of reimbursement," Brief at 22-26, as if that pronouncement somehow established the existence of a cause of action to enforce that supposed property interest. Plaintiffs are wrong, both because they do not have any protected property interest in receiving a $3.65 dispensing fee when they freely contracted to receive less than that amount, but also because even if they had a protected property interest, that would not establish the existence of an implied private right of action.

Here, the language of the statute defeats Plaintiffs' claim of a property interest in being paid a $3.65 dispensing fee on Medicaid prescriptions. Plaintiffs ignore §27-2-16(A), which conditions HSD's assistance on the availability of state funds. At the outset, then, Plaintiffs could not reasonably expect payment of a dispensing fee of $3.65 if state funds were not available. And, obviously, the

availability of funds varies from one fiscal period to another and beyond the control of both Plaintiffs and Cimarron. Thus, Plaintiffs could not reasonably assume that the funds would be available for any indefinite period of time or that such funds would somehow apply to their provision of pharmacy services under SALUD!. *See, e.g., Maynard v. Bonta*, 2003 U.S. Dist. LEXIS 16201, *38 (C.D. Cal. Sept. 3, 2003) (joining the surveyed majority of cases in holding that medical provider does not have a protected property interest in continued participation in federally-funded state healthcare programs) (cited by Plaintiffs in Brief at 24).

Further, even subsection (B) is also far from definite. Section 27-2-16(B) starts out: "If drug selection is permitted by Section 26-3-3 NMSA 1978," so obviously the dispensing fee would not be universally applicable, but only when the Product Selection Act permits drug selection. As of the date of the MCOs' dismissal from the lawsuit, the district court had not yet determined when §27-2-16(B) applied, after more than ten years of litigation. Thus, it could not at any point have been reasonably clear that pharmacies were entitled to payment of the $3.65 dispensing fee for any particular Medicaid prescriptions. That is a far cry from the definite and specific property interest required as the first hurdle in establishing a private cause of action.

Moreover, the statute itself provides that payment, or "reimbursement" is to be made "by the medicaid program." Plaintiffs were well aware, however, that

they had no agreement with the State concerning the amounts of dispensing fee, nor any reasonable expectation that the State would pay any dispensing fee for SALUD! prescriptions, since Plaintiffs had already negotiated rates at arms' length with Cimarron's PBM. As a result of those market-driven negotiations, Plaintiffs entered into different contracts with different entities, providing different dispensing fees, depending on what any particular market would bear. (SR 12059). As this Court previously recognized in connection with Plaintiffs' claim against individual State defendants, "the action resulting in the lower payments was not action by the state; rather, it was the agreement by Plaintiffs to provide services to Medicaid recipients via contracts with either the MCOs or the pharmacy provider groups." *Starko, Inc. v. Gallegos*, 2006-NMCA-85, ¶21, 140 P.3d at 1093. *See also Concilio de Salud Integral de Loiza, Inc. v. Dep't of Health & Human Services*, 538 F. Supp.2d 139, 149 (D.P.R. 2008) ("The woes of which Plaintiffs complain arise from the terms of their subcontracts with the HMOs," not federal funding of the Puerto Rico Medicaid program). Thus, Plaintiffs cannot establish any deprivation of property "by the medicaid program" or otherwise: "We doubt that Plaintiffs have even alleged a 'deprivation' particularly in comparison to more traditional cases in which the state acts directly to take property or remove an entitlement." *Starko, Inc. v. Gallegos*, 2006-NMCA-85, ¶21, 140 P.3d at 1093.

In any event, Plaintiffs cannot establish any private right of action based on §27-2-16(B). *See Scott d/b/a Rainbow Constr. Co. v. Board of Commissioners of County of Los Alamos*, 109 N.M. 310, 312, 785 P.2d 221, 223 (1989) ("Implication of a cognizable property interest, however, does not necessarily imply the existence of a cause of action") (cited by Plaintiffs in Brief at 24 n. 10).

Plaintiffs' claim is even weaker when the statute is viewed in its more immediate context, the New Mexico Public Assistance Act. The very title of that Act disclaims any intent to benefit vendors of services like the Plaintiff pharmacies: "'public assistance' means any aid or relief granted to or on behalf of an eligible person". §27-2-2(E) NMSA 1978.

Further, the Act provides a remedy for certain enumerated claims by recipients of public assistance. *E.g.*, §27-3-3 (setting out procedures for hearings for claims by recipients of or applicants for public assistance), §27-3-4 (providing for an appeal in state district court of any decision rendered under §27-3-3); §27-2-12.5(B) (authorizing recovery by patient in any action brought against a nursing facility because of a failure to make a refund). In fact, the Public Assistance Act explicitly authorizes a provider of services – a hospital – to a hearing, "if the hospital disagrees with the department's determination of the reimbursement the hospital is to receive." §27-2-9(C). Thus, the Act itself demonstrates that the New Mexico Legislature knows how to create remedies for a particular group of

providers, and did so where it felt that such remedies were warranted, but it created no such remedies for pharmacies. The District Court correctly ruled that pharmacies had no private right of action against the MCOs under §27-2-16(B).

Nor does the federal Medicaid statute allow a private right of action by providers of services, like pharmacies. *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 59 (1st Cir. 2004) ("pharmacies do not have a private right of action under subsection (30)(A); if they think that state reimbursement is inadequate--and cannot persuade the Secretary to act--they must vote with their feet."); *Pennsylvania Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 541 (3rd Cir.) (Medicaid did not authorize private right of action for higher reimbursement to pharmacists), *cert. denied,* 537 U.S. 821 (2002); *Mandy R. v. Owens*, 464 F.3d 1139, 1148 (10th Cir. 2006) (providers not identified as Medicaid beneficiaries so no claim), *cert denied,* 127 S. Ct. 1905 (2007); *Sanchez v. Johnson,* 416 F.3d 1051, 1062 (9th Cir. 2005) (Congress did not intend to create a right enforceable by Medicaid providers); *Westside Mothers v. Olszewski*, 454 F.3d 532, 543 (6th Cir. 2006) (same); *Bio-Medical Applications of N.C., Inc. v. Elec. Data Sys. Corp.*, 2006 U.S. Dist. LEXIS 4398 (E.D.N.C. Jan. 25, 2006) (providers had no claim for insufficient reimbursement under Medicaid); *Oklahoma Chapter of the American Academy of Pediatrics v. Fogarty*, 366 F. Supp. 2d 1050, 1103 (N.D. Okla. 2005) (pediatricians "do not have enforceable rights" under Medicaid statute); *In re*

NYAHSA Litigation, 318 F. Supp. 2d 30 (N.D.N.Y. 2004) (no private right of action for providers to enforce Medicaid), *affirmed by* 444 F.3d 147 (2d Cir. 2006).[4]

In short, nothing in §27-2-16(B), the New Mexico Public Assistance Act, or the federal Medicaid statute authorizes the cause of action Plaintiffs claim. These failures doom Plaintiffs' claim of entitlement to a private statutory right of action.

Plaintiffs' cases applied the same analysis and do not compel a different result. In *National Trust for Historic Preservation v. City of Albuquerque*, 117 N.M. 590, 874 P.2d 798 (Ct. App. 1994), this Court considered whether a citizen could sue to enjoin road construction as violative of the Prehistoric and Historic Sites Preservation Act. Unlike the statute at issue here, that Act allowed enforcement "by an action for injunction or other appropriate relief in a court of competent jurisdiction." 117 N.M. at 592, 874 P.2d at 800. The Preservation Officer had also implemented regulations explicitly authorizing any "interested person" to seek enforcement of that Act. *Id.* at 593, 874 P.2d at 801. Thus, the

[4] Cimarron acknowledges that the cited cases involved claims brought under 42 U.S.C. § 1983, whereas Plaintiffs have abandoned their claims under that statute. Nevertheless, these cases are instructive, because in both the implication of a private right of action under a statute, and the assertion of a statutory claim under § 1983, the tests applied "ask whether the statute at issue was intended to benefit the putative plaintiff or plaintiffs." *Pennsylvania Pharmacists Ass'n v. Houstoun*, 283 F.3d at 536.

plaintiffs obviously had the right to bring the action, by the plain terms of the statutory scheme itself. *Id.*

The other authority cited by Plaintiffs serves them no better. Some of those cases addressed questions of standing to sue public entities, which is different than the question, raised in this case, of whether a cause of action exists. *See New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶¶12-14, 975 P.2d 841, 847, *cert. denied,* 526 U.S. 1020 (1999); *Lovato v. City of Albuquerque*, 106 N.M. 287, 290, 742 P.2d 499, 502 (1987). In others, there was some recognized cause of action invoked, *e.g. Montoya v. Mentor Corp.*, 1996-NMCA-67, 919 P.2d 410 (strict products liability), *Michaels v. Anglo American Auto Auctions, Inc.*, 117 N.M. 91, 869 P.2d 279 (1994) (tort of retaliatory discharge); a statutory cause of action, *Gandy v. Wal-Mart Stores, Inc.*, 117 N.M. 441, 872 P.2d 859 (1994) (retaliation claim under New Mexico Human Rights Act); or claims brought pursuant to 42 U.S.C. §1983. *E.g. Arkansas Medical Society, Inc. v. Reynolds,* 6 F.3d 519 (8th Cir. 1993) (pre-*Gonzaga* case allowing Medicaid medical providers to bring claim under §1983); *Oberlander v. Perales*, 740 F.2d 116 (2d Cir. 1984) (same).[5] And Plaintiffs' reliance on *Cockrell v. Bd. of Regents of New Mexico*

[5] Plaintiffs' Brief at 23-25 and fn. 10 cites several procedural due process cases. Plaintiffs' reliance on these cases is misplaced; as this Court has already noted, "we conclude that Defendants' actions, in directing or enabling the contracts at issue, do not constitute a violation of procedural due process[.]" *Starko, Inc. v. Gallegos*, 2006-NMCA-85, ¶20, 140 P.3d at 1093.

State Univ., 2002-NMSC-009, 45 P.3d 876, is perplexing, since in that case there was an existing contract between the plaintiff basketball coach and the university he sued.

Plaintiffs also rely on *Gonzaga University v. Doe*, 536 U.S. 273 (2002), claiming that "where a statute grants an 'individualized concrete monetary entitlement,' then the entitled person may enforce that statutory right even if there is not an express remedy provided for in the statute." Brief at 25. But *Gonzaga* fails to support that proposition. *Gonzaga* rejected a claim by a student against a private university for damages under 42 U.S.C. §1983 for alleged violations of the Family Educational Rights and Privacy Act of 1974. The United States Supreme Court held that because the relevant provisions of the federal statute did not create both "a private *right*" and "also a private *remedy*," there was no cause of action under §1983. 536 U.S. at 284 (emphasis in original).

Therefore, the cases on which Plaintiffs rely do not assist them. The court correctly held that Plaintiffs had no cause of action directly under §27-2-16(B), and had no implied private right of action based on that statute.

B. There is No Joint and Several Liability Here.

At the outset of this case, long before they decided to add the MCOs as additional Defendants, Plaintiffs filed a motion for partial summary judgment and succeeded in obtaining a ruling that §27-2-16(B) applied to SALUD! and that the

State had a non-delegable duty to comply with §27-2-16(B). After joining the MCOs, Plaintiffs seek to impose joint and several liability on the MCOs through a novel theory of a "shared" non-delegable duty. This theory, like most of the theories driving this lawsuit, stands existing law on its head and turns Medicaid into a program to benefit vendors of services to the indigent. Indeed, Plaintiffs claim entitlement to higher dispensing fees for prescriptions filled with Medicaid dollars than they can garner from prescriptions paid through commercial health insurance plans. (RP 3341-3342, 3360-3362). The district court properly rejected Plaintiffs' attempt to enrich themselves from the Medicaid program.

Plaintiffs argue that "the finding of a non-delegable duty dictates the imposition of joint and several liability" on both the party originally having the duty and the party entrusted with the duty. Brief at 19. Plaintiffs ignore, however, that joint and several liability in New Mexico remains viable only in a few very limited arenas (and those primarily involve tort law). *Payne v. Hall*, 2006-NMSC-29, ¶11, 137 P.3d 599, 604 ("While several liability is the majority rule, however, certain narrow exceptions still allow for joint and several liability."). *See also* §41-3A-1(C) NMSA (enumerating limited circumstances justifying application of joint and several liability, none of which apply here).

Notwithstanding the clear limits to the application of joint and several liability, Plaintiffs continue to insist that it applies here. The cases Plaintiffs cite

do not support that proposition. In three out of four of those cases, the courts were justifying imposition of liability on the party doing the delegating (the State here), *not* the party to whom the duty was delegated. *E.g., Saiz v. Belen School Dist.*, 113 N.M. 387, 400, 827 P.2d 102, 105 (1992); *Gallegos v. State Bd. of Educ.*, 1997-NMCA-40, ¶22, 940 P.2d 468, 474, *cert. denied,* 123 N.M. 215, 937 P.2d 76 (1997); *Clear v. Patterson*, 80 N.M. 654, 657, 459 P.2d 358, 361 (Ct. App. 1969). In the fourth case, *Dellaira v. Farmers Insurance Exch.*, 2004-NMCA-132, ¶27, 102 P.3d 111, 118, Judge Fry, specially concurring, advocated reliance on "the common law legal theory of delegability of performance" in the unique context of a first-party insurance bad faith claim to impose liability on the claims adjusters hired by the insurance company.[6] In short, no New Mexico appellate court has adopted the approach urged by Plaintiffs here.

Nor should this Court be the first to do so. This entire argument is premised on Plaintiffs' faulty assumption that they have any causes of action at all against Cimarron, notwithstanding the fact that they never entered into *any* contracts with Cimarron but instead contracted freely and exclusively with PBMs. (SR 12541). As discussed above and below, Plaintiffs have no such causes of action.

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[6] Plaintiffs mischaracterize *Dellaira* when they represent that "the ***court*** relied on the Restatement (Second) Contracts §318" (emphasis added), citing Judge Fry's special concurrence. In fact, Judge Fry pointed out that the majority of the Court had *not* adopted her preferred approach, which is the one Plaintiffs urge here.

III. PLAINTIFFS WERE NOT THIRD-PARTY BENEFICIARIES OF CIMARRON'S CONTRACTS TO PROVIDE MEDICAID SERVICES.

The district court also correctly held that Plaintiffs were not third-party beneficiaries of the MMCS Agreements. The touchstone for third party beneficiary analysis is the intent of the parties. A third party can only enforce the terms of a contract when it is the clear intent of both parties to enter into a contract for the specific benefit of that third party. *Callahan v. New Mexico Federation of Teachers – TVI*, 2006-NMSC-10, ¶20, 131 P.3d 51, 58. The burden of showing third-party beneficiary status is on the person claiming that status. *Casias v. Continental Cas. Co.*, 1998-NMCA-93, ¶11, 960 P.2d 839, 842, *cert. denied*, 125 N.M. 322, 961 P.2d 167 (1998).

Not only does the contract have to be intended to benefit the third party, but that intent to benefit the third party must be one of the *motivating causes* behind forming the contract. *Permian Basin Investment Corp. v. Lloyd*, 63 N.M. 1, 11, 312 P.2d 533, 537 (1957). Moreover, a party who is not an intended beneficiary has no right to enforce the contract, even though performance of the contract may incidentally benefit him. *Id.*

Plaintiffs never had any evidence that the parties to the MMCS Agreements (the State and the MCOs) intended to benefit Plaintiffs, nor that it was one of the ***motivating reasons*** for entering into the Agreements. In contrast, Cimarron established that not only were the Agreements for the benefit of SALUD!

enrollees, rather than Plaintiffs, but also that the State and Cimarron never even considered Plaintiffs when they were entering into the MMCS Agreements. (SR 12041-12042, 12049-12051, 12061-12062).

Because Plaintiffs cannot satisfy their burden of proving any intent by the contracting parties to benefit them, they attempt to sidestep clearly-established third-party beneficiary law by creating a new standard. Their argument can be summed up as: (1) §27-2-16(B) was enacted for their benefit; (2) §27-2-16(B) was incorporated into the MMCS agreements; and (3) when a statute is incorporated into a contract, it trumps the parties' intent. Brief at 34. The District Court properly rejected all of these arguments, as should this Court.

A. Plaintiffs Never Proved The Legislature's Intent in Enacting §27-2-16(B).

The first fatal problem with Plaintiffs' argument is that they have no evidence to show that the Legislature intended to enact §27-2-16(B) for their benefit. Plaintiffs relied on incompetent "evidence" to support their argument that §27-2-16(B) was enacted for their benefit, all of which was stricken by the court below. Plaintiffs continue to rely on that same incompetent evidence, *e.g.,* Brief at 39, yet they have not appealed the district court's order striking the "legislative history."

Plaintiffs also argue that "to guarantee there will be adequate pharmacist participation, the Legislature enacted §27-2-16(B)." Brief at 39, citing SR 12195-

12196, 12230. Even if that were true, that does not establish intent to benefit pharmacies, but rather an intent to benefit enrollees by ensuring their access to pharmacies. In any event, the cited documents do not show any Legislative intent in enacting §27-2-16(B).

Nor can Plaintiffs compensate for their lack of legislative history by relying on cases discussing Congress' intent in passing Medicaid. Plaintiffs cite to *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 509-10 (1990), claiming that this case found that the reimbursement requirements under the (since-repealed) Boren Amendment of the Medicaid Act were intended to benefit providers of Medicaid services. Even if that were true, and it is not, *Wilder* does not support any entitlement by Plaintiffs to be third party beneficiaries of the MMCS Agreements. The only question the *Wilder* Court considered was whether the Boren Amendment was enforceable under 42 U.S.C. §1983, not whether medical providers were third party beneficiaries of any contract. 496 U.S. at 501.

Wilder is easily distinguishable from the instant case, and Plaintiffs cannot bootstrap their contract claim as third party beneficiaries onto the *Wilder* Court's reasoning for several reasons. First, Plaintiffs are not appealing the district court's dismissal of their claim under Section 1983. Therefore, *Wilder* is inapposite, since it did not consider whether the Boren Amendment conferred a benefit on medical providers in any context other than a claim under Section 1983, and even that

context was subsequently limited by the Supreme Court in *Gonzaga,* 536 U.S. at 284 (even where "a statute is phrased in explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent to create not just a private *right* but also a private *remedy.*") (emphasis in original).

Second, in *Wilder*, legislative history of the Boren Amendment was critical to its holding, but Plaintiffs have never provided any competent evidence of the legislative intent underlying §27-2-16(B). In any event, Plaintiffs cannot properly compare the purpose of the Boren Amendment, which was derived from a thorough review of the Amendment's legislative history, to the purpose of §27-2-16(B), which is a completely different law, and does not have legislative history. Therefore, since this Court is not analyzing Plaintiff's claim under the lens of Section 1983, and because there is no evidence as to the New Mexico Legislature's intent in enacting §27-2-16(B), *Wilder* is unhelpful to Plaintiffs.

Moreover, there is every reason to conclude that §27-2-16(B) was *not* intended as pork-barrel legislation designed to benefit one particular special-interest group. First, such an interpretation would render the statute unconstitutional as an impermissible grant of a privilege to Medicaid-provider pharmacies that is not available to pharmacies that do not fill prescriptions for enrollees in Medicaid fee-for-service or SALUD!. N.M. Const. Art. IV, §26. And,

since statutes should be construed in a manner that renders them constitutional, *see, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-507 (1979), this Court could do so by construing §27-2-16(B) to give effect to its location in the Public Assistance Act as effectuating the purpose of ensuring that pharmacy services will be available to Medicaid recipients, rather than as conferring a legislative windfall on a special interest group.

B. Incorporating §27-2-16(B) Into the Contracts Does Not Create An Intent by the Parties to Benefit the Pharmacies.

Even if §27-2-16(B) was enacted to benefit pharmacies, and Plaintiffs never provide that it was, that "intent" cannot be imported into the MMCS Agreements. Plaintiffs' entire argument is predicated on the assumption that the assumed intent underlying a single ambiguous clause referencing §27-2-16(B) in a contract of more than 100 pages is sufficient to displace the parties' actual intent in entering into the contracts. Plaintiffs are wrong, on the law and on the facts.

Although the reference to §27-2-16(B) in the 2001 MMCS Agreements is critical to their third-party beneficiary claim, the language of that reference demonstrates the weakness of their argument. The provision on which Plaintiffs rely provides:

> The subcontract for pharmacy providers shall include a payment provision consistent with 1978 NMSA §27-2-16(B) ***unless the subcontractor provides a voluntary waiver to any rights*** under 1978 NMSA §27-2-16(B) or the CONTRACTOR is notified by HSD that the provisions of Section 27-2-16(B) do

> not apply to the CONTRACTOR's subcontract with the Pharmacies.

(SR 12022) (emphasis added). This reference is not sufficiently definite to confer any specific rights, and is certainly insufficiently definite to constitute the concrete and definite intent to benefit pharmacies that is required to confer third-party beneficiary status.

Further, Plaintiffs have never disputed that this provision was not present in the original 1997 MMCS Agreements, and Plaintiffs never presented any evidence that the insertion of this provision in response to the District Court's 2000 Order was intended to alter in any way the purpose of the Agreement. And there was also no evidence that this provision in any way displaced the parties' intended beneficiaries under the MMCS Agreements – the SALUD! enrollees. To the contrary, the evidence established that HSD never discussed the meaning or applicability of §27-2-16(B) either internally or with the MCOs. (SR 12046-12048). And even after the above provision was inserted into the MMCS Agreements, the parties to those contracts still did not contemplate any benefit to the pharmacies. (SR 12046-12051). Thus, the reference to §27-2-16(B) in the 2001 MMCS Agreements does not advance Plaintiffs' claim.

Plaintiffs' theory also ignores the fact that not only is §27-2-16(B) incorporated into the MMCS Agreements, but so is the entire Public Assistance Act. Plaintiffs would like this Court to interpret only one small section of a much

broader act with much broader application, in order to garner a windfall for themselves as a class. Regardless of the incompetent evidence Plaintiffs submitted (and continue to cite) as to the purpose of §27-2-16(B), Plaintiffs cannot and do not dispute that the generally accepted purpose of the Public Assistance Act, and the federal Medicaid Act from which it was born, is to benefit the poor and disadvantaged individuals who qualify for Medicaid, not a particular group of vendors who provide services to those disadvantaged individuals.

Plaintiffs also argue that they are intended beneficiaries by virtue of being creditor beneficiaries under Restatement (Second) of Contracts §302. The debt, they argue, is $3.65 owed by the State to Plaintiffs under §27-2-16(B), enforceable because the MCOs promised the State to pay "the barred and unenforceable debt." Brief at 36-37. The flaw in Plaintiffs' argument is obvious: Cimarron never promised to pay the pharmacies $3.65 (or any other sum). Indeed, Plaintiffs persist in ignoring the fact that Cimarron negotiated with PBMs, and the PBMs, in turn, negotiated and contracted with Plaintiffs to provide pharmacy services at negotiated prices. Plaintiffs have never asserted claims that the PBMs failed to pay them the prices they negotiated; instead, they claim an entitlement to payment from Cimarron – an entity with which Plaintiffs never contracted.

Furthermore, Plaintiffs can cite to no provision in the MMCS Agreements specifying the MCOs' putative promise to pay the "debt" to the pharmacies.

Although the reference to §27-2-16(B) in the 2001 MMCS Agreements is critical to Plaintiffs' third-party beneficiary claim, the language of that reference does not support it. As discussed above, the provision's qualified reference hardly constitutes a definite promise to pay anyone anything. It certainly cannot confer third-party beneficiary status.

Finally, even if the MCOs agreed to comply with §27-2-16(B), and even if the State believed it gave the MCOs enough money to comply with §27-2-16(B), the MCOs did not promise to pay a debt on behalf of the State to Plaintiffs. Plaintiffs cite to no authority holding that a statute can create a debt, such as the one they claim is owed to them in this case. Therefore, Plaintiffs are not creditor beneficiaries under the MMCS Agreements by virtue of §27-2-16(B).

C. The Incorporation of a Statute Into the Contract Does Not Supplant the Parties' Intent.

Plaintiffs' true argument attempts to turn more than one hundred years of case law on its head by contending that neither the intent of the parties nor that of the Legislature are relevant when determining whether Plaintiffs are third party beneficiaries. Plaintiffs claim that *Gonzaga,* 536 U.S. at 283, and *Roob v. Fisher*, 856 N.E.2d 723, 730 (Ind. App. 2006) support this proposition, but Plaintiffs are mistaken.

As discussed above, *Gonzaga* is inapposite, since it did not consider the issue of third party beneficiary status and held only that a federal spending statute

did not confer a basis for private enforcement through Section 1983. *Gonzaga*, 536 U.S. at 279. Therefore, contrary to Plaintiffs' argument, whether §27-2-16(B) confers a right (in the context of those enforceable under Section 1983) is irrelevant to the question of whether they are third party beneficiaries under the MMCS Agreements.

Likewise, *Roob* is equally unhelpful to Plaintiffs because it also dealt with "rights" under Section 1983, and not third party beneficiary status under a contract. Plaintiffs' citation to the *Roob* opinion is puzzling, since that court found that the Medicaid transportation providers did not even have a private right of action under Section 1983 for payment. 856 N.E.2d at 733. In any event, even if Plaintiffs are correct that the district court erred in both (1) assuming that Medicaid's payment provisions cannot be for the benefit of Plaintiffs as providers of Medicaid services, and (2) not finding a clearly defined right for Plaintiffs under §27-2-16(B), neither alleged error would transform Plaintiffs into third party beneficiaries under the MMCS Agreements.

Apparently recognizing that their claims are unsupported by either the parties' intent or the Legislature's intent in enacting §27-2-16(B), Plaintiffs argue that the Court can ignore altogether the intent of the parties to a contract when determining third party beneficiary status. Instead, Plaintiffs rely on the language of §27-2-16(B) as evidencing an intent to benefit them, and then cite to comment d

of Section 302 of the Restatement (Second) of Contracts, which says: "In *some cases* an overriding policy, which may be embodied in a statute, requires recognition of such a right without regard to the intention of the parties." (Emphasis added).

In a case like this, however, where the contracts at issue are government contracts, Section 302, comment d of the Restatement is inapplicable. *County of Santa Clara v. Astra USA, Inc.*, 2006 U.S. Dist. LEXIS 33047, *30 (N.D. Cal. 2006) ("comment d of Section 302 of the Restatement is trumped by Section 313 of the Restatement, which rejects third party rights on government contracts"). Section 313 of the Restatement (Second) of Contracts provides

> [A] party who contracts with a government agency to do an act or render a service to the public is generally not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform. The only exceptions to this rule involve situations where the terms of the contract provide for such liability, or where the governmental entity would be subject to liability to the injured member of the public.

Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 603 (1983).[7]

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[7] One of these exceptions was present in a case cited by Plaintiffs, *Flagstaff Medical Center, Inc. v. Sullivan*, 962 F.2d 879 (9th Cir. 1992). In the decision amending the opinion on which Plaintiffs rely, the Ninth Circuit Court of Appeals made clear that the decision rested on the fact that "Flagstaff's assurances incorporate a subsequent statutory enactment evidencing an intent to make Flagstaff liable to third parties." *Flagstaff Medical Center, Inc. v. Sullivan*, 1992 U.S. App. LEXIS 12152, *33-34 (9th Cir. June 2, 1992). Thus, the court explicitly

In *County of Santa Clara*, pharmaceutical companies claimed to be third party beneficiaries under a contact between drug manufacturers and the government that required participating pharmaceutical manufacturers to "provide statutorily-defined discounts on outpatient drugs to qualified hospitals and clinics. Manufacturers were required to participate in [the program] as a condition of having drug charges reimbursed by Medicaid." 2006 U.S. Dist. LEXIS 33047, *30. The court held that there was no "clear intent" to benefit the plaintiff pharmaceutical companies, and therefore, the plaintiffs' claims as third party beneficiaries could not go forward, even in light of the Medicaid statute governing the program. *Id.*

The *County of Santa Clara* court recognized that reference to an "overriding policy" in §302, comment d of the Restatement (Second) Contracts is not enough to confer third party beneficiary status in light of law requiring "clear intent" in the contract. *Id.* The court also found that comment d of Section 302 was "trumped by Section 313 of the Restatement, which rejects third-party rights on government contracts". *Id. See also Harris v. Aero. Testing Alliance*, 2008 U.S. Dist. LEXIS 1185, *13 (E.D. Tenn. Jan. 7, 2008) ("Plaintiff has provided no grounds for her recovery under a contract to which she is not a party. Contract law 'distinguishes an "intended" beneficiary, who acquires a right by virtue of a promise, from an

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and correctly relied on traditional third-party beneficiary analysis of the parties' intent even in the context of a government contract.

"incidental" beneficiary, who does not.' Restatement (Second) of Contracts §302, comment a. 'Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested.' Restatement (Second) of Contracts §313, comment a."). Thus, Plaintiffs' continued reliance on Section 302, comment d of the Restatement is misplaced, and should not be adopted by this Court in considering Plaintiffs' elaborately cobbled-together argument for recognition as third party beneficiaries under the MMCS Agreements between Cimarron and the State.

Nor can Plaintiffs rely on general, boilerplate language in the MMCS Agreements requiring the MCOs to comply with the law. In *Stockton v. Silco Constr. Co.*, 877 P.2d 71 (Ore. 1994), the Oregon Supreme Court affirmed summary judgment, finding that subcontractors were not third party beneficiaries under contracts that incorporated a statute providing for payment of minimum wages for labor and rejected the plaintiffs' argument that they were third party beneficiaries "of the prevailing wage provisions in the public works contracts, because those provisions were 'designed to directly benefit [plaintiffs] by assuring that they would not be paid substandard wages'" 877 P.2d at 78. *See also Great Plains Equip. v. Northwest Pipeline Corp.*, 979 P.2d 627, 638-9 (Idaho 1999) ("the contract entered into between [the parties] was not made expressly for the benefit of any of the plaintiffs as third parties to the arrangement between [the parties].

The contract merely referenced [state] law[.]"). In short, applicable authority rejects Plaintiffs' novel third-party beneficiary theory.

Plaintiffs also rely on a group of cases that purportedly support their assertion that "intent to benefit for third-party beneficiary purposes can also be supplied by a statute that is read into the contract." Brief at 38. But the cases cited support no such proposition. In *Rogers v. Speros,* 580 P.2d 750 (Ariz. Ct. App. 1978), the court did not decide whether the plaintiffs were actually third party beneficiaries under a contract, but only held that a claim for third party beneficiary status under a minimum wage statute incorporated into a contract could survive a motion to dismiss. *Rogers*, 580 P.2d at 754. The court created no exception to traditional third-party beneficiary requirements.[8]

Foundation Health v. Westside EKG Assocs., 944 So.2d 188 (Fla. 2006), is also inapposite for a similar reason. In that case, the court did not decide that the plaintiff *was* a third party beneficiary; instead, the court explicitly relied on the Florida HMO statute's provision of a private right of action when it held that a medical service provider may bring a cause of action as a third party beneficiary to a contract between the health maintenance organization and its subscriber. *Foundation Health*, 944 So.2d at 191, 196. Unlike the contracts in this case, the contract at issue in *Foundation Health* was not a government contract; thus, the

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[8] Plaintiffs' citation of several other cases in their Brief at 38 n. 16 is equally misplaced for the same reason.

Restatement (Second) of Contracts §313, prohibiting third-party beneficiary actions in cases involving government contracts, was inapplicable. In any event, the case does not support Plaintiffs' theory that the presence of a statute renders irrelevant the parties' intent in entering into a contract because the court made clear that in order to actually recover on the third party beneficiary theory, the plaintiff would still have to establish "the clear or manifest intent of the contracting parties that the contract primarily and directly benefit the third party[.]" *Id.* at 195.

Another case that Plaintiffs cite, *Rendleman v. Bowen*, 860 F.2d 1537 (9th Cir. 1988) did not involve a third-party beneficiary claim. The court did use statutory intent to help interpret the contract but only because of the very unusual circumstance that the "exact terms to be included in the contract [were] specified in the statute." 860 F.2d at 1539. *Rendleman* cannot be read to support the proposition that a court should assume that the parties to a contract have the same intents and purposes as the legislature.

Likewise, not only did *American Hospital Asso. v. Schweiker*, 721 F.2d 170 (7th Cir. 1983), another case on which Plaintiffs rely, not concern a third-party beneficiary claim but the case did not involve a contract at all, so it is hardly surprising that the court found the intent of the parties to be irrelevant in a challenge by a hospital association to the authority of the Secretary of Health and Human Services to promulgate administrative regulations. 721 F.2d at 183. In

short, none of the cases cited by Plaintiffs support their argument that legislative intent underlying a statute somehow substitutes for the intent of the contracting parties in evaluating a claim to third-party beneficiary status.

The holdings of these cases are unremarkable. They create no exception for a particular group or class claiming third party beneficiary status and instead, allow such claims, as a matter of law, only if all the elements of a third party beneficiary claim can be proved. The plaintiffs in these cases are held to the same standard as everybody else – they have to overcome the "significant hurdle" of proving "clear or manifest intent" to "primarily and directly benefit" the provider. In this case, Plaintiffs have produced no competent evidence that the MMCS Agreements were intended primarily and directly to benefit them. No such evidence exists. Therefore, as a matter of law, Plaintiffs are not intended third party beneficiaries of the MMCS contracts between the MCOs and the State.

D. Even If Plaintiffs Were Third-Party Beneficiaries, They Waived Their Rights By Entering Into Contracts For Rates Other Than Those They Now Claim.

Finally, even if Plaintiffs could satisfy the requirements of third-party beneficiary status under the MMCS Agreements, and they cannot, their contract claims would still fail because Plaintiffs waived any rights they may have under Cimarron's contract with the State by their voluntary entry into contracts with the PBMs to provide pharmacy services for Cimarron SALUD! enrollees. In their

freely-negotiated contracts with PBMs, Plaintiffs agreed to accept different rates than the rate they now claim was guaranteed to them in §27-2-16(B). (SR 12059). Some of the dispensing fees under those subsequent contracts were more than $3.65 and some were less than that amount. (*Id.*). Plaintiffs admittedly knew about §27-2-16(B) at the time they negotiated for the market price on each contractual rate. (*Id.*). Tellingly, Plaintiffs did not think that these subsequent, negotiated contracts were unlawful, (SR 12059-12060), although they now claim otherwise.

These subsequent contracts superseded any benefit Plaintiffs would have been entitled to under the MMCS Agreements, even if they were third party beneficiaries under those Agreements. *K&V Scientific Co. v. Bayerische Motoren Werke Aktiengesellschaft*, 164 F. Supp.2d 1260, 1262 (D.N.M. 2001), citing 6 CORBIN ON CONTRACTS, §§1293, 1296 (1962); Restatement (Second) on Contracts §279 and cmt. a (finding that a later agreement between the parties was substituted for an earlier one to the extent the later contract had contradictory terms, and noting that when two parties execute a second contract that deals with the same subject matter as the first, the two contracts must be interpreted together; insofar as the contracts are inconsistent, the later one prevails), *reversed on other grounds,* 314 F.3d 494 (10th Cir. 2002); *Superior Concrete Pumping, Inc. v. David Montoya Constr., Inc.*, 108 N.M. 401, 773 P.2d 346 (1989) (in the case of subsequent,

inconsistent contracts, the later one governs). Adopting Corbin's language, the court in *K&V Scientific* described the rule:

> The new agreement may make no reference to the previous contract or claim; and yet it may operate as a substituted contract. If the new agreement contains terms that are clearly inconsistent with the previously existing contract or claim, the fact of inconsistency is itself a sufficient indication of the intention to abrogate the old and substitute the new.

164 F. Supp.2d at 1262.

Plaintiffs' conduct supported the argument that their performance under the subsequent contracts superseded the MMCS Agreements. *Shaeffer v. Kelton*, 95 N.M. 182, 186, 619 P.2d 1226, 1230 (1980) ("it is an established rule that the waiver of an express contractual condition may be implied in the conduct of the parties"). Waiver is defined as the intentional relinquishment or abandonment of a known right. *J.R. Hale Contracting Co. v. United New Mexico Bank of Albuquerque*, 110 N.M. 712, 717, 799 P.2d 581, 586 (1990). The intent to waive contractual obligations or conditions may be implied from a party's representations that fall short of an express declaration of waiver, or from his conduct. *See Elephant Butte Resort Marina, Inc. v. Wooldridge*, 102 N.M. 286, 289, 694 P.2d 1351, 1354 (1985) (when party agreed to alternate financing plan, he waived enforcement of a contrary provision in the contract); *Cooper v. Albuquerque City Commission*, 85 N.M. 786, 790, 518 P.2d 275, 279 (1974) (waiver can be implied from the conduct of the parties). "Implied in fact" waivers represent a voluntary

act whose effect is intended, under New Mexico law. *J.R. Hale*, 110 N.M. at 717, 799 P.2d at 586. Plaintiffs' acts of negotiating those subsequent contracts at arms' length and then performing under them was compelling evidence of their waiver of any claim to be third-party beneficiaries under the MMCS Agreements.

And that was not all. After negotiating and voluntarily entering into those subsequent contracts for reimbursement rates different from those they argue were required under the MMCS Agreements, Plaintiffs then ratified those contracts by accepting payments under those negotiated contracts. *Morris Oil Co., Inc. v. Rainbow Oilfield Trucking, Inc.*, 106 N.M. 237, 242, 741 P.2d 840, 845 (1987) (even when a principal is unaware of the acts of its agents, a principal may be held liable for those acts, if the principal ratifies the transaction after acquiring knowledge of the material facts concerning the transaction). Therefore, even if Plaintiffs were third-party beneficiaries under the MMCS Agreements between the State and Cimarron, and they were not, they waived any right to recover under those Agreements by entering into superseding contracts with contrary terms and then ratifying those contracts by accepting payments thereunder.

IV. THE DISTRICT COURT CORRECTLY REJECTED PLAINTIFFS' EQUITABLE CLAIMS.

Plaintiffs' claims for equitable relief are predicated on two different, and equally untenable legal theories: first, they attempt to resuscitate their third-party beneficiary claim by characterizing it as an equitable unjust enrichment claim, and,

second, they seek injunctive and declaratory relief to enforce a statute under which there is no private right of action, §27-2-16(B). Under either theory, Plaintiffs' claims for equitable relief are unavailing.

Plaintiffs do not and cannot dispute that there is no right to declaratory or injunctive relief in a vacuum. In other words, "it should be apparent that unless a valid cause of action is stated under the rules of substantive law, there can be no recourse to declaratory judgment procedure to reach the desired end. No new substantive rights were created by the declaratory judgment act." *American Linen Supply v. Las Cruces*, 73 N.M. 30, 32, 385 P.2d 359, 360 (1963). *See also Three Rivers Ctr. for Indep. Living, Inc. v. Hous. Auth.*, 382 F.3d 412, 421 (3d Cir. 2004) (affirming dismissal of claims got equitable relief under HUD regulations, on the grounds that such regulations did not provide a private right of action).

A. Plaintiffs Had No Claim for Unjust Enrichment.

An unjust enrichment claim is distinct from a contract claim. *Ontiveros Insulation Company, Inc. v. Sanchez*, 2000-NMCA-051, ¶11, 3 P.3d 695, 698-99 ("The theory has evolved largely to provide relief where, in the absence of privity, a party ***cannot claim relief in contract*** and instead must seek refuge in equity.") (emphasis added). Here, of course, Plaintiffs ***have*** claimed relief in contract – indeed, they do so to this day. Plaintiffs' claims in this case have always been firmly grounded on contracts; their unjust enrichment claim explicitly references

their performance of services "under valid written contracts" but contends that they were paid "at an unlawful rate." (RP 5778, ¶83). The Court correctly concluded that because Plaintiffs' claims were really contract claims (to the extent Plaintiffs had viable claims at all), Plaintiffs could not pursue their claims of unjust enrichment.

Plaintiffs argue, however, that because the Court rejected their contract claims, the Court should have resuscitated their unjust enrichment claim. Brief at 42. This "heads we win, tails you lose" style of advocacy reflects a misunderstanding of the law. Plaintiffs ***did*** claim relief in contract and their claims were – and are – firmly rooted in contract. This Court's decision in *Ontiveros Insulation* explained that where a contract claim exists, a claim for unjust enrichment is disfavored: "Simply, equity does not take the place of remedies at law, it augments them; in this regard, an action in contract would be preferred to one in quasi-contract." *Ontiveros Insulation,* 2000-NMCA-051, ¶12, 3 P.3d at 699. Plaintiffs brought their contract claims in this litigation, although they chose not to sue their contractors – the PBMs. Their inability to prevail on their contract claims against Cimarron does not legitimize their unjust enrichment claim.[9]

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[9] Plaintiffs' cited authorities at 43-44 are not to the contrary or are wholly irrelevant. For example, *Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts*, 954 F.2d 299, 305-06 (5th Cir. 1992) simply recognized a cause of action for restitution as complimentary to the ERISA statutory scheme. The case did not address the propriety of resuscitating a claim for unjust

Furthermore, even if they had a legitimate claim of unjust enrichment, Plaintiffs could not prove the required elements of such a claim. Plaintiffs do not and cannot dispute that at all times, Cimarron paid the PBMs pursuant to its contracts with those PBMs. "It follows, then, that if a defendant has already *paid* for the benefit, there has been no enrichment, much less *unjust* enrichment." *Ontiveros Insulation,* 2000-NMCA-051, ¶17, 3 P.3d at 700. *See also J.R. Hale Contr. Co. v. Union Pac. R.R.*, 2008-NMCA-37, ¶67, 179 P.3d 579, 599 ("Generally, a subcontractor has no right to claim quantum meruit against an owner when the owner has paid all or substantially all of what it owes under its contract with the prime contractor."). The PBMs, in turn, negotiated with Plaintiffs and paid the market rates for pharmacy services that they negotiated. (SR 12059). Although Plaintiffs were aware of §27-2-16(B) at the time of the negotiations, they agreed to accept dispensing fees that were sometimes below $3.65 and sometimes above that rate. (SR 12059). Thus, there was no *unjust* enrichment here, because Cimarron paid for pharmacy services to the PBMs, and Plaintiffs freely negotiated with the PBMs at arms' length and chose to accept market rates for pharmacy services.

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enrichment simply because the plaintiff could not prevail on the primary contract claim. *Plucinski v. I.A.M. Nat. Pension Fund*, 875 F.2d 1052, 1057-58 (3rd Cir. 1989) involved the same ERISA-specific question as *Jamail.* Plaintiffs here have brought no claims for restitution, and have abandoned their claims for reformation.

The same facts demonstrate that Plaintiffs could never establish that Cimarron was knowingly benefited at their expense, a required element of their unjust enrichment claim. Indeed, it was actually the other way around. At the very same time that Robert Ghattas, the owner of one of the Plaintiff pharmacies, Regent Drugs, was planning this litigation, he was selling his services as Cimarron's pharmacy benefits manager. (SR 12058). When Mr. Ghattas succeeded in that endeavor, he (as PBM Regent Services) negotiated with member pharmacies and offered dispensing fees of considerably less than $3.65 because it "was the best he could do." (SRP 12332). Although the contract prices he negotiated were different from those specified in §27-2-16(B), he did not think those below-$3.65 dispensing fees were unlawful. (SR 12059-12060). "Unjust enrichment permits recovery of the reasonable value of a given service." *Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alternatives, Inc.*, 832 A.2d 501, 510 (Pa. Super. 2003), *appeal denied*, 847 A.2d 1288 (Pa. 2004). Plaintiffs *have* recovered the reasonable value of pharmacy services from the PBMs. Therefore, they have no unjust enrichment claim.

B. The District Court Properly Dismissed Plaintiffs' Claims for Injunctive and Declaratory Relief.

Counts 8 and 9 of Plaintiffs' Fourth Amended Complaint requested the court to declare that Plaintiffs have a right to be reimbursed with "a dispensing fee of not less than $3.65 per prescription as set forth in NMSA 1978, §27-2-16(B) or $4.00

per prescription as set forth in the [then-] current State Plan." (RP 5781, ¶100). In other words, Plaintiffs sought to enforce their "rights" under §27-2-16(B) and asked the district court to rewrite their freely-negotiated market rate contracts with the PBMs. Or, put another way, Plaintiffs' requests for declaratory and injunctive relief essentially asked the court to give them a damages action under §27-2-16(B) through the vehicles of declaratory and injunctive relief. The district court properly dismissed these claims.

Plaintiffs' only half-hearted argument is to state the unremarkable proposition that declaratory and injunctive relief "may be available" on a contract claim, or to enforce rights under a statute. Brief at 44. But Plaintiffs ignore that they have no contract, as in *Baca v. New Mexico State Highway Dep't*, 82 N.M. 689, 486 P.2d 625 (Ct. App. 1971) and *Winrock Enterprises, Inc. v. House of Fabrics of New Mexico, Inc.*, 91 N.M. 661, 579 P.2d 787 (1978), and they have no contractual right to enforce zoning ordinances, as in *City of Sunland Park v. Harris News, Inc.*, 2005-NMCA-128, 124 P.3d 566, *cert. quashed*, 141 P.3d 1280 (2006). For those obvious reasons, the cases upon which they rely are inapposite. To the contrary, as discussed above, it is well-established that Plaintiffs cannot call upon the court to provide relief in equity where they have no cause of action at law. *American Linen Supply v. Las Cruces*, *supra*. Since the district court correctly dismissed their claims brought directly under §27-2-16(B) and as third-party

beneficiaries of the MMCS Agreements between the State and Cimarron, Plaintiffs cannot resuscitate those same claims through requests for declaratory and injunctive relief.

CONCLUSION

For all of the foregoing reasons, Defendant Cimarron Health Plan, Inc. respectfully requests this Court to affirm the judgment entered in its favor by the District Court.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS
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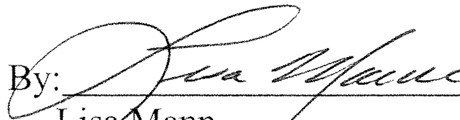
By: 

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-213(F)(3) NMRA, I certify that the attached brief uses proportionately spaced type of 14 points, is double-spaced using a roman font, and contains 10,814 words.

DATED this 9th day of July, 2008.

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