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

JOSEPH HERRERA

Plaintiff,

v. Case No.: D-101-CV-2025-02352

REGULATION & LICENSING DEPARTMENT

Defendant.

PLAINTIFF JOSEPH HERRERA'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE FIRST AMENDED VERIFIED CLASS ACTION COMPLAINT FOR DAMAGES AND FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Joseph Herrera, through counsel, replies in support of his Motion for Leave to File First Amended Verified Class Action Complaint for Damages and for Declaratory and Injunctive Relief ("Proposed FAC"). The Court should grant leave under Rule 1-015(A) NMRA because amendment is favored, and Defendant has not shown a substantial reason why it should be denied. Defendant's opposition largely seeks a merits and justiciability adjudication that is inappropriate on a motion for leave.

LAW AND ARGUMENT

I. Rule 1-015(A) NMRA requires leave to amend absent a substantial reason, and "futility" must be clear on the face of the Proposed FAC.

Rule 1-015(A) directs that leave to amend "shall be freely given when justice requires." Defendant accordingly must show a substantial reason to deny leave. Where a party asserts "futility," denial is appropriate only if the insufficiency is apparent on the face of the proposed amended pleading. *LensCrafters, Inc. v. Kehoe*, 2012-NMSC-020, ¶ 27.

Defendant's brief does not identify a facial defect. Instead, it disputes Plaintiff's legal theory and forecasts how Defendant believes the case should come out on ripeness and due process. The "better reasoning" cited by Defendant allows a futility analysis only when futility is clear on the face of the amended pleading. The Proposed FAC easily clears this threshold by presenting allegations sufficient to survive a motion under Rule 1-012(B)(6) NMRA as to all counts.

II. Defendant's ripeness argument fails on the face of the Proposed FAC because Plaintiff pleads a completed deprivation, *i.e.*, loss of the rule-based appeal opportunity during the appeal window.

Defendant's central claim is that Plaintiff seeks advisory, pre-enforcement relief because "no final enforcement action" has occurred. This framing does not match the Proposed FAC's core allegation.

Section 14.5.9.9 NMAC creates short, mandatory appeal windows triggered by service of the Code Violation Determination (CVD)–making front-end notice the relevant "proceeding." The Proposed FAC pleads that CID's initiating CVD triggers this rule-based internal appeal pathway: (i) the licensee may appeal by sending a written appeal to the director within 10 calendar days of receipt of the CVD; (ii) if the director upholds the CVD, the licensee may appeal to the Commission within 20 days of receipt of the director's decision; and (iii) the commission's decision is final and not subject to judicial review. § 14.5.9.9 NMAC.

On the face of the rule's text, the internal appeal windows are not peripheral. They are the State's designated mechanism for timely review of "one or all" violation determinations before escalation, and the rule expressly forecloses judicial review after the Commission's final appeal decision. *Id.* When a notice initiates a short, mandatory deadline to invoke the only internal review

mechanism available within an agency, but omits how to invoke that mechanism, it can plausibly deprive the recipient of meaningful access to the procedure at the time it must be used. *See id.*

The Proposed FAC pleads that Plaintiff received a CVD/NOV that omitted the appeal advisements; that the omission started the appeal clock running without "conspicuous, step-by-step" notice of how and when to appeal; that Plaintiff sought guidance; that Defendant did not provide any written appeal advisement within the 10-day period; and that Plaintiff therefore did not file the director appeal because he was never advised of it. Accepting these allegations as true, as the Court must at this stage, Plaintiff does not allege a hypothetical future injury. He alleges the expiration of an internal appeal window without functional notice of how to invoke it. In other words, he has pleaded a completed loss of process at the moment the rule required him to act. *See* § 14.5.9.9 NMAC.

Defendant also emphasizes the breadth of Plaintiff's requested remedies. But the question is whether the Proposed FAC states at least a plausible claim and is not facially futile–not whether every requested remedy is ultimately warranted in its broadest form. Here, Rule 1-023 NMRA itself provides tools for tailoring relief (namely, issue classes and subclasses), confirming that even if the Court later narrows remedies or phases them, that is fundamentally a case-management question, not a basis to deny amendment at this juncture.

III. Plaintiff's procedural due process theory is at least plausible under the flexible due process framework.

The Proposed FAC's due process theory is not that Plaintiff is entitled to a particular substantive outcome on the alleged violations. It is that due process requires meaningful access to the State's own prescribed review mechanism at the time it must be invoked–here, within 10 days of receipt of the CVD. *See* § 14.5.9.9 NMAC. Due process focuses on meaningful opportunity and

timing, evaluated by balancing affected interests, risk of error, the value of safeguards, and any corresponding governmental burden. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The U.S. Supreme Court has explained that due process is flexible and that identifying "the specific dictates of due process" generally requires considering three factors: (1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used and the probable value of additional safeguards; and (3) the government's interest, including fiscal and administrative burdens. *Id.*

At the pleading stage, Plaintiff need only allege a plausible procedural deficiency and a plausible, non-speculative harm resulting from that deficiency. The Proposed FAC does so. It pleads that a rule-based appeal clock ran; that the initiating notice omitted the information needed to use the process; and that a basic safeguard–printing the rule's appeal instructions on the CVD–would materially reduce the risk that recipients lose review by default, at minimal burden to the government. *Mathews* supports Plaintiff's point about timing. The injury is denial of the procedure "when due," *not* only at the end of an enforcement pipeline. *See id.* at 332.

Counts II and III in the Proposed FAC are directed at the adequacy of the initiating procedure and notice. This kind of claim is plausibly "collateral" to the merits of whether building code violations ultimately existed at the property in question, just as the procedural challenge in *Mathews* was collateral to an entitlement dispute. *See id.* at 330. This, alone, is not dispositive, particularly where the defect alleged is a lack of adequate front-end process. In such scenarios, the deprivation occurs at the time the state-triggered mechanism runs without adequate safeguards–not only after later enforcement events. *See id.* at 331-332. This is especially true where a complaint alleges harms that are not "recompensable through retroactive payments." *Id.*

IV. The Proposed FAC pleads a proper Rule 1-023(B)(2) class framework based on a uniform statewide form omission.

Defendant's opposition also attempts to prematurely litigate class certification on a motion for leave. Rule 1-023(A) NMRA sets forth the requirements of numerosity, commonality, typicality, and adequacy. Rule 1-023(B)(2) NMRA expressly authorizes class treatment where "the party opposing the class has acted or refused to act on grounds generally applicable to the class," making "final injunctive relief or corresponding declaratory relief" appropriate for the class as a whole.

The Proposed FAC pleads precisely what is required: a standardized statewide CVD template used over a long period that omitted the appeal advisements and lacked a standardized backup practice. This is the paradigm of "grounds generally applicable to the class," supporting declaratory and injunctive relief aimed at correcting the form and ensuring meaningful notice going forward. To the extent the case later presents individualized issues, Rule 1-023 NMRA expressly allows issue certification and subclasses. The existence of these mechanisms in the rule further confirms that Defendant's manageability objections are not a valid basis to deny leave.

PRAYER FOR RELIEF

Wherefore, Plaintiff Joseph Herrera respectfully requests that this Court:

1. Grant his Motion for Leave to Amend; and

2. Deem his *First Amended Verified Class Action Complaint for Damages and for Declaratory and Injunctive Relief* filed as of the date of the Court's order granting this motion.

Respectfully submitted,

LAW OFFICE OF MATTHEW J. BOUILLON MASCAREÑAS LLC

Dated: February 23, 2026 By: */s/ MJBM*

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2026, the foregoing was electronically filed via the Odyssey File and Serve system, with a courtesy copy via email to:

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/s/ MJBM
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