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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

11 RENE C. DAVIDSON COURTHOUSE

13 **MOTHERS AGAINST MURDER,**

14 Petitioner,

15 v.

16 **CALIFORNIA VICTIM COMPENSATION**
17 **BOARD,**

18 Respondent.

Case No. 21CV003220

[Assigned to Hon. Frank Roesch–Dept. 17]

**RESPONDENT’S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF DEMURRER TO
FOURTH AMENDED PETITION**

Reservation No. 216726797327

Date: January 12, 2023

Time: 3:30 p.m.

Dept: 17

Judge: Hon. Frank Roesch

Trial Date: None Set

Action Filed: November 30, 2021

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1 **INTRODUCTION**

2 The Court sustained respondent California Victim Compensation Board’s (Board) demurrer
3 to petitioner Mothers Against Murder’s (MAM) Third Amended Petition (TAP) with limited
4 leave to amend. Pertinent here, the scope of that leave to amend was as to MAM’s claim seeking
5 to compel the Board to comply with a mandatory duty. The Board’s demurrer was based on
6 MAM’s failure to allege facts showing it was entitled to public interest standing. Pursuant to the
7 Court’s leave to amend, MAM filed its Fourth Amended Petition (FAP) on or about
8 November 17, 2022. However, the FAP, as did the TAP, fails to allege any facts showing MAM
9 has public interest standing for its ordinary mandate cause of action. The FAP simply alleges in
10 conclusory fashion that MAM is a non-profit Public Benefit Corporation and has standing to
11 bring this matter against the Board pursuant to the public interest exception.

12 Furthermore, MAM cannot amend its FAP to allege it has public interest standing. The
13 court may confer such standing only if it finds that failing to do so would result in the lack of an
14 effective remedy for violation of an important public interest statute. Here, aggrieved victim
15 compensation applicants have effective administrative and judicial remedies to challenge the
16 Board’s alleged denial of their requests for an “in person” hearing. Consequently, aggrieved
17 applicants do not need MAM’s litigation efforts in this case, and accordingly, the Court should
18 not recognize MAM’s putative public interest standing.

19 Furthermore, the FAP’s ordinary writ of mandate claim is facially defective for two
20 reasons. First, as a matter of law, MAM has not alleged and cannot allege that the Board has a
21 ministerial duty under law to provide all aggrieved victim compensation applicants with an “in-
22 person” hearing. Under Government Code section 13959, subdivision (a), and the Board’s
23 regulations, not every aggrieved victim compensation applicant has an automatic right to an “in-
24 person” hearing. Second, as a general rule, mandate will not lie in the absence of a present duty
25 to act. MAM’s ordinary mandate cause of action is allegedly brought for the benefit of future
26 aggrieved victim compensation claimants. The FAP fails to allege facts that show it is clear that
27 the Board does not intend on complying with a future ministerial duty, assuming it has one.
28

1 As to the FAP's second cause of action for a declaratory relief, MAM has not alleged
2 beneficial interest standing, and public interest standing is only available in ordinary mandate
3 causes of action, and moreover, this cause of action is plainly outside the scope of the Court's
4 leave to amend.

5 The Board's demurrer should be sustained in its entirety, this time, without leave to amend.

6 **PROCEDURAL HISTORY**

7 The Board demurred to MAM's First Amended Petition, and the Court sustained that
8 demurrer with leave to amend pursuant to specific instructions. (See April 21, 2022 Ord. ["If any
9 of the three causes of action are brought pursuant to Code of Civil Procedure § 1085, Petitioner
10 must [allege] facts demonstrating why its claims fall within the public interest exception to the
11 beneficial interest requirement for writ relief".]) MAM filed its Second Amended Petition (SAP)
12 on May 8, 2022, and the Board again demurred on the ground that MAM lacked standing because
13 it failed to allege facts showing it had a direct and substantial beneficial interest in the relief
14 sought. (Board's demurrer Supp. Memo. at pp. 8-9.) Further, the Board argued that MAM failed
15 to allege that the public interest exception applied if the SAP's first cause of action is construed as
16 seeking an ordinary writ of mandate. (*Id.* at p. 9.)

17 The hearing on the Board's demurrer to the SAP was held on June 30, 2022. The Court
18 sustained that demurrer with leave to amend. (6/30/22 Min. Ord.) Based on the Court's
19 statements made at the hearing, the scope of the leave to amend was limited to MAM's allegation
20 of facts showing that the public interest exception applied to MAM's ordinary mandate cause of
21 action. Pursuant to the Court's leave to amend, petitioners filed a Third Amended Petition on
22 July 29, 2022.

23 The Board demurred to the TAP. The Court heard the Board's demurrer on October 27,
24 2022, and sustained the demurrer with leave to amend. (10/27/22 Min. Ord.) As to MAM's leave
25 to amend, the Court's order was very specific as to the scope of the new allegations:

26 The Demurrer is **SUSTAINED WITH LEAVE TO AMEND** as to any claim
27 that the administrative decision rendered against Mr. Butler may be reviewed and or
28 remanded to the respondent agency. The administrative decision became final and
unappealable after Mr. Butler allowed the appeal deadline to expire without filing a
Petition for Administrative Mandamus.

1 In ruling on this demurrer, any allegations that are contrary to the law or to a fact of which
2 judicial notice may be taken should be treated as a nullity by the court (*Interinsurance Exchange*
3 *v. Narula* (1995) 33 Cal.App.4th 1140, 1143), including facts impossible in law (*Hilltop*
4 *Properties, Inc. v. State* (1965) 233 Cal.App.2d 349, 354).

5 A demurrer may properly be sustained where the court lacks jurisdiction over the cause of
6 action asserted in the pleadings, the person who filed the pleading does not have the legal
7 capacity to sue; or when the complaint fails to state facts sufficient to constitute a cause of action.
8 (Code Civ. Proc., § 430.10, subs. (a), (b), (e).) Where there is not a reasonable possibility the
9 defect can be cured by amendment, a demurrer should be sustained without leave to amend.
10 (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

11 ARGUMENT

12 I. MAM LACKS STANDING FOR THE FIRST CAUSE OF ACTION

13 A. MAM Still Fails to Allege Facts Showing it has Public Interest Standing

14 The Board's demurrer to the TAP's second cause of action for ordinary mandate was based
15 on MAM's failure to allege facts showing it was entitled to public interest standing. (Board's
16 Memo. filed on Aug. 15, 2022 at pp. 7-8.) As mentioned, the Court sustained the Board's
17 demurrer to the TAP with leave to amend. (10/27/22 Min. Ord. [granting leave to amend "as to
18 petitioner's claim seeking to compel respondent to comply with a mandatory duty"].) MAM's
19 amended ordinary mandate cause of cause of action, pursuant to the Court's October 27 minute
20 order, is set forth in the FAP's first cause of action. (FAP at pp. 3-5.) The FAP contends MAM
21 has public interest standing for its first cause of action for ordinary mandate. (FAP ¶ 1.)¹

22
23 ¹ MAM also contends it has a clear, present and beneficial right to compel the Board to
24 provide crime victims and their families who contest the denial of compensation through a staff
25 recommendation with an "in-person" hearing. (FAP ¶ 8.) The FAP's paragraph 8 should be
26 disregarded by the Court in ruling on the Board's demurrer. First, the court does not assume the
27 truth of contentions, deductions or conclusions of law in testing the legal sufficiency of a
28 complaint. (*Moore v. Regents of University of California, supra*, 51 Cal.3d at p. 125.) Second,
paragraph 8 is immaterial because the Court has previously determined that MAM has not
alleged, and cannot allege, standing under Code of Civil Procedure section 1085. (See 4/21/2022
Min. Ord. ["If any of the three causes of action are brought pursuant to Code of Civil Procedure
§ 1085, Petitioner must [allege] facts demonstrating why its claims fall within the public interest
exception to the beneficial interest requirement for writ relief"].)

1 However, the FAP, as did the TAP, is entirely devoid of allegations showing MAM has
2 public interest standing for its ordinary mandate cause of action. Therefore, the Board’s demurrer
3 to the FAP’s first cause of action should be sustained.

4 **B. MAM Will Not be Able to Amend its Ordinary Mandate Cause of Action**
5 **to Show it has Public Interest Standing**

6 Public interest standing is not freely available to any party, and the courts will not recognize
7 it if competing interests of a more urgent nature outweigh it. (*Dept. of Consumer Affairs v.*
8 *Superior Court* (2016) 245 Cal.App.4th 256, 261-262.) “[E]ven if a plaintiff otherwise meets the
9 requirements of the public right/public duty exception in a mandamus proceeding, he is not
10 entitled to proceed as a matter of right.” (*Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th
11 865, 874 (*Reynolds*.) Rather, the court may confer such standing only if it finds that failing to do
12 so would result in the lack of an effective remedy for violation of an important public interest
13 statute. (*Id.* at pp. 874-875.) “[T]he public interest standing doctrine is designed to ensure that
14 government misconduct *can be challenged*, not that alleged government misconduct *will be*
15 *challenged in every case.*” (*Id.* at p. 875, italics added.)

16 *Reynolds* involved a challenge by a resident of San Diego County to the City of Napa’s use
17 of sales tax revenues (which he alleged he had paid in Napa) to operate a reservoir in a manner
18 that allegedly harmed downstream fisheries. *Reynolds* held that public interest standing for
19 persons like Reynolds was not necessary to ensure that misuse of tax funds in such situations
20 could be challenged. The opinion noted that there was a class of persons who would have
21 ordinary standing to challenge the actions in question:

22 We find nothing in the policy considerations recognizing a citizen’s interest in
23 having laws executed and public duties enforced that would compel application here.
24 (*Green v. Obledo, supra*, 29 Cal.3d at p. 144) No “pointed” public need to
25 recognize Reynolds’s public interest standing is demonstrated. The judgments
26 required of local officials in allocation of public funds for public purposes are already
27 subject to challenge by county taxpayers, including the retailers who bear the sales
28 tax.

26 (*Reynolds, supra*, 223 Cal.App.4th at p. 875.)

27 Furthermore, enforcement of a statute through an administrative process, giving participants
28 in the process standing to challenge the administrative decision in court, is a superior alternative

1 to public interest standing. For example, in *Consumer Affairs*, a state bureau announced a policy
2 regarding arbitration of disputes under the “lemon law” for automobile purchases. The plaintiffs
3 were car purchasers who had not participated in the arbitration process. They sought to invalidate
4 the bureau’s policy as an illegal underground regulation. The Court of Appeal found that the
5 plaintiffs did not have a beneficial interest, because they had not been directly affected by the
6 policy. (*Consumer Affairs, supra*, 245 Cal.App.4th at p. 263.) And it rejected plaintiffs’ claim
7 they had public interest standing, concluding, “we should not extend public interest standing to
8 plaintiffs who have an administrative remedy that may enforce a public duty when they otherwise
9 lack a beneficial interest that is different from the public at large.” (*Id.* at pp. 261-263.)

10 Here, aggrieved victim compensation applicants have effective administrative and judicial
11 remedies to challenge the Board’s alleged denial of their requests for an “in person” hearing.
12 These administrative remedies are: (1) the applicant’s objection to an informal hearing on the
13 written record (Cal. Code Regs., tit. 2, § 617.5); and (2) the applicant’s request to the Board for
14 reconsideration of its decision (Gov. Code, § 13959, subd. (j)). Judicial review of the Board’s
15 final decision, by way of administrative mandate (Code Civ. Proc., § 1094.5), is available
16 pursuant to Government Code section 13960, subdivision (a), to challenge the Board’s alleged
17 improper “in-person” hearing denials. Consequently, aggrieved applicants do not need MAM’s
18 litigation efforts in this case.

19 In light of these administrative and judicial remedies, the Court should not recognize
20 MAM’s putative public interest standing. Accordingly, the Board’s demurrer to the FAP’s first
21 cause of action should be sustained without leave to amend.

22 **II. ALTERNATIVELY, THE FIRST CAUSE OF ACTION IS FACIALLY DEFECTIVE BECAUSE**
23 **MAM HAS NOT ALLEGED THE BOARD FAILED TO PERFORM A MINISTERIAL DUTY**

24 MAM’s first cause of action for ordinary mandate must allege that the Board is failing to
25 perform a ministerial duty. (Code Civ. Proc., § 1085, subd. (a); *Orange Unified School Dist. v.*
26 *Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 765.) A ministerial duty
27 is one that is required to be performed in a prescribed manner under the mandate of legal
28 authority without the exercise of discretion or judgment, when a given state of facts exists. (*Cape*

1 *Concord Homeowners Assn. v. City of Escondido* (2017) 7 Cal.App.5th 180, 189.) Where a
2 statute clearly defines the specific duties or course of conduct that a governing body must take,
3 that course of conduct becomes mandatory and eliminates any element of discretion. (*Great*
4 *Western Sav. & Loan Assn. v. City of Los Angeles* (1973) 31 Cal.App.3d 403, 413.)

5 The FAP's first cause of action for ordinary mandate alleges that the Board "has
6 consistently and unlawfully failed to perform its mandatory duty pursuant to Cal. Govt. Code
7 § 13959(a) and its regulations by its refusal to provide 'in-person' hearings to those persons
8 whose application for victim compensation has been denied by staff." (FAP ¶ 13.) However,
9 under Government Code section 13959, subdivision (a), and the Board's regulations, not every
10 aggrieved victim compensation applicant has an automatic right to an "in-person" hearing.

11 Government Code section 13959, subdivision (a), provides that, "[t]he board shall grant a
12 hearing to an applicant who contests a staff recommendation to deny compensation in whole or in
13 part." But subdivision (e)(1) of section 13959 provides that "[t]he hearing shall be informal and
14 need not be conducted according to the technical rules relating to evidence and witnesses."
15 Under the Board's regulations, an "informal hearing" is defined as including "any hearing limited
16 to submission of written materials." (Cal. Code Regs., tit 2, § 615.2, subd. (a)(6)(B).)
17 Subdivision (e)(1) also provides that "[i]f the applicant or the applicant's representative chooses
18 not to appear at the hearing, the *board may act solely upon the application for compensation, the*
19 *staff's report, and other evidence that appears in the record.* (*Ibid.*, italics added.) Further, under
20 the Board's regulations, the "Board's Executive Officer or Hearing Officer may limit a hearing to
21 the written record if the request for a hearing fails to state a basis upon which the applicant may
22 be granted relief." (Cal. Code Regs., tit. 2, § 647.20.1, subd. (a).) Finally, an applicant "may
23 object to having an informal hearing." (*Id.*, § 617.5, subd. (a).)

24 Consequently, section 13959, subdivision (a), including the Board's regulations, does not
25 mandate that the Board provide an "in-person" hearing to all applicants who contest a staff
26 recommendation to deny victim compensation in all cases. Therefore, FAP paragraph 13 is
27 contrary to the law. Consequently, this Court must disregard paragraph 13 in ruling on this
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1 demurrer. (*Interinsurance Exchange v. Narula*, *supra*, 33 Cal.App.4th at p. 1143 [any allegations
2 that are contrary to the law should be treated as a nullity by the court].)

3 At bottom, the FAP fails to allege that the Board is failing to perform a ministerial duty. If
4 the Court determines MAM has public interest standing for its ordinary mandate claim, it should
5 nevertheless sustain the Board’s demurrer to the FAP’s first cause of action because MAM has
6 not alleged and cannot allege the Board’s failure to perform a ministerial duty.

7 **III. ALTERNATIVELY, THE FIRST CAUSE OF ACTION IS FACIALLY DEFECTIVE BECAUSE**
8 **MAM HAS NOT ALLEGED THAT THE BOARD WILL FAIL TO PERFORM A FUTURE**
9 **MINISTERIAL DUTY**

10 MAM’s ordinary mandate cause of action is brought for the benefit of future aggrieved
11 victim compensation claimants. (FAP ¶¶ 7-8, 15.) As a general rule, mandate will not lie in the
12 absence of a present duty to act, although the remedy may be sought when it is clear from the
13 circumstances that the public officer does not intend to comply with his obligation when the time
14 for performance arrives. (*Young v. Gness* (1972) 7 Cal.3d 18, 21, cert. den. 409 U.S. 915.) The
15 FAP fails to allege facts that show it is clear that the Board does not intend on complying with a
16 future ministerial duty.

16 The Board’s demurrer to the FAP’s first cause of action should be sustained.

17 **IV. THE SECOND CAUSE OF ACTION FAILS TO STATE A CAUSE OF ACTION BECAUSE**
18 **MAM DOES NOT HAVE PUBLIC INTEREST STANDING AS A MATTER OF LAW**

19 The FAP’s second cause of action is for declaratory relief. (FAC ¶ 17.) The public interest
20 exception does not apply to declaratory relief. (See *People ex rel. Becerra v. Superior Court*
21 (2018) 29 Cal.App.5th 486, 503 [“Public-interest standing . . . however, is available only in a
22 mandate proceeding, not in an ordinary civil action”].) What is more, adding a new cause of
23 action (the TAP did not allege a declaratory relief cause of action) is plainly outside of the
24 Court’s leave to amend. (See 10/27/22 Min. Ord. [granting leave to amend MAM’s claim
25 seeking to compel the Board to comply with a mandatory duty].)

26 MAM plainly lacks standing for the FAP’s second cause of action. The Board’s demurrer
27 to that cause of action should be sustained without leave to amend.

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CONCLUSION

For the reasons stated above, the Board’s demurrer to the FAP should be sustained in its entirety without leave to amend.

Dated: December 12, 2022

Respectfully submitted,

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DECLARATION OF SERVICE BY E-MAIL

Case Name: **Mothers Against Murder v. California Victim Compensation Board**

Case No.: **21CV003220**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On December 12, 2022, I served the attached **RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO FOURTH AMENDED PETITION** by transmitting a true copy via electronic mail, addressed as follows:

Robert Baker, Esq.
Robert David Baker, Inc.
E-mail Address: rbaker@rdbl原因.net
Attorney for Mothers Against Murder

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 12, 2022, at Sacramento, California.

Ksenia Lavrushchak

Declarant

/s/ Ksenia Lavrushchak

Signature