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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ORANGE
12 CENTRAL JUSTICE CENTER
13

14
15 **HNHPC, INC.,**
16
Plaintiff and Petitioner,
17
v.
18
DEPARTMENT OF CANNABIS
19 **CONTROL,**
20
Defendant and Respondent.

Case No. 30-2021-01221014-CU-WM-CJC

**DEFENDANT AND RESPONDENT
DEPARTMENT OF CANNABIS
CONTROL'S NOTICE OF DEMURRER
AND DEMURRER TO HNHPC, INC.'S
PETITION FOR WRIT OF MANDATE
AND COMPLAINT; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF.**

RESERVATION NO.: 73636397

Date: November 29, 2021
Time: 10:30 a.m.
Dept: C26
Judge: Honorable Gregory H. Lewis
Trial Date: To Be Determined
Action Filed: September 15, 2021

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NOTICE OF DEMURRER AND DEMURRER

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on **November 29, 2021, at 10:30 a.m.**, or as soon after as the matter may be heard, in Department C26 of the above-entitled court, at the Central Justice Center at 700 Civic Center Drive, Santa Ana 92701, Defendant and Respondent Department of Cannabis Control (Department) will present for hearing its demurrer to the Petition for Writ of Mandate and Complaint (Petition) filed by Petitioner and Plaintiff HNHPC, Inc. (HNHPC).

The Department’s Demurrer is based on Code of Civil Procedure section 430.10, subdivision (e), on the grounds that HNHPC’s Petition fails to state facts sufficient to constitute causes of action against the Department and Code of Civil Procedure section 430.10, subdivision (f), on the grounds that the Petition is uncertain, ambiguous, and unintelligible. The demurrer is based on this notice of demurrer and demurrer, the supporting memorandum of points and authorities, the declaration of Ethan A. Turner, the Request for Judicial Notice, all pleadings and papers on file, and such other matters as may be presented in connection with the hearing on the motion.

DEMURRER TO PETITION AND COMPLAINT

The demurrer is made on the following grounds:

1. The Petition is uncertain, ambiguous, and unintelligible, because the causes of actions alleged are internally inconsistent, speculative, conclusory, contradicted by matters properly subject to judicial notice, and because it is unclear from the face of the pleadings what specific duty has been breached, how any injury has been suffered, or what specific remedy the Court could grant (Code Civ. Proc., § 430.10, subd. (f));

2. The Petition fails to state facts sufficient to warrant issuance of a writ of mandamus because HNHPC has failed to establish a beneficial interest or right in issue and has failed to identify mandatory act that was required to be performed but was not undertaken (Code Civ. Proc., § 430.10, subd. (e)); and,

//

1 3. The Petition fails to state facts sufficient to sustain a complaint for injunctive relief
2 because HNHPC has failed to identify any legally cognizable duty or obligation of the Department
3 that can be compelled by the Court, failed to allege facts which could demonstrate that any
4 irreparable harm that would be avoided or any benefit would be derived from the issuance of the
5 requested relief. (Code Civ. Proc., § 430.10, subd. (e)).

6 WHEREFORE, the Department of Cannabis Control moves the Court for an order
7 sustaining the demurrer to the Petition, without leave to amend, for an Order of dismissal, and for
8 such other relief as the Court may deem proper.

9
10 Dated: October 29, 2021

Respectfully submitted,

11 ROB BONTA
12 Attorney General of California

13 

14 ETHAN A. TURNER
15 Deputy Attorney General
16 Attorneys for Respondent and Defendant
17 Department of Cannabis Control

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Department of Cannabis Control (Department) respectfully submits the following memorandum of points and authorities in support of its demurrer to plaintiff HNHPC’s (HNHPC) petition for writ of mandamus and complaint for injunctive relief (Petition).

INTRODUCTION

This action arises as a result of the Department carrying out the Legislature’s mandate that the Department establish a process for tracking and tracing commercial cannabis activity from seed to sale. HNHPC makes contradictory allegations of fact, claims that conflict with material properly subject to judicial notice, and draws the unsupportable conclusion that the Department has failed to undertake this “mandatory and/or discretionary duty.”¹

Defendant filed this demurrer for several reasons. First, the Petition is uncertain and ambiguous and the relief requested unintelligible. (Code Civ. Proc., § 430.10, subd. (f).) Second, the Petition fails to state facts sufficient to support the issuance of a writ of mandamus because HNHPC cannot establish that the Department has a mandatory duty that has not been performed or that HNHPC has a beneficial interest or right to the performance of any duty owed by the Department. (Code Civ. Proc., § 430.10, subd. (e).) Finally, HNHPC fails to plead facts sufficient to show that the Department has engaged in wrongful conduct or breached any duty, that HNHPC has or will suffer any irreparable injury, or that any injury could be avoided by the issuance of injunctive relief. (Code Civ. Proc., § 430.10, subd. (e).) Further, since there is no reasonable possibility that these defects could be cured by amendment, the demurrer should be granted without leave to amend.

BACKGROUND

The Department, pursuant to the Medicinal and Adult Use Regulation and Safety Act (MAUCRSA), has authority over the California Cannabis Track and Trace (CCTT) program. The CCTT program originated in the Medical Marijuana Regulation and Safety Act (MMRSA), which was enacted following the passage of three legislative bills.² The MMRSA authorized the

¹ This phrase appears throughout the Petition at 2:2, 5:11, 10:24, and 11:6.
² Assembly Bill 243 (Chapter 688 of the Statutes of 2015), Assembly Bill 266 (Chapter 689 of the Statutes

1 creation of a state regulatory and licensing system for the cultivation, manufacturing, delivery,
2 and sale of medical cannabis that was set to become operational by January 1, 2018. In its
3 original form, the CCTT system was to be created and implemented by the California Department
4 of Food and Agriculture (CDFA).

5 MMRSA required CDFA, in consultation with other agencies, to establish a unique
6 identifier system for the medical cannabis regulatory system to track cannabis plants from
7 nurseries and cultivation sites through the processing, manufacturing, and distribution chain to
8 retailers. (Former Health & Saf. Code, § 11362.777. subd. (e), repealed by stats. Sen Bill No. 94
9 2017-2018 § 141.) It also required CDFA to create “an electronic database containing the
10 electronic shipping manifests” which would record a broad array of information about the
11 cannabis and cannabis products as it moved through the distribution chain and allowed for
12 collection of data to be used by regulators and taxing authorities. (Former Bus. & Prof. Code, §
13 19335, subd. (b), repealed by stats. Sen. Bill No. 94 2017-2018 Reg. Sess. § 1.)

14 Among the specific requirements for the CCTT program found in the MMRSA was that
15 “[t]he database shall be designed to flag irregularities for all licensing authorities in this division
16 to investigate.” (Former Bus. & Prof. Code, § 19335, repealed by stats. Sen. Bill No. 94 2017-
17 2018 Reg. Sess. § 1.) This has been a constant feature of the contemplated “electronic database”
18 since October 9, 2015 and, though it has been located in different provisions of the regulatory
19 schemes at various times, the requirement has been unchanged through the passage of Proposition
20 Department of Cannabis Control on July 12, 2021 (Assem. Bill 141, 2020-2021 reg. sess.).³

21 //

22 _____
23 of 2015), and Senate Bill 643 (Chapter 719 of the Statutes of 2015).

24 3 The Department of Cannabis Control is an agency that was created through Assembly Bill 141
25 which became operative on July 12, 2021. Prior to that time, the regulation of commercial
26 medicinal and adult use cannabis was the responsibility of the Bureau of Cannabis Control, the California
27 Department of Food and Agriculture’s CalCannabis division, and the California Department of Public
28 Health’s Manufactured Cannabis Safety Branch (see former Bus. & Prof. Code, § 26012, subd. (a)(2)
repealed by Stats AB 141 reg sess. 2021-2022 § 11). The Department of Cannabis Control is the legal
successor of these agencies in relevant respects. (Bus. & Prof. Code, § 26010.7.)

1 In requiring the “electronic database” to have the capacity to “flag irregularities,” the
2 legislature did not provide significant guidance about what this would entail. A plain reading of
3 the statute requires, at a minimum, that the “database” be “electronic,” that it “contain[] electronic
4 shipping manifests” and that it “facilitate the administration of the track and trace program.”
5 (Bus. & Prof. Code, § 26067, subd. (b).) CDFA, and subsequently the Department, were vested
6 with discretion to determine how to best comply with these general descriptions, set forth in
7 former Business and Professions Code section 19335⁴ and the subsequent versions of section
8 26067.

9 In working towards the design and creation of the CCTT program, CDFA developed
10 detailed criteria for the purpose of assessing proposals by vendors and drafting regulations for the
11 implementation of the system.⁵ Ultimately, Franwell, Inc. was awarded the contract for the
12 CCTT system. The criteria developed by CDFA was set forth as contractual obligations under
13 the agency’s agreement with Franwell, Inc., that was entered into on June 30, 2017, and was
14 renewed and extended on May 5, 2021. (See RJN Exhibit A pp. 1-2.)

15 As it relates to this case, the contract specifically addresses the requirement to “flag
16 irregularities” found in what is now section 26067, subdivision (b)(2). The contract specifically
17 stated that “The licensing authorities need to be aware of ‘irregular’ cannabis distribution chain
18 activity (e.g. activity that falls outside expected values and statistical norms). The licensing
19 authorities will designate the criteria used to flag irregular activity and will refine this criteria
20 over time.” (RJN Exhibit A p. 22-23.) The “electronic database” that was created is a cloud
21 based data entry program that is used in conjunction with a radio frequency identification (RFID)
22 enabled tagging and labeling system and allows commercial cannabis licensees to enter and
23 record data regarding cultivation, manufacturing, distribution, transportation, testing, and retail
24 activities. This system is entitled “Marijuana Enforcement Tracking Reporting and Compliance”
25 or METRC.

26 Though the legal cannabis market came to exist on January 1, 2018, the METRC platform

27 ⁴ All references are to the Business and Professions Code, unless otherwise indicated.

28 ⁵ The most recent version of regulations governing the Track and Trace System can be found at Cal. Code
Reg. tit. 4, § 15047.1 et. seq.

1 launched a year later on January 2, 2019, when licensees began to enter data regarding their
2 commercial cannabis activities into the system. On September 15, 2021, approximately two years
3 and nine months after the launch of the CCTT and the METRC software platform, HNHPC filed
4 the present petition and complaint. HNHPC alleges that the department could have exercised its
5 discretion differently and seeks an order from the Court that the track and trace system be
6 “redesigned or modified/upgraded” (Petition 10:1) in some manner, which is not described in its
7 pleadings.

8 STANDARD ON DEMURRER

9 A demurrer tests the sufficiency of the Petition. In determining whether the complaint
10 states a cause of action, the court may consider all material facts plead in the complaint, as well as
11 matters of which the court may take judicial notice. (*Young v. Gannon* (2002) 97 Cal.App.4th
12 209, 220.) The court may not consider contentions, deductions or conclusions of fact or law.
13 (*Ibid.*) Although a petition or complaint should be liberally construed, doubt in the complaint
14 may be resolved against the plaintiff and facts not alleged are presumed not to exist. (*Kramer v.*
15 *Intuit, Inc.* (2004) 121 Cal.App.4th 574, 578.) The Court may also consider matters subject to
16 judicial notice (CCP §430.70) including background information related to applicable statutes.
17 (*Rossco Holdings Inc. v. State of California* 212 Cal.App.3d 642, 646).

18 A demurrer may be sustained without leave to amend where the nature of the defect
19 cannot be cured, or the plaintiff’s claim is clear, and under the applicable substantive law, it is
20 plain that there is no liability. (*Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th
21 1035, 1044; *Award Metals, Inc. v. Superior Court* (1991) 228 Cal.App.3d 1128, 1132.)

22 ARGUMENT

23 A. The Petition is Speculative, Conclusory, and Fatally Unintelligible

24 Without first alleging any supporting facts, HNHPC draws the factual and legal conclusion
25 that the Department has failed to carry out a “mandatory and/or discretionary duty” or that it has
26 abused its discretion in carrying out that duty. But “[i]n order to state a cause of action
27 warranting judicial interference with the official acts of the administrative body the plaintiff must
28 allege more than mere conclusions of law; it must allege specific facts from which the

1 conclusions entitling it to relief follow.” (*California State Psychological Assn. v. County of San*
2 *Diego* (1983) 148 Cal.App.3d 849, 861.) HNHPC has not done so.

3 Instead of alleging specific facts, HNHPC asserts without factual support that the
4 Department has determined that it is in “the State’s political and financial interest” to “bolster the
5 illegal black market in California” because “it is collecting substantial ‘cultivation taxes’” while
6 making no effort to collect “hundreds of millions in unpaid taxes.” (Petition 5:20, 4:10-11, 4:24-
7 5:2.⁶) These contentions are unmoored to any specific facts in HNHPC’s pleadings; indeed, they
8 are incoherent. HNHPC also contends, in conclusory fashion, that the Department was “arbitrary,
9 capricious, unfair, unlawful, and corrupt” when it purportedly made decision not to “upgrade” or
10 “augment” its system in some indefinite way, but does not provide any information as to a
11 particular circumstance or occasion when the Department made any such decision. (Petition
12 10:12-13.)

13 HNHPC’s assertions are based on unfounded speculation about the Department’s data
14 collection practices, the use of the data, and how and when it undertakes enforcement action.
15 HNHPC claims that the CCTT database created using the METRC software and unique identifier
16 system has failed to satisfy the requirements of section 26067, subdivision (b)(2). (Petition 7:2.)
17 However, HNHPC offers no allegations concerning and, in fact, does not even claim knowledge
18 of, the kind of information contained in the CCTT database, or entered in that database by other
19 licensees (such as Burner Distros) (Petition 8:8-11). Indeed, all information received through the
20 METRC Platform and contained in the database is “confidential and shall not be disclosed
21 pursuant to the California Public Records Act. . .” (Bus. & Prof. Code, § 26067, subd. (b)(5)).⁷
22 Nor does HNHPC offer any factual basis for its speculation concerning the enforcement actions
23 or investigations that have or have not been prompted by information found in the database.
24 (Petition 3:25-26.)

25 _____
26 6 Citations to the Petition for Writ of Mandamus and Complaint for Injunctive Relief are as follows:
27 “Petition” followed by the page and line number.

27 7 In accordance with confidentiality requirements of Section 26067, subdivision (b)(5) to the METRC
28 contract requires that only a licensee who has been issued credentials may report transactions of cannabis
and cannabis products between licensees and that only regulatory, law enforcement and taxing authorities
would be able to access that information. (RJN Exhibit A pg. 26, 28, 84)

1 Instead of alleging specific facts, each of the claims supporting HNHPC’s causes of action
2 can only be based on conjecture or surmise. And, in considering a demurrer, courts “need not
3 accept allegations containing legal conclusions, adjectival descriptions or unsupported
4 speculation.” (*Doe v. Roman Catholic Archbishop of Los Angeles* (2016), 247 Cal.App.4th 953.)
5 Although pleaded *facts* are taken as true, this rule is not “applicable to contentions, deductions, or
6 conclusions of fact or law.” (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877 and
7 see fn.6 at pp 892; *Dale v. City of Mountain View* (1976) 55 Cal.App.3d 101, 105.) On this basis,
8 all of the foregoing conclusions of fact and law, as well as characterizations of the Department’s
9 actions can be disregarded by the Court. And when these unsupportable conclusions of fact and
10 law are removed from HNHPC’s petition and complaint virtually no substance remains.

11 Finally, in order to demonstrate that the Department has failed to satisfy the requirements of
12 section 26067, subdivision (b)(2), HNHPC would have to allege that the database created to
13 administer the CCTT system cannot be used to “flag irregularities.” HNHPC does not and cannot
14 do so. Indeed, HNHPC’s position on this point seems internally incoherent: as set forth below,
15 HNHPC necessarily takes the position that the CCTT system and the Department *do* flag
16 irregularities, despite HNHPC’s conclusory contention that they *do not* do so. HNHPC claims
17 that the “State is collecting cultivation taxes from Burner Distros on volumes of cultivated
18 cannabis that the Department *knows far exceed the amount that ultimately is sold* in licensed
19 dispensaries.” (Petition 7:16-18, emphasis added.) Unless the Department is collecting and
20 analyzing data entered by licensees it could not “know,” as HNHPC alleges, that more cannabis is
21 being purchased by Burner Distros than is being sold to licensed retailers. HNHPC also states
22 that it “currently believes many (but not all) of the Burner Distros will pay the cultivation tax on
23 such purchases in order to placate the State and throw off suspicion about their subsequent illicit
24 activities.” (Petition 8:8-10). If the Department is not identifying and investigate irregularities,
25 then its “suspicion” could not be “throw[n] off.”

26 HNHPC cannot have it both ways. It cannot allege that the Department is incapable of
27 flagging irregularities while it is also aware of these irregularities, and has made “a purposeful
28 decision to turn a blind eye.” (Petition 7:17.) The fact is, that the Department does not “look the

1 other way” (Petition 5:20), rather it allocates significant resources to the analysis of CCTT data
2 and subsequent investigations as evidenced by its budget request for the 2021-2022 fiscal year:
3 the Department intends to spend significant funds on analysis of data aggregated through the
4 METRC platform, for inspections, and on CCTT based enforcement actions. (See RJN Exhibit B
5 pp. 117, 119-124, 180). In fact, the Department’s budget request for the 2021-2022 fiscal year
6 clearly states an intention to “conduct more strategic and streamlined compliance and
7 enforcement processes.” (RJN Exhibit B, p, 3.)

8 HNHP’s conclusory statements—rooted in speculation, that the Department deliberately
9 and for corrupt purposes declined to have the current CCTT system “augmented” or “upgraded” do
10 not give rise to any cause of action. Further, HNHP has not specified what the Department did
11 or did not do, it has not indicated when this omission occurred and it has failed to describe with any
12 particularity what would constitute appropriate relief under the circumstances. There is no way
13 that the unfounded conclusions of law and fact which make up HNHP’s pleadings can be
14 organized into a viable petition for writ of mandamus or complaint for declaratory relief. For this
15 reason, the Court should grant a demurrer to the entire petition and complaint because it is
16 uncertain, ambiguous, and unintelligible. (Code Civ. Proc., § 430.10, subd. (f).)

17 **B. The Elements of Traditional Mandamus Relief cannot be Established**

18 HNHP fails to meet the two basic requirements essential for the issuance of a writ. These
19 two requirements are: “(1) a clear, present (and usually ministerial) duty on the part of the
20 respondent [and] (2) [a] clear present and beneficial right in the petitioner to the performance of
21 that duty.” (*Santa Monica Mun. Employees Ass’n v. City of Santa Monica* (1987) 191 Cal. App.3d
22 1538, 1547.) “Because a demurrer tests the legal sufficiency of a complaint, the plaintiff must
23 show the complaint alleges facts sufficient to establish every element of each cause of action.”
24 (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43.) In this case,
25 because the duty set forth in section 26067, subdivision (b) involves the exercise of discretion,
26 and it is indisputable that this discretion has been exercised, HNHP has failed to identify any
27 unperformed duty owed by the Department and it cannot establish either the presence of a
28

1 beneficial interest in the issuance of the requested order. The Court need only find that one of
2 these elements is absent to grand demurrer as to the first cause of action, however, neither
3 element can be established under the facts of this case.

4 **1. HNHPC Fails to Identify a Clear Present Mandatory Duty That**
5 **Could Be Compelled.**

6 HNHPC contends, without factual basis, that the Department has failed to perform a
7 mandatory duty and that it must be compelled to do so. In HNHPC’s words, HNHPC “seeks to
8 *compel* the DCC to actually perform its mandatory and/or discretionary legal duties, including . . .
9 the creation of a track and trace system that is in fact capable of tracking and tracing cannabis . . .
10 and of identifying and flagging questionable transactions for further investigation and
11 enforcement.” (Petition 13:10-13, emphasis in the original). But, as judicially noticeable
12 materials (see *infra*, Part IV, B.1.b) and HNHPC’s own pleadings (see *supra*, Part IV.A) make
13 clear, the Department has fulfilled the only relevant mandatory duty here—its duty to see that the
14 track and trace system is designed to “flag irregularities” under section 26067, subdivision (b)(2).
15 Failure to allege a basis for a clear and present duty on the part of the respondent is fatal a cause
16 of action for writ of mandate. (*Galbiso v. Orosi Public Utility Dist.* (2010) 182 Cal. App. 4th 652,
17 674.)

18 **a. Creation of an Electronic Database is a Discretionary Function.**

19 The nature of the duty in issue is not a mandatory duty of a ministerial variety which can be
20 mechanically compelled by traditional mandamus. The creation of an “electronic database” that
21 has certain characteristics is a task that is discretionary in nature. “Whether a particular statute is
22 intended to impose a mandatory duty, rather than a mere obligation to perform a discretionary
23 function is a question of statutory construction” (*California High-Speed Rail Authority v.*
24 *Superior Court* (2014) 228 Cal.App.4th 676, 707-708.) “Where a statute or ordinance clearly
25 defines the specific duties or course of conduct that a governing body must take, that course of
26 conduct becomes mandatory and eliminates any element of discretion” (*Schwartz v. Poizner* 187
27 Cal.App.4th 592, 597.)

1 In this case, the Department was given the responsibility to create a way to ascertain when
2 licensees engage in activities that are “irregular” and may indicate that illegal commercial
3 cannabis activity or regulatory violations could be occurring. The terms “flag,” “irregularities,”
4 and “database” are not defined by statute. The only guidance provided is that the database must
5 be “electronic” and contain “electronic shipping manifests to facilitate the administration of the
6 track and trace program.” (Bus. & Prof. Code, § 26067, subd. (b)(1).) The Department exercised
7 its discretion to determine what electronic database to create, how information would be entered
8 into it, how it would be accessed by licensees and state agency stakeholders, what types of
9 “irregularities” should be subject to “flagging” and what “irregularities” warrant allocation of
10 limited investigative and enforcement resources.

11 “Where only one choice can be a reasonable exercise of discretion, a court may compel an
12 official to make that choice.” (*California Correctional Supervisors Organization, Inc. v.*
13 *Department of Corrections* (2002) 96 Cal.App.4th 824, 827.) Here there is not only one choice,
14 the problem to be solved is administration of the track and trace program such that violations of
15 state laws and regulations can be identified and “the entire enterprise involves balancing various
16 factors and selecting among various approaches to the same problem, [and therefore has] the
17 hallmarks of discretionary acts.” (*Carrancho v. California Air Resources Board* 111 Cal.App.4th
18 1255, 1268.)

19 In designing a database for a set of specific purposes, including the “flag[ging of]
20 irregularities” there were a myriad of choices to make. Thus, where the agency or official is
21 vested with discretion on the manner of performance, traditional mandate will not lie unless the
22 petitioner can show the discretion legally can be exercised in only one way. (*Barrett v. Stanislaus*
23 *County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1613; *Taylor v. State*
24 *Personnel Bd.* (1980) 101 Cal.App.3d 498, 505.) In this case, the facts and the law clearly permit
25 more than one choice and, in fact, require making many choices based upon many variables and
26 upon technical expertise. As such, it is properly left to the agency to make the choice(s) it has
27 been authorized to make.

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1 **b. The Department Has Complied With Its Duty And Carried Out**
2 **Its Discretionary Function.**

3 Compliance with section 26067, subdivision (b)(2), requires an exercise of discretion,
4 which has been carried out. The Department has unquestionably already complied with the
5 “mandatory and/or discretionary duty” at the heart of this controversy: the CCTT program exists;
6 it flags irregularities; and licensees, including HNHPC, enter data into it using the METRC
7 platform.⁸ It can be established by matters subject to judicial notice that the Department has
8 already exercised that discretion in the manner required by law when it established criteria,
9 including the requirement that Department staff be able to update and modify frameworks for
10 identifying irregularities in the distribution chain and that the vendor produce reports on
11 “distribution chain activities and irregularities.” (see RJN Exhibit A pp. 6, 23-27, 31, 138.)

12 Allegations of the complaint which are inconsistent with, or contradicted by, judicially
13 noticed facts must be rejected. (*Blatty v. New York Times co.* (1986) 42 Cal.3d 1033, 1040.) The
14 demurrer can be sustained through facts judicially noticed. (Code Civ.Proc., §430.30(a); *Javor v.*
15 *State Board of Equalization* (1974) 12 Cal.3d 790.) It is unequivocally the case that the duty to
16 exercise discretion has been complied with, and there is nothing left to compel through traditional
17 mandamus – there is no clear, present, mandatory duty left to compel. HNHPC’s failure to satisfy
18 this required element is sufficient to justify granting demurrer as to the first cause of action. In an
19 effort to plead around this fatal defect, HNHPC falls back on the argument that mandamus should
20 lie to correct some non-specific abuse of discretion that occurred at some indefinite time.

21 **c. Mandamus Will Not Lie to Compel the Exercise Discretion in a**
22 **Particular Manner.**

23 A writ of mandamus will lie to compel an exercise of discretion where it is required by law,
24 but it will not require that discretion be exercised in a particular manner. (*Ellena v. Department of*
25 *Insurance* (2014) 230 Cal.App.4th 198, 205.) Because, as indicated above, it is incontrovertible
26 that the Department has exercised its discretion as required by the statute, the petitioner asks the
27 Court to find that the Department has abused its discretion.

28 ⁸ <https://www.metro.com/california>

1 HNHPC writes:

2 “To the extent Respondents claim they had or have discretion in the creation, implementation,
3 and/or operation of the track and trace system, HNHPC contends they abused that discretion,
4 that their actions and determinations on such matters were/are arbitrary, capricious, unfair,
5 unlawful, corrupt, and against the overwhelming weight of facts and evidence available to
6 them at the time, and/or were the result of ‘unreasonable’ policies and procedures that are not
7 permitted.”

8 (Petition 10:10-14).

9 These characterizations of the Department’s exercise of discretion are not well plead
10 factual allegations that can be deemed true for the purposes of demurrer, they are hollow
11 characterizations and conclusions of law which are insufficient to support any cause of action.
12 In considering demurrer, the Court need only “accept well pleaded facts, but not adjectival
13 descriptions, legal conclusion to determine whether a cause of action exists.” (*Ellis v. County of*
14 *Calaveras* (2016) 245 Cal.App.4th, 64, 70; see also *Bell Atl. Cort v. Twombly* (2007) 550 US
15 544, 555 [“Courts are not bound to accept as true legal conclusions couched as a factual
16 allegation.”].)

17 When the Petition is stripped of HNHPC’s meritless descriptions and its unfounded
18 conclusions related to the “corrupt” motivations of the Department and “the State,” there remains
19 only a baseless legal conclusion that is insufficient to warrant judicial intervention in the
20 Department’s design and use of its own database. Section 26067 is enabling legislation which
21 provided authorization for a broad array of actions to achieve stated policy goals. As stated by
22 the California Supreme Court, “although a court may issue a writ of mandate requiring legislative
23 or executive action to conform to the law, *it may not substitute its discretion for that of legislative*
24 *or executive bodies in matters committed to the discretion of those branches.”* (*Common Cause v.*
25 *Board of Supervisors* (1989) 49 Cal.3d 432, 445 (emphasis added).)

26 In its petition and complaint, HNHPC is not just asking the Court to substitute its discretion
27 for that of the Department over a single, discreet question, but is asking the Court to determine
28 how the database which facilitates the CCTT program “can be redesigned or modified/upgraded
to flag . . . irregularities and ultimately identify Burner Distros.” (Petition 7:3-4.) Essentially, the

1 relief requested is not that the Court merely command the execution of a specifically delineated
2 ministerial duty, but that the Court step into the shoes of the Director of the Department for the
3 purpose of overseeing the redesign and upgrade of the CCTT system, as well as the allocation of
4 investigative and enforcement resources to seek out a particular kind of criminal activity. This is
5 not the proper subject of a mandamus action.

6 These principles of judicial intervention militate against the possibility that any viable
7 claim can be found in the uncontested facts of this case. The Court should properly decline to
8 interfere with the discretion granted to the Department by the legislature by granting the
9 requested demurrer.

10 **2. HNHPC Has No Beneficial Interest in the Issuance of the Requested**
11 **Relief.**

12 HNHPC has failed to demonstrate a concrete substantial beneficial interest that will be
13 served by its requested relief. Standing to bring a mandate action requires that a petitioner be
14 “beneficially interested” in the administrative action or decision at issue. (Code Civ. Proc., §
15 1086.) “The beneficial interest must be direct and substantial.” (*Save the Plastic Bag Coalition v.*
16 *City of Manhattan Beach* (2011) 52 Cal.4th 155, 165.) HNHPC claims it has “a beneficial
17 interest in enforcing Respondents’ mandatory and/or discretionary duties . . . because it has been
18 directly and financially harmed by the offending conduct alleged herein.” (Petition 10:22-25.)
19 Specifically, HNHPC claims that the alleged harm it has suffered “could be stopped or
20 significantly reduced if DCC simply *complied with its legal duty* to create and implement a track
21 and trace system that actually *flags* these types of transactions and irregularities for further
22 investigation and prompt follow-up enforcement.” (Petition 9:8-11.)

23 Implicit in HNHPC’s claim to have a beneficial interest are several assumptions that find
24 no support in the facts alleged in the petition. In particular, HNHPC assumes that an unspecified
25 “upgrade” to “augment” the CCTT system would directly benefit HNHPC economically. But
26 even if the Court ordered the Department to somehow “augment” its database and such
27 augmentation did immediately flag all irregularities in the CCTT database generated by “Burner
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1 Distros,” additional steps would be necessary before the “injustice [of illegal competition] could
2 be immediately stopped or significantly reduced.” (Petition 9:8.)

3 The Department is required to make decisions regarding allocation of regulatory and law
4 enforcement resources on a daily basis. While HNHPC has requested that the Court order the
5 Department’s database for facilitating the CCTT program be “upgraded,” it has not asked the
6 Court to direct the Department to allocate enforcement resources in any particular manner. Thus,
7 even if the Court was able to make sense of the requested order and devise a way in which the
8 database could be augmented and further assumed that compliance with this order would instantly
9 cause the “flag” of all “irregularities” entered into the database by the Burner Distros, further
10 discretionary action to deploy investigative and enforcement resources would have to occur. For
11 these reasons, even if the relief requested were sufficiently definite to be the basis of a Court
12 order, and it would have the effect HNHPC claims it would, there would remain a series of
13 uncertain events that would have to follow the requested relief in order for any direct benefit to
14 accrue to HNHPC. Therefore, the beneficial interest which HNHPC concludes that it has, is not
15 supported by sufficient factual allegations and cannot be regarded as a concrete injury that could
16 be directly redressed by the requested relief. HNHPC simply cannot satisfy this indispensable
17 element necessary for the issuance of a writ as it has no legally cognizable beneficial interest in
18 the outcome of this case. (Code Civ. Proc., § 1086.) For this reason, and the reasons set forth
19 above, HNHPC has failed to plead facts sufficient that it has a beneficial interest or right in the
20 performance of that duty, that there is even any mandatory duty which could be compelled.
21 Therefore, HNHPC has failed to state facts sufficient to meet either required element of a petition
22 for writ of mandamus and demurrer should be granted as to the first cause of action.

23 **C. There Are No Facts Sufficient to Sustain a Complaint for Injunctive Relief**

24 Where it cannot be shown that there is (1) a wrongful act constituting a cause of action and
25 (2) a factual showing that the wrongful act constitutes an actual or threatened injury to property or
26 personal rights which cannot be compensated by damages, a complaint for injunctive relief may
27 be disposed of by demurrer. (See, *Brownfield v. Daniel Freeman Marina Hospital* (1989) 208
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1 Cal.App.3d 405, 410; *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 748-749.) Here,
2 HNHPC does not establish either that it will suffer irreparable harm in the absence of the Court’s
3 intervention or that any wrong related to the Department’s exercise of discretion pursuant to
4 section 26067 has occurred.

5 **1. HNHPC Is Without Standing to Seek Injunctive Relief.**

6 A party seeking injunctive relief “must demonstrate a real threat of immediate and
7 irreparable injury due to the inadequacy of legal remedies.” (*Choice-in-Education League v. Los*
8 *Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415, 422.) HNHPC fails to allege facts
9 showing irreparable injury. Rather, HNHPC states, in conclusory fashion, that it has been
10 “directly and financially harmed by the offending conduct alleged” (Petition 10:25), namely the
11 Department’s design of the CCTT database. HNHPC contends that if the Court could order the
12 Department to “modify its track and trace system to ‘catch’ the most egregious Burner Distro
13 operators” (Petition 7:27) that “this injustice could be stopped or significantly reduced” (Petition
14 9:9). But whether a modification of the track and trace system would ultimately result in
15 increasing the “competitiveness and financial success of operators such as HNHPC” (Petition
16 4:14) requires a series of speculative inferences that are not set forth in HNHPC’s pleadings. The
17 purported benefit that HNHPC claims it would receive is, at best, remote from the acts it asks the
18 Court to compel.

19 Moreover, even if this assertion were not remote, it is insufficient to show irreparable harm.
20 As noted above, HNHPC contends that it suffers economic harm under the status quo—that the
21 relief it seeks here would increase its “competitiveness and financial success.” (Petition 4:14.)
22 But “mere monetary loss does not constitute irreparable harm” (*Friedman v. Friedman* (1993) 20
23 Cal.App.4th 876, 890), and even “a substantial economic loss of [business] revenues” does not
24 rise to the level of irreparable injury. (*IT Corp. v. Cty. of Imperial* (1983) 35 Cal.3d 63, 75.) For
25 this reason, too, the speculative conclusion that some unspecified “augmentation” of the CCTT
26 database would be financially advantageous to HNHPC cannot be regarded as a sufficient factual
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1 allegation to satisfy the required factual element of irreparable injury that is necessary for the
2 issuance of injunctive relief.

3 For these reasons, HNHPC has failed to allege sufficient facts that it has suffered or will
4 suffer a particularized injury in the absence of the requested injunction.

5 **2. There Has Been No Wrongful Act or Omission Which Can Be**
6 **Redressed Through Injunctive Relief.**

7 The Department's duty under section 26067 is to ensure that a "database shall be designed
8 to flag irregularities for the department to investigate." As set forth above and demonstrated by
9 the documents subject to the Department's requests for judicial notice, this duty has been
10 performed. HNHPC, has made only hollow characterizations and unsupported conclusions of
11 fact in an effort to construe the performance of this duty as an abuse of discretion. Just as
12 HNHPC failed to identify any mandatory duty that has not already been undertaken relative to
13 mandamus relief, it has also failed to establish the required element that any breach of duty or
14 wrong has occurred which could be redressed by injunctive relief. HNHPC has failed to plead
15 facts sufficient to establish that the Department has any duty which it has not already performed.
16 For this reason, the motion for demurrer should be granted.

17 **CONCLUSION**

18 For the reasons set forth, the Department respectfully requests that the Court grant its
19 motion for demurrer without leave to amend.

20 Dated: October 29, 2021

Respectfully submitted,

21 ROB BONTA
22 Attorney General of California
23 HARINDER K. KAPUR
Senior Assistant Attorney General

24 

25 ETHAN A. TURNER
26 Deputy Attorney General
27 *Attorneys for Respondent and Defendant*
28 *Department of Cannabis Control*

DECLARATION OF SERVICE BY E-MAIL

Case Name: **HNHPC, Inc. v. The Department of Cannabis Control**
Case No.: **30-2021-01221014-CU-WM-CJC**

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 October 29, 2021, I served the attached **DEFENDANT AND RESPONDENT DEPARTMENT OF CANNABIS CONTROL'S NOTICE OF DEMURRER AND DEMURRER TO HNHPC, INC.'S PETITION FOR WRIT OF MANDATE AND COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by transmitting a true copy via electronic mail, addressed as follows:

Jeff Augustini, Esq.
E-mail Address: jeff@augustinilaw.com
Counsel for Plaintiff/Petitioner

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 October 29, 2021, at Sacramento, California.

N. Clark

Declarant



Signature