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6 SUPERIOR COURT OF THE STATE OF CALIFORNIA
7 COUNTY OF SAN FRANCISCO

8 KENNETH P. STOLLER, MD, and
9 JK, being the mother of a vaccine exempt
10 Child

11 Plaintiffs,

Case No: CGC-19-576439

11 **PLAINTIFFS' MEMORANDUM OF**
12 **POINTS AND AUTHORITIES IN**
13 **OPPOSITION TO DEFENDANTS'**
14 **DEMURRER TO THE SECOND**
15 **AMENDED COMPLAINT**

14 vs.

14 DATE: December 3, 2019
15 TIME: 9:30 AM
16 DEPT: 302
17 Judge: Hon. Ethan P. Schulman
18 Action Filed: July 15, 2019
19 Trial date: Not Assigned
20 Reservation No. 010291203-08

18 DENNIS HERRERA, in his official capacity
19 as the CITY ATTORNEY of the City of
20 San Francisco, THE CITY AND COUNTY
21 of SAN FRANCISCO, KIMBERLY
22 KIRCHMEYER, in her official capacity
23 as EXECUTIVE DIRECTOR, MEDICAL
24 BOARD OF CALIFORNIA, CHRISTOPHER
25 SHULTZ in his official capacity as Chief Deputy
26 Director of the CALIFORNIA DEPARTMENT OF
27 CONSUMER AFFAIRS, JOHN and JANE DOES 1
28 THROUGH 5 and ROBERT SCHECHTER in his
official capacity of Chief of the Clinical Policy
and Support Section ("CPSS") of the CALIFORNIA
DEPARTMENT OF PUBLIC HEALTH,
IMMUNIZATION BRANCH

Defendants

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PRELIMINARY STATEMENT

This lawsuit deals with one of the most controversial and polarizing public policy issues facing California in the recent past; exemptions from childhood vaccination. The public controversy was precipitated by the 2014-15 measles outbreak in Disneyland, which directly led to the passage of SB 277 which removed the personal belief exemption. (Second Amended Complaint (“SAC”) page 9, para. 45 to page 10 ln.8)¹

However, according to the explicit statements of the bill’s author, (and others) in its final iteration, SB 277 was represented to have created a robust medical exemption whereby physicians had the authority and complete discretion to issue exemptions to children who did not meet the narrow CDC contraindications. (SAC, page 10, ln. 9 to page 12, ln. 10)

In their moving papers, the Demurring Defendants dispute this, argue that SB 277 made no such changes to medical exemptions, and that the recently passed SB 276/714 just restated the clear import of SB 277 (and created a mechanism to report errant doctors who were not following the unchanged law). (Defendants’ Memo at page 12, lns. 18-25).

This manifest sharp difference of opinion as to the meaning, purpose and implications of the successive versions of the bills may itself justify the court retaining jurisdiction under the important public policy exception to the exhaustion of administrative remedies doctrine. In any event, the importance of the legal issues involved in this case easily fall within prior precedent whereby the important public policy exception was used to allow cases to continue despite the existence of an administrative remedy and the pendency of an administrative case. The chaos,

¹The SAC demonstrates that 38% of the Disneyland measles cases were vaccine related, and as much as an additional 12% were likely the result of primary vaccine failure. SAC page 9 ln. 26 to page 10, ln. 8.

1 confusion and actual lawlessness which the new law has engendered creates an even more
2 compelling justification than the facts and circumstances in any of the prior precedential decisions
3 discussed hereinafter. (SAC page 2, para. 1 to page 3, para 6, page 4, para 20 to page 14, para.
4 62, page 14 para. 63 to page 17, para. 70)

6 **ARGUMENT**

7 **1. THE STANDARDS FOR DEMURRER**

8
9
10 The standards and basic test for sustaining a demurrer, and sustaining a demurrer without
11 leave to amend are well established:

12
13 “We treat the demurrer as admitting all material facts properly pleaded, but not
14 contentions, deductions or conclusions of fact or law.... * * * When a demurrer is
15 sustained, we determine whether the complaint states facts sufficient to constitute
16 a cause of action.... And when the demurrer is sustained without leave to amend,
17 we decide whether there is a reasonable possibility that the defect can be cured by
18 amendment; if it can be, the trial court has abused its discretion and we reverse; if
19 not, there has been no abuse of discretion and we affirm.”

20 *Action Apartment Association v; Santa Monica Rent Control Board*, (2001) 114 Cal Rptr. 2d 412,
21 419, 94 Cal. App. 4th 587, 597, *quoting Blank v Kirway* (1985) 39 Cal. 3d 311, 318, 216 Cal.
22 Rptr. 718, 703 P.2d 58. The gist of which was recently recited in *Aids Healthcare Found v. State*
23 *Dep’t Health Care Servs.* (2015) 241 Cal.App.4th 1327, 1136, 194 Cal.Rptr. 3d. 425, 431.

24 **2. THE PRIMARY ISSUE IN THIS MOTION**

25 After the Demurring Defendants were brought into this case via the First Amended
26 Complaint, the Medical Board filed an accusation against the Plaintiff relating to eleven medical
27 exemptions he wrote. (The Accusation is attached to Defendants’ Request for Judicial Notice).
28 The filing of the Accusation of course raises the failure to exhaust administrative remedies issue,
at least as to the First Cause of Action. However, as set forth hereinafter, the primary issue to be

1 decided in this Demurrer is whether the well-established important public policy exception
2 applies to this case.

3 The Defendants argue that this district's recent decision in *Contractors' State License Bd. v.*
4 *Superior Court of Contra Costa*, (2018) 28 Cal App. 5th 771, 239 Cal. Rptr. 501 is dispositive of
5 this case and mandates granting the demurrer. Not so because *Contractors* only held 1. another
6 exhaustion exception (futility) did not apply to the facts of that case, and 2. the lower court
7 incorrectly decided that merely seeking a declaratory judgment created an exception to the failure
8 to exhaust requirement. Plaintiffs are not arguing the futility exception, nor are they arguing that a
9 declaratory judgment action *ipso facto* creates a failure to exhaust exception. Therefore,
10 *Contractors* is neither dispositive nor particularly relevant to the core issue before this Court.
11

12 **3. THE "IMPORTANT PUBLIC POLICY" EXCEPTION TO THE FAILURE TO** 13 **EXHAUST ADMINISTRATIVE REMEDIES**

14 California courts have long recognized their power to decide cases involving important
15 policy issues despite a litigant's failure to exhaust administrative remedies. *Lindeleaf v.*
16 *Agricultural Labor Relations Bd.* (1986) 41 Cal.3d 861, 871, 226 Cal. Rptr. 119, 718 P.2d 106
17 [exhaustion excused when case raises "important questions of public policy"]; *Action Apartment*
18 *Assn. v. Santa Monica Rent Control Bd., supra.* (2001) 94 Cal.App.4th at 615, 114 Cal. Rptr.2d
19 412 [same]. This exception was most recently used by the California Supreme Court as a basis to
20 decide an important public policy dispute in *Steinhart v. County of Los Angeles*, (Cal., 2010) 47
21 Cal.4th 1298, 104 Cal. Rptr. 3d 195, 223 P.3d 57
22

23 "Important policy issues" affect many people beyond the parties to a particular
24 administrative action and/or where the consequences could cause irreparable injury to a party or
25 class of people. In *Lindeleaf*, exhaustion was excused because refusal to consider the alleged
26 procedural defects in the Agricultural Labor Relations Board hearing process would affect all or
27 many litigants before that board.
28

1 In *Action Apartments Assn.*, a landlord challenged a Santa Monica rent control rule that
2 would force all Santa Monica landlords to pay part of the required 3% interest on security
3 deposits out of their own pockets since bank interest rates were lower than 3%. Because (i) all the
4 Santa Monica landlords who would have to pay (what appears to be a relatively insignificant
5 amount of) money out of their own pockets, and (ii) there might not be an administrative forum to
6 seek relief from that heavy financial burden on owners of these prime coastal California
7 commercial properties, the California Supreme court reversed the trial court’s demurrer based on
8 failure to exhaust administrative remedies grounds (and granted the landlord’s request to overturn
9 the law as a taking without just compensation).

11 In *Steinhart*, a taxpayer’s failure to go through the administrative process to seek an
12 \$18,587.64 tax rebate was excused because the case involved important and unsettled change of
13 ownership rules that affected many people and many taxing authorities.

15 **4. THIS ACTION PRESENTS IMPORTANT PUBLIC POLICY ISSUES WHICH**
16 **SHOULD BE ADJUDICATED INITIALLY BY THE CIVIL COURTS**

17 This lawsuit presents two sharply different views of what any reasonable person would
18 view as an important health and safety policy issue. Proponents on both sides think there is a
19 public health crisis which is creating a serious risk to children and families.

20 Take the two California Senate news release cited in the SAC: “Dr. Richard Pan
21 Introduces SB 276 to Combat Fake Medical Exemptions that Put Children and Communities at
22 Risk” (SAC page 13, footnote 1) and “Dr. Richard Pan Los Angeles Public Health Officials, and
23 Coalition of Community Advocates Release Data on Economic Impact of Measles Outbreaks and
24 Cost to California Taxpayers” (*Id.* at footnote 2).

26 The Medical Board’s Accusation against the Plaintiff complains about eleven vaccine
27 medical exemptions allegedly given outside of the standard of care. As the above Senate articles
28 show, these eleven patients and Plaintiff Stoller are just a small part of the problem/public health

1 crises for which Senator Pan is sounding the public health alarm.

2 On the other hand, Plaintiffs allege that the false PR campaign orchestrated by Senator
3 Pan and his allies has created confusion, chaos and widespread illegal activities on the part of
4 state agencies and schools who are not following the rule of law. (SAC page 2, para. 1 to page 3,
5 para 6, page 4, para 20 to page 14, para. 62). The potential life and death need for medical
6 exemptions broader than CDC contraindications, as promised by Senator Pan during the SB 277
7 legislative process is set out in the SAC. (page 14 para. 63 to page 17, para. 70.)

9 Considering both points of view, the issues which require judicial resolution are far
10 broader than the eleven cases in the Medical Board's Accusation, and these health public policy
11 issues are as important, if not more important than whether Santa Monica property owners have
12 to pay out of their own pockets part of the interest on security deposits (*Action Apartments Assn.*),
13 or whether an alleged procedural defect in the selection of hearing examiners in *Lindeleaf*, or an
14 18,587.64 tax rebate in *Steinhart*.

16 The health and safety public policy issues articulated in the SAC, in conjunction with the
17 institutional view espoused by Senator Pan and others that the Plaintiff and other like-minded
18 physicians are creating a public health crisis clearly merit a finding that the important public
19 policy exception to the failure to exhaust administrative remedies applies in this case.

21 **5. OTHER CONSIDERATIONS JUSTIFYING ALLOWING THIS CASE TO
22 PROCEED DESPITE FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES**

23 **a. The Core Issues in This Case Are Legal and Involve Statutory Interpretation
24 and A Constitutional Claim**

25 Some of the confusion for physicians like Plaintiff Stoller, the public and the schools,
26 which is discussed in detail in the SAC relates to the interpretation of SB 277, and its subsequent
27 amendment in 2019 via SB 276 and SB 714 (Health and Safety Code Section 120370 *et. seq.*),
28 and the reasons for the amendment. (SAC at page 9, para. 44 to page 14, para. 62)

1 Plaintiffs assert that SB 277 created a broader than CDC contraindications basis for
2 medical exemption and that there is a constitutional right to such exemption under California
3 privacy law. (SAC page para. 47 to page 12 para. 56 and the First Cause of Action, pages 16-17).

4 Defendants argue that the “laws relating to vaccine exemptions are clear and were
5 emphatically restated and reinforced by the California Legislature when it passed SB 276 and SB
6 714.” (Defendants’ Memo at page 12 lns. 18-20).

7
8 The interpretation of the current and prior medical vaccine exemption statute is of course
9 a matter of statutory interpretation, which is something that the civil courts routinely do.
10 Irrespective of whether an administrative law judge can issue a proposed decision on
11 constitutional issues and have that proposal reviewed by the members of the medical board, the
12 civil courts have greater expertise to definitively resolve these statutory interpretation and
13 Constitutional issues, especially given the important public health policies implicated in this case,
14 and the far reaching effect that vaccine medical exemptions have on families.

15
16 **b. This Case Is Different from Most Medical Board Cases Because It Only**
17 **Involves A Statutorily Created Standard for A Statutory Right**

18 As indicated above, this case involves the interpretation of a public health law which
19 creates a legal right for an unvaccinated child to attend school. The first part of all physicians’
20 analysis of that determination is understanding the contours of medical exemptions permitted
21 under the statute. That is the scope of this action with respect to the statute at issue. There is no
22 allegation in the SAC about whether the medical condition or family history of any of the eleven
23 patients listed in the Accusation did or did not qualify the child for a medical exemption. The
24 civil court need not worry about a detailed factual record about individual patients. The case deals
25 with legal standards which apply to all California physicians in complying with a statutorily
26 created standard for a statutorily created right of children, and whether there is a constitutional
27 dimension involved in a physician’s vaccine medical exemption decision making.
28

1 **c. Administrative Process is Insufficient to Investigate the issues raised in the**
2 **SAC**

3 Administrative law does not permit civil litigation type discovery of potential witnesses
4 (See Govt. Code, Section 11450.10 on hearings subpoenas.) Thus, there is no administrative
5 mechanism to depose Senator Pan who is a key witness to Plaintiffs' claims concerning the
6 reasons and meaning of the changes in the successive versions of SB 277, SB 276 and SB 714,
7 and the basis of his negative PR campaign against physicians like Dr. Stoller who relied on his
8 words in writing broad-based medical exemptions. Accordingly, the administrative remedy to
9 explore the claims in the First Cause of Action (the only cause of action which is subject to the
10 failure to exhaust administrative remedies defense) is inadequate which further justifies the public
11 policy exception.

12 **d. This Case Is A Case of First Impression but It Is Unlikely to Set Broad Legal**
13 **Precedent**

14 The application of the public policy exception to the failure to exhaust administrative
15 remedies defense as applied to the Medical Board appears to be a case of first impression.
16 However, this case is unlikely to set major precedent since few, if any Medical Board cases
17 involve important general issues like in this case, which basically involve legal and statutory
18 issues, and where the details of the individual cases and conduct of the physician/respondent are
19 seemingly irrelevant to the issues to be decided by the court in this civil case.

20 **e. The Medical Board Has Failed to Timely Address the Issue**

21 As pointed out in the SAC, Plaintiff Stoller approached the Medical Board seeking
22 clarification about the meaning and implications of SB 277, (SAC page 14, paras. 61 and 62). He
23 and other physicians received no guidance about this important issue. Having failed to provide
24 timely guidance, it is time for the courts to step up to the plate and give guidance to the entire
25 medical community and the families who have vaccine medical exemptions which could be
26 revoked or rescinded by Department of Public Health under the new law (as discussed
27
28

1 hereinafter).

2
3 **6. MANY PARTS OF THE SAC ARE NOT SUBJECT TO DEFENDANTS’**
4 **EXHAUSTION DEMURRER**

- 5 a. The SAC points out that the *San Jose Mercury* obtained state and federal privacy
6 protected school records, and now the *Los Angeles Times* is also seeking these
7 privacy protected records. (SAC page 4 para. 20 to page 5 para. 22). These are
8 important privacy issues which the Court should address and are not subject to
9 exhaustion.
- 10 b. The Second Cause of Action in the SAC makes specific allegations of misconduct
11 on the part of one or more Medical Board and/or Division of Investigation
12 investigators (SAC page 7 para. 32 to page 8, para. 3 and page 18, para. 76 to para.
13 78, page 19, ln.1). Defendants’ assertion that the board’s alleged misconduct can
14 be asserted as a defense (See Defendants’ Memo at page 11 lns. 7-20) does not
15 adequately address the alleged misconduct, *inter alia* because there is other alleged
16 misconduct on the part of the Medical Board, as discussed below.
- 17 c. The Third Cause of Action alleges that the Medical Board is using a deceptive, and
18 illegal tactic to trick and/or intimidate families into waiving their right to protect
19 their children’s privacy protected medical records. (SAC page 7, para. 32 to page
20 8, para. 36 and Third Cause of Action, page 19, paras. 79-80).

21
22
23 The Medical Board does not have the statutory jurisdiction to address its own privacy
24 violations and illegal investigative tactics set forth above. That makes these allegations and
25 claims arguably subject to the “lack of authority” exception to the failure to exhaust
26 administrative remedies defense. *Coachella Valley Mosquito Control v PERB*, (2005) 29
27 Cal.Rptr. 3d 234, 241, 35 Cal. 4th 1072, 112 P.3d. 623 *citing, inter alia, Edgren v Regents of*
28

1 *University of California* (1984) 158 Cal. App.3d 515, 521, 205 Cal Rptr. 6. *Cf Action Apartment*
2 *Association v; Santa Monica Rent Control Board, supra* (2001) 114 Cal. Rptr. 2d at 432-423, 94
3 Cal. App. 4th at 615. (An administrative agency is not competent to decide whether its own action
4 constitutes a taking....”)

5
6 The Medical Board’s lack of statutory authority over these allegations and claims also
7 satisfies the “no available administrative remedy exception to the exhaustion defense.” *Id.* at
8 114 Cal. Rptr. 2d at 430, 94 Cal. App. 4th at 611.

9 As indicated, the Defendants’ argument that its conduct can be used as a defense in an
10 administrative action (Defendants’ Memo at page 11, lns. 7-20) is not responsive or adequate to
11 address the wrongdoing alleged in the complaint, and in particular the third cause of action which
12 suggest that the misconduct is systematic. (SAC, page 19, page 7 para. 32 to page 8 para. 36)

13
14 **7. THIS CASE PRESENTS MATTERS OF PUBLIC INTEREST WHICH**
15 **CONSTITUTES AN ACTUAL CONTROVERSY**

16 In *Gafcon, Inc. v Ponsor & Associates*, (2002), 120 Cal.Rptr.2 392, 403, 98 Cal. App. 4th
17 1388, 1405 the court held that part of the case was moot, meaning that there was no actual
18 controversy, but that the cause of action dealing with a broader issue (whether an insurer was
19 illegally practicing law by using in house/captive law firms representing its insureds) was not.

20
21 The court held that “declaratory relief is appropriate where “questions of public interest ...
22 are involved.” (citations omitted). The same considerations which support the public policy
23 exception to the exhaustion doctrine support a finding that there are questions of public interest
24 which constitute an actual controversy in this case.

25 The chaos and confusion created by SB 277 and the negative PR campaign created by
26 Senator Pan and his allies in advocating for SB 276 require judicial attention to clarify the statute
27 that has precipitated the Board case against Plaintiff Stoller and its investigation of likeminded
28

1 physicians throughout the state. Clarification will also assist the families whose children are being
2 illegally barred from their schools (SAC page 8, paras 37-39). Thus, the relief requested is no
3 mere “academic exercise” as stated by the Defendants (Defendants’ Memo, page 12, ln. 25 to
4 page 13, ln. 2).

5
6 Beyond that, SB 714 provides for the rescission of grandfathered medical exemptions
7 written if the exemption writing physician is placed under a Medical Board order (Health and
8 Safety Code Section 120372 (c) (4). Thus, the Board’s interpretation of the medical exemption
9 statute will potentially adversely effect not only Plaintiff Stoller’s vaccine medically exempt
10 patients, but the patients of all likeminded physicians who are or will be investigated by the
11 Board. Manifestly, these are all matters of public interest.

12
13 **8. SENDING A MEDICAL RELEASE WITH A PROPOSED SUBPOENA DOES**
14 **NOT JUST “CONFIRM THAT THE BOARD PROVIDED THE NOTICE TO**
15 **CONSUMERS THAT IS REQUIRED BY LAW.”**

16 Because the Medical Board was unsuccessful in obtaining/inducing families to release
17 their children’s medical records, it started attaching a copy of a proposed subpoena that it
18 intended/threatened to serve unless the families completed and returned the release of records
19 form. (SAC page 7, para. 32 to page 8 para 36). *Sehlmeyer v. Department of General Services*
20 (1993) 17 Cal.App.4th 1072, 1080-81, cited by the Defendants offers no support for this tactic.
21 That case only created an obligation of a party who had issued a subpoena in an on-going
22 administrative proceeding to give notice to the non-party whose records were being subpoenaed.

23 What the Medical Board is doing is more akin to an abuse of process or even extortion,
24 since, as alleged, families are being confused and/or intimidated into thinking that unless they
25 execute the enclosed medical release, they will be dragged into court. And there is the small
26 problem that this is a new tactic alleged to have been initiated after the Medical Board’s standard
27 practice of just sending medical release forms had failed. *Sehlmeyer* was decided 26 years ago.
28

1 Did the Board just recently get around to reading the case? In any event, *Sehlmeyer* offers no
2 support for the Medical Board sending a proposed subpoena with a medical release with the
3 stated threat to sign the release or else.
4

5 **NO OPPOSITION TO DEFENDANTS REQUEST FOR JUDICIAL NOTICE**

6 Plaintiffs do not oppose Defendants Request for Judicial Notice of the Accusation against
7 Plaintiff Stoller,
8

9 **CONCLUSION**

10 For the foregoing reasons, Plaintiffs request that the Defendants' Demurrer be denied.

11 Dated November 18, 2019
12

13 RESPECTFULLY SUBMITTED,

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DECLARATION OF SERVICE BY FAX, AND EMAIL

I am a member of the California bar and I am counsel to the Plaintiff/Petitioner (and over 18 and not a party to this action).

On November 18, 2019, I served this Memorandum of Points and Authorities in Opposition to Defendants Demurrer to the Second Amended Complaint by electronic service:

Deputy Attorney General Lawrence Mercer
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3488

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on November 18, 2019.


Richard Jaffe