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8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF MARICOPA**

10 THOMAS BLANKENBAKER, D.C., an
Arizona licensed chiropractic physician;
11 SHAWN WHERRY, D.C., an Arizona licensed
chiropractic physician; EMILIA INDOMNICO,
12 an Arizona resident,

13 Plaintiffs,

14 vs.

15 CHRISTINA URIAS, in her official capacity as
Director of the Arizona Department of
16 Insurance,
17 Defendant.

Case No.: CV2011-093099

**Defendant's Motion to Dismiss for Failure
to State a Claim**

(Assigned to the Hon L. Grant)

18 Pursuant to Ariz. R. Civ. P. 12(b)(6), Defendant Christina Urias, in her official capacity
19 as Director of Insurance ("Director"), by and through undersigned counsel, moves this Court to
20 dismiss Plaintiff's Verified Statutory Special-Action Complaint with prejudice for failure to
21 state a claim upon which relief can be granted. This Motion is supported by the accompanying
22 Memorandum of Points and Authorities.

23 RESPECTFULLY SUBMITTED this 19th day of April, 2011.

24
25 THOMAS C. HORNE, Attorney General

26 By: /s/ Alyse C. Meislik

Alyse C. Meislik
Assistant Attorney General
Attorneys for Defendant

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. STANDARD OF REVIEW**

3 Motions to dismiss for failure to state a claim should be granted where, after assuming
4 the truth of all the complaint’s material allegations and according the plaintiff the benefit of all
5 inferences which the complaint can reasonably support, it is clear that the plaintiff can prove no
6 set of facts which will entitle him to relief upon his stated claims. *Luchanski v. Congrove*, 193
7 Ariz. 176, 179, 971 P.2d 636, 639 (App. 1998); *Gatecliff v. Great Republic Life Ins. Co.*, 154
8 Ariz. 502, 508, 744 P.2d 29, 35 (App. 1987).

9 **II. FACTUAL BACKGROUND**

10 Plaintiffs, Thomas E. Blankenbaker, D.C., Shawn Wherry, D.C., and Emilia Indomenico
11 filed a Verified Statutory Special-Action Complaint (“Complaint”) against the Director on
12 March 14, 2011, and served the Director on March 30, 2011. Plaintiffs seek issuance of a writ
13 of mandamus ordering, pursuant to Arizona Revised Statutes (“A.R.S.”) § 20-142(A), the
14 Director to enforce the provisions of A.R.S. § 20-461(B) against Blue Cross Blue Shield of
15 Arizona (“BCBSAZ”). Specifically, Plaintiffs allege BCBSAZ is committing unfair claim
16 settlement practices and, they further assert, that the Director has refused to take any steps to
17 stop these alleged unfair claim-settlement practices. Complaint ¶¶ 26, 31.

18 **III. LEGAL ARGUMENT**

19 Plaintiffs can prove no set of facts which would entitle them to the relief requested;
20 therefore, their Complaint should be dismissed.

21 The writ of mandamus is an extraordinary and expeditious legal remedy which proceeds
22 upon the assumption that the applicant has an immediate and complete legal right to the thing
23 demanded. *Campbell v. Hunt*, 18 Ariz. 442, 448, 162 P. 882, 884 (1917). Mandamus may be
24 issued by a court to compel an official to perform an act which the law specifically imposes as a
25 mandatory duty to act under a clearly defined set of circumstances. *Sensing v. Harris*, 217 Ariz.
26 261, 264, 172 P.3d 856, 859 (App. 2007); *see also* A.R.S. § 12-2021. Mandamus may compel a

1 public official to perform a ministerial duty or compel the official to act in a matter involving
2 discretion, but it may not designate how that discretion shall be exercised. *Kahn v.*
3 *Thompson*, 185 Ariz. 408, 411, 916 P.2d 1124, 1127 (App. 1995). Ministerial duties are those
4 which permit a public officer only one course of action on an admitted state of facts. *Id.*
5 Mandamus is not available to compel a public official to perform acts not authorized or required
6 by some plain provision of the law. *Id.* If a public official is not specifically required to
7 perform a duty or has any discretion as to what should be done, a plaintiff may not employ a
8 writ of mandamus. *Graham v. Moore*, 56 Ariz. 106, 109, 105 P.2d 962, 964 (1940).

9 A mandamus action is designed to compel performance of an act the law requires;
10 therefore, the “general rule is that if the action of a public officer is discretionary that discretion
11 may not be controlled by mandamus.” *Sears v. Hull*, 192 Ariz. 65, 68, 961 P.2d 1013, 1016
12 (1998) (refusing to compel mandamus “if the public officer is not specifically required by law to
13 perform the act”). In situations where a public official has discretion about how to perform a
14 function, mandamus is available “to require him to act properly,” only if the official abuses that
15 discretion. *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 465, 160 P.3d 1216, 1223 (App.
16 2007). A writ of mandamus is not an appropriate method to use to obtain a definition of duties
17 that are otherwise subject to dispute. *Id.* at 467, 160 P.3d at 1225.

18 **A. The Director’s Enforcement of A.R.S. § 20-461(B) is a General, Discretionary**
19 **Duty Not Subject to a Writ of Mandamus**

20 Plaintiffs seek mandamus relief and assert that A.R.S. § 20-142(A) imposes a mandatory
21 duty on the Director to enforce the provisions of A.R.S. § 20-461(B) against BCBSAZ. In fact,
22 A.R.S. § 20-142(A) simply states: “The director shall enforce the provisions of this title.”
23 Despite this broad language, Plaintiffs allege that the “Director has a legal duty to perform a
24 ministerial act, having no discretion in the manner of its performance.” Complaint ¶ 40.
25 Contrary to Plaintiffs’ contentions, A.R.S. § 20-142(A) merely provides the Director with a
26 general, discretionary duty to enforce all of the Title 20 insurance statutes, not a duty to enforce

1 a specific statute in a specific way against a specific person or entity. The Complaint in its
2 entirety fails to meet the basic requirements for a mandamus action; therefore, it is not
3 appropriate for mandamus. *Sensing*, 217 Ariz. at 263-64, 172 P.3d at 858-59.

4 *1. Mandamus May Only be Used to Compel a Public Officer to Perform an Act Which*
5 *the Law Specifically Imposes as a Duty*

6 Plaintiffs' Complaint fails at a basic level since it seeks mandamus to order the Director
7 to perform an act that the law never specifically requires the Director to perform. *See Sears*, 192
8 Ariz. at 68, 961 P.2d at 1016 (finding that mandamus "does not lie if the public officer is not
9 specifically required by law to perform the act"). Plaintiff cannot cite to any legal directives or
10 express provisions of law that specifically mandate the Director to enforce A.R.S. § 20-461(B)
11 under a clearly defined set of circumstances against any person or entity, including BCBSAZ.
12 *Sensing*, 217 Ariz. at 264, 172 P.3d at 859; *Kahn*, 185 Ariz. at 411, 916 P.2d at 1127. The only
13 mandatory language Plaintiffs can cite to is the broad, general mandate "to enforce the
14 provisions of this title." A.R.S. § 20-142(A). Even if the Director had a duty to act in this
15 instance, there are no legal directives designating any specific, requisite acts that the Director
16 must take to enforce A.R.S. § 20-461(B). A.R.S. § 20-461(D) simply provides the Director with
17 "solely an administrative remedy" for violations of A.R.S. § 20-461. Since no clearly defined
18 statutory directives exist to mandate that the Director act under any specific circumstances to
19 enforce A.R.S. § 20-461(B) against BCBSAZ,¹ Plaintiffs have no right to demand the relief they
20 request from this Court. *Sensing*, 217 Ariz. at 263-64, 172 P.3d at 858-59.

21 ...

22 ...

23 ...

24
25 ¹ Plaintiffs focus their allegations of unfair claim settlement practices against BCBSAZ
26 and the Director's alleged failure to enforce A.R.S. § 20-461(B) against BCBSAZ. The
Director's general, discretionary duty to enforce Title 20 is, of course, applicable to all persons
and entities within the Department of Insurance's scope of regulatory authority.

1 2. *Mandatory Language in a General Legal Directive Does Not Remove the Director’s*
2 *Discretion for Enforcement*

3 Plaintiffs’ assertions that A.R.S. § 20-142(A) allows the Director no discretion to enforce
4 A.R.S. § 20-461(B) against BCBSAZ are logically flawed. Although A.R.S. § 20-142(A)
5 contains the word “shall,” the Director must necessarily exercise her discretion when deciding
6 whether or not to enforce the hundreds of statutes in Title 20 of the Arizona Revised Statutes.
7 A.R.S. § 20-142(A) simply sets forth a general legal directive for the Director to enforce the
8 insurance statutes. Mandamus may not be used to override the Director’s discretion to compel
9 her to enforce A.R.S. § 20-461(B) against BCBSAZ solely on the basis of the general legal
10 directive in A.R.S. § 20-142. *Id.* at 265, 172 P.3d at 860.

11 In fact, Plaintiffs’ contentions regarding A.R.S. § 20-142(A) are strikingly similar to
12 those presented in the case for mandamus rejected by the *Sensing* court. In *Sensing*, the request
13 for mandamus also was based on a general legal directive containing the word “shall,” Phoenix
14 City Code (“Code”) § 2-119(a), which stated: “[t]here shall be a Police Department, headed by
15 a Chief of Police. He shall be responsible for the enforcement of State laws and City ordinances
16” *Id.* at 263, 172 P.3d at 858. The *Sensing* court found that the Code’s use of the term
17 “shall” does not impose “a mandatory duty to act under a clearly defined set of circumstances.”
18 *Id.* at 264, 172 P.3d at 859. Rather, the court found that the Code gave the Chief of Police a
19 general duty to enforce the ordinance, and left the official with discretion to choose what, if any,
20 enforcement actions should be taken. *Id.*

21 The fact that A.R.S. § 20-142(A) uses the term “shall” does not remove the Director’s
22 discretion to choose what, if any, enforcement actions to take. *Id.* A.R.S. § 20-142(A) simply
23 provides a general, discretionary enforcement duty to the Director which may not be compelled
24 by mandamus. *Id.*

25 Moreover, even where a law contains mandatory language, law enforcement and
26 regulatory activities are generally considered to be discretionary and not appropriate for

1 mandamus relief. *Id.* at 263, 172 P.3d at 858. In fact, the United States Supreme Court has
2 rejected the possibility that mandatory language in a state law affords the police no discretion.
3 *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61 (2005) (explaining that mandatory
4 statutes cannot be interpreted literally for a number of reasons, including their legislative
5 history, insufficient resources, and sheer physical impossibility). The United States Supreme
6 Court has stated that it is “common sense that all police officers must use some discretion in
7 deciding when and where to enforce city ordinances.” *Id.* (quoting *Chicago v. Morales*, 527
8 U.S. 41, 62 n. 32 (1999)). Likewise, the Arizona courts have determined that state regulatory
9 agencies’ enforcement of laws generally should be considered discretionary and are not
10 appropriate for mandamus relief. *See Wesley v. State*, 117 Ariz. 261, 263, 571 P.2d 1057,
11 1059 (App. 1977) (stating that “the enforcement of liquor laws and regulations is not unlike law
12 enforcement generally and is thus not subject to mandamus by a court for its performance”). It
13 is clear that the Director must use her discretion to enforce A.R.S. § 20-142(A).

14 3. *The Enforcement of A.R.S. § 20-461(B) Requires the Director to Exercise Discretion*
15 *Which May Not be Controlled by Mandamus*

16 It would be impossible for the Director to enforce A.R.S. § 20-461(B) without exercising
17 some discretion. “The general distinction between ministerial and judicial acts seems to be that,
18 where the duty to be performed is described by law with such certainty that nothing is left to the
19 exercise of discretion or judgment, the act is ministerial, but, where it requires discretion or
20 judgment to determine whether the duty to act exists or not, it is judicial.” *Bryant v. Bryant*, 40
21 Ariz. 519, 521, 14 P.2d 712, 713 (1932). The courts generally consider the distinguishing test to
22 be the necessity of the exercise of judgment or discretion. *Id.* For example, using the test set
23 forth in *Bryant*, the service of a summons is a ministerial act since it is not judicial in its nature.
24 *Id.* In other words, the law plainly describes the duty to be performed by an officer during
25 service of a summons and the officer is given no discretion as to his right or duty to perform it.
26 *Id.* In contrast, the wording of A.R.S. § 20-461(B) does not describe a duty with such certainty

1 that nothing is left to the exercise of discretion or judgment. In order for the Director to enforce
2 A.R.S. § 20-461(B), she must analyze the relevant facts of each case and use discretion to
3 determine whether or not those facts constitute “discrimination.” Consequently, the
4 enforcement of A.R.S. § 20-461(B) is not a ministerial act. This distinction makes the
5 Complaint inappropriate for mandamus.

6 **B. The Director’s Discretion to Enforce A.R.S. § 20-461 is a Political Question**
7 **That is Inappropriate for Judicial Review**

8 The Director’s discretionary enforcement of A.R.S. § 20-461(B) against BCBSAZ
9 renders the issue of enforcing the statute a political question that is not appropriate for judicial
10 resolution. *Sensing*, 217 Ariz. at 265, 172 P.3d at 860 (citing *Kromko v. Ariz. Bd. Of Regents*,
11 216 Ariz. 190, 193-94, 165 P.3d 168, 171-72 (2007) (holding that university tuition is a “non
12 justiciable political question” because it is “entrusted to branches of government other than the
13 judiciary” and there are “no judicially discoverable and manageable standards” for measuring
14 constitutionality)). Similar to *Sensing*, the requirement in A.R.S. § 20-142(A), that “[t]he
15 director shall enforce the provisions of this title,” may be a traditional, general duty the
16 legislature imposes on the Director; however, if the Director exercises her discretion reasonably
17 and appropriately, the judiciary may not substitute its subjective judgment for that decision. The
18 judiciary has no authority to order the Director to act differently. *Id.*; see *Kromko*, 216 Ariz. at
19 194, 165 P.3d at 168 (“[A]t best, we would be substituting our subjective judgment of what is
20 reasonable under all the circumstances for that of . . . the very branches of government to which
21 our Constitution entrusts this decision.”). Mandamus is thus inappropriate and Plaintiffs’ proper
22 remedy, if any, would be to seek legislative changes regarding the application and enforcement
23 of the unfair claim settlement practices statutes they allege BCBSAZ is violating in this
24 instance. *Id.*

25 . . .

26 . . .

1 Document electronically transmitted
2 to the Clerk of the Court for filing using
3 AZTurboCourt this 19th day of April, 2011.

4 **COPY** of the foregoing mailed
5 this 19th day of April 2011, to:

6 David L. Abney, Esq.
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10 By: /s/ Leah C. Rossow

11 #1700381

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