

**FILED**  
San Francisco County Superior Court

MAR 29 2019

CLERK OF THE COURT  
BY: [Signature]  
Deputy Clerk

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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF SAN FRANCISCO

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14 JON B. EISENBERG and JEFF SENGSTACK,  
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16 Petitioners and Plaintiffs,  
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18 vs.  
19 DAVE JONES, in his capacity as California  
Insurance Commissioner, and CALIFORNIA  
DEPARTMENT OF INSURANCE, ,  
20 Respondents and Defendants.

Case No. CGC-18-567790

**[PROPOSED] ORDER OVERRULING  
DEMURRER TO SECOND AMENDED  
PETITION AND COMPLAINT**

21 This matter came on for hearing on February 20, 2019, in Department 302 of the San  
22 Francisco Superior Court, Judge Ethan P. Schulman presiding. Neil A. Goteiner and Jon B.  
23 Eisenberg appeared for Petitioners and Plaintiffs. Lucy F. Wang appeared for Respondents and  
24 Defendants.

25 The Court, having heard the arguments of counsel and having reviewed the pleadings in  
26 the case, orders as follows:

27 The demurrer is overruled as to causes of action 1-6. Insurance Code § 790.05 provides  
28 that whenever the Commissioner shall have reason to believe that an unfair practice is occurring

1 and it would be in the public interest to issue an order to show cause, then the Commissioner shall  
2 issue an order to show cause. Plaintiffs allege that persons are violating Insurance Code §§ 14022  
3 and 14022.5, the Commissioner has been apprised of specific evidence regarding these violations,  
4 and that the Commissioner has failed to investigate such evidence.

5 The complaint, fairly construed, alleges that companies falsely represented to the  
6 Commissioner that dozens, if not hundreds, of out-of-state adjusters were employees of the  
7 companies rather than what they in fact were, which was independent contractors, in order to  
8 evade the Insurance Code's licensing requirement. (2/20/19 RT 15:14-20.) This is an allegation  
9 that these companies are engaged in fraudulently misrepresenting the status of people who are  
10 working for them, on a large scale. (2/20/19 RT 16:18-21.) The fact that they may be subject, at  
11 least on paper, to nominal supervision by licensed California adjusters is no answer to this  
12 problem. (2/20/19 RT 16:22-24.) Plaintiffs allege sufficient facts from which the inference can be  
13 drawn that the Commissioner has reason here to believe that an unfair practice is occurring.  
14 (2/20/19 RT 14:1-6.) Plaintiffs allege sufficient ultimate facts showing that the Commissioner is  
15 acting arbitrarily and failing to perform his mandatory duty. (SAC, 34, 36, 47-54.)

16 "Although traditional mandamus will not lie to control the discretion of a public official or  
17 agency, that is, to force the exercise of discretion in a particular manner, '...[it] will lie to correct  
18 abuses of discretion, and will lie to force a particular action by the ... officer, when the law clearly  
19 establishes the petitioner's right to such action.' " (Schwartz v. Poizner (2010) 187 Cal.App.4th  
20 592, 598.) Further, "[w]hile a party may not invoke mandamus to force a public entity to exercise  
21 discretionary powers in any particular manner, if the entity refuses to act, mandate is available to  
22 compel the exercise of those discretionary powers in some way." (Ellena v. Department of Ins.  
23 (2014) 230 Cal.App.4th 198, 205.) The Court concludes there are circumstances where the Court  
24 may issue a writ of mandate directing the Commissioner to issue an order to show cause because,  
25 as set forth in Insurance Code § 790.05, there is reason to believe that (1) an unfair practice is  
26 occurring and (2) it would be in the public interest to do so. (2/20/19 RT 45:8-15.) At the hearing  
27 on this matter, the Commissioner's counsel conceded, in response to the Court's admittedly  
28 extreme hypothetical, that it is not the Commissioner's position that the Court could never issue a

1 writ of mandate directing the Commissioner to issue an order show cause when he has reason to  
2 believe that the two statutory prongs have been met. (2/20/19 RT 45:16-22.)


3 The Commissioner cites *Women Organized for Employment v. Stein* (1980) 114  
4 Cal.App.3d 133, 139-140 and argues that there is no mandatory duty under Ins. Code § 790.05.  
5 There, various consumer, minority, and women's organizations sought to compel officials from  
6 the real estate, insurance, and business and transportation state agencies "to ... gather the  
7 minimum data necessary for proper future industry regulation." (*Id.* at p. 137; italics omitted.)  
8 They cited a wide assortment of statutes that broadly described the official duty to achieve the  
9 maximum protection for the public. (*Id.* at pp. 138-139.) Hence, the petition requested an  
10 extraordinarily broad and vague order to gather data based on an equally broad and vague  
11 smorgasbord of duties scattered throughout three different codes. The Court of Appeal found that  
12 the statutes did not define specific duties subject to a traditional writ of mandamus. The instant  
13 complaint is distinguishable as plaintiffs identify one administrative agency (Department of  
14 Insurance), one law (Insurance Code § 790.05), and one straightforward remedy (OSC). The  
15 Legislature explicitly specified the procedure to be employed in the circumstances that plaintiffs  
16 allege. (*Id.* at p. 139-140.)

17 The demurrer is overruled as to causes of action 7-12. Under Insurance Code §§ 12921.3  
18 and 12921.4, the Commissioner has discretion to pursue a particular remedy or any remedy at all  
19 against an insurer accused of misconduct. (See *Schwartz v. Poizner* (2010) 187 Cal.App.4th 592,  
20 597.) The Commissioner, however, has a mandatory duty under those provisions to notify a  
21 complainant of receipt of the complaint, investigate the complaint, and notify the complainant of  
22 the final action taken on that complaint. Plaintiffs allege that the Commissioner has acted  
23 arbitrarily and capriciously by not taking final action on their complaints within a reasonable time.  
24 (SAC, 25, 32, 55-62, 86, 95.) Plaintiffs' allegations implicate sections 12921.3 and 12921.4  
25 because they relate to "insurer" misconduct. (SAC, 25.) The Commissioner's contention that it  
26 has taken final action on the complaints raises disputed factual issues that cannot be resolved on  
27 demurrer.  
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**IT IS SO ORDERED.**

Dated: March 12, 2019

  
HONORABLE ETHAN P. SCHULMAN  
Judge of the Superior Court of the  
State of California