

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

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SHERRY LOAR and DAWN IVES,

Court of Appeals No: 294087

Plaintiffs,

V

MICHIGAN DEPT. OF HUMAN SERVICES  
And ISMAEL AHMED, in his official  
Capacity as Director of the Michigan Dept.  
Of Human Services,

Defendants.

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**DEFENDANTS' BRIEF IN SUPPORT  
OF THEIR MOTION TO DISMISS  
PURSUANT TO MCR 2.116 (C)(8) AND (C)(4)**

**ORAL ARGUMENT REQUESTED**

Respectfully submitted,

Joshua S. Smith (P63349)  
Joseph E. Potchen (P49501)  
Assistant Attorneys General  
Attorneys for Defendants  
Health, Education & Family Services  
Division  
PO Box 30758  
Lansing, MI 48909  
517-373-7700

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### Questions Presented

- I. Under Michigan law, plaintiffs must give defendants proper notice of their claim by pleading all of the elements of the claim and supporting them with factual allegations. Where plaintiffs fail to provide such notice, a dismissal under MCR 2.116(C)(8) is proper. Here, Plaintiffs' Complaint for mandamus fails to state the elements of mandamus in their Complaint and their supporting brief fails to argue how the elements entitling them to mandamus have been satisfied in the present case. Should this Court dismiss Plaintiffs' claim for mandamus relief?
  
- II. Courts are free to look beyond procedural labels to determine the gravamen of an action or the exact nature of the claim. And where this Court lacks jurisdiction over a claim, the only action it may take is to dismiss it. In the present case, Plaintiffs label their case as an action for mandamus, but the actual claims are for declaratory and injunctive relief. This Court, however, lacks original jurisdiction over declaratory and injunctive claims, especially those that relate to unnamed necessary parties whose presence is necessary to render complete relief, and where they have failed to exhaust available remedies. Should this Court dismiss Plaintiffs' complaint pursuant to MCR 2.116(C)(4)?

## Introduction

The Michigan Home Based Child Care Council (Council) was created by a 2006 interlocal agreement between Mott Community College (Mott) and the Michigan Department of Human Services (DHS). Also, in 2006, the Michigan Employment Relations Commission (MERC) certified a union to represent over 40,000 home-based child care providers, called Child Care Providers Together Michigan (Union). When the Council and the Union entered into a collective bargaining agreement, the parties agreed to have DHS withhold union dues from members' subsidy checks received for providing home-based child care. DHS began deducting these dues in January 2009.

On September 16, 2009, Plaintiffs Sherry Loar and Dawn Ives filed an original action in this Court seeking a writ of mandamus to stop DHS from deducting union dues from their home-based child care subsidy payments. Plaintiffs allege that the Union was improperly formed because it did not have the state legislature's approval. Plaintiffs further assert that the Mott/DHS interlocal agreement created a "shell corporation"- the Council- to improperly act as the "employer" of the state's home-based child care providers.

Plaintiffs, however, completely fail to articulate the requisite elements of mandamus in their Complaint. Plaintiffs fail to allege facts showing what clear legal right they assert, or what clear legal duty DHS has to discontinue withholding union dues. Nor does the Complaint establish the ministerial nature of DHS's action, or the lack of any adequate legal or equitable remedy. Accordingly, Plaintiffs' complaint for a writ of mandamus should be dismissed under MCR 2.116(C)(8).

Additionally, despite calling the action a "Complaint for Writ of Mandamus," the true nature of Plaintiffs' complaint is an action seeking declaratory and injunctive relief. Plaintiffs want this Court to declare that it is unlawful for DHS to deduct union dues from their subsidy

checks and seek to enjoin DHS from withholding dues. This Court, however, lacks original jurisdiction over actions for declaratory or injunctive relief. Moreover, in order for this Court to determine whether Plaintiffs are entitled to their relief, this Court must address various legal rights and obligations of parties who have not been named in this action -- those whose presence are necessary to afford complete relief. And, Plaintiffs failed to exhaust their available remedies, because they never filed any claim with MERC regarding the matters challenged in this lawsuit. Accordingly, dismissal under MCR 2.116 (C)(4) is also proper.

### Statement of Facts

For purposes of this Motion, this Court must accept all factual allegations in Plaintiffs' Complaint as true. On July 27, 2006, the Department of Human Services (DHS) and Mott Community College (Mott) entered an interlocal agreement to create the Michigan Home Based Child Care Council (Council) (Complaint, ¶ 18). The express purpose of the Council included coordination of "providing effective, efficient, and stable child care, offering training to [home-based child care] Providers, and providing public sector payments to Providers" (Complaint, Exhibit 8, Interlocal Agreement, § 2.01, p 6). Section 6.10 of the agreement states that the Council has the right to collectively bargain and enter into agreements with labor organizations (Complaint, ¶ 21).

In September 2006, an entity called Child Care Providers Together Michigan (Union) filed a petition with the Michigan Employment Relations Commission (MERC) seeking to represent a bargaining unit comprised of all home-based child care providers receiving reimbursement payments from the Michigan Child Development and Care Program and other programs (Complaint, ¶ ¶ 22-23). In November, 2006, MERC certified the Union (Complaint, ¶ ¶ 26). After MERC's certification, the Council and the Union entered into a collective bargaining agreement. In the agreement, the parties agreed to have DHS withhold union dues from members' subsidy checks they receive for providing home-based child care (Complaint, ¶ ¶ 27-30).

Plaintiffs are home-based child care providers who "had 'union dues' removed from subsidy checks," beginning in January 2009 (Complaint, ¶ ¶ 31-33). Plaintiffs filed their complaint for mandamus on September 16, 2009, seeking an order to "stop taking 'union dues' from their checks."



### Standard of Review

Because Plaintiffs filed an original action in this Court, there is no lower court ruling to review. In such situations, this Court applies the same standards a trial court would use to decide a motion brought pursuant to MCR 2.116.<sup>1</sup> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings<sup>2</sup> and is based on a review of the pleadings alone.<sup>3</sup> A motion under MCR 2.116(C)(8) should be granted where, as a matter of law, the claims alleged are clearly unenforceable and no possible factual development could justify recovery.<sup>4</sup> If the plaintiffs' allegations fail to state a legal claim, summary disposition pursuant to MCR 2.116(C)(8) is appropriate.<sup>5</sup> A pleading that fails to allege each element of the claim is deficient and must be dismissed under MCR 2.116(C)(8).<sup>6</sup> In addition, a claim must be dismissed where it fails to allege a factual basis for each element of the claim.<sup>7</sup>

A motion for summary disposition under MCR 2.116(C)(4) is appropriate when the court lacks subject matter jurisdiction.<sup>8</sup> The Supreme Court has held that, "[w]hen a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void."<sup>9</sup> Summary disposition for lack of jurisdiction under MCR 2.116(C)(4) is

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<sup>1</sup> See *Wayne County Bd of Comm'rs v Wayne County Airport Auth*, 253 Mich App 14, 19-20; 658 NW2d 804 (2002).

<sup>2</sup> *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 49; 693 NW2d 149 (2005).

<sup>3</sup> *Meadows v Detroit*, 164 Mich App 418, 426; 418 NW2d 100 (1987).

<sup>4</sup> *Gerling Konzern*, 472 Mich at 49.

<sup>5</sup> *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993).

<sup>6</sup> *Whispering Pines AFC, Home v Department of Treasury*, 212 Mich App 545, 554; 538 NW2d 452 (1995); *Lansing Schools Educational Ass'n v Lansing Bd of Education*, 282 Mich App 165, 173, 177; \_\_\_ NW2d \_\_\_ (2009).

<sup>7</sup> *Merillat v Michigan State University*, 207 Mich App 240, 248; 523 NW2d 802 (1994); *Eichhorn v Lamphere School Dist*, 166 Mich App 527, 546; 421 NW2d 230 (1988).

<sup>8</sup> *Papas v Michigan Gaming Control Bd*, 257 Mich App 647, 657; 669 NW2d 326 (2003).

<sup>9</sup> *Fox v Board of Regents*, 375 Mich 238, 242; 134 NW2d 136 (1965).

proper when plaintiffs have failed to exhaust their administrative remedies.<sup>10</sup> Because this Court lacks jurisdiction over the present case, it should be dismissed pursuant to MCR 2.116(C)(4).

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<sup>10</sup> *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000).

## Argument

- I. Under Michigan law, plaintiffs must give defendants proper notice of their claim by pleading all of the elements of the claim and supporting them with factual allegations. Where plaintiffs fail to provide such notice, a dismissal under MCR 2.116(C)(8) is proper. Plaintiffs' Complaint for mandamus fails to state the elements of mandamus in their Complaint and their supporting brief fails to argue how the elements entitling them to mandamus have been satisfied in the present case. Therefore, this Court should dismiss Plaintiffs' claim for mandamus relief.

The purpose of a complaint is to inform the defendant of the claims against which it must defend.<sup>11</sup> Accordingly, a complaint must "apprise a defendant of the specific nature" of the action.<sup>12</sup> Essentially, a plaintiff must plead a *prima facie case*.<sup>13</sup> To that end, Michigan law requires a plaintiff, in a complaint, to plead each element of an action.<sup>14</sup> The failure to establish the elements of the claim mandates dismissal.<sup>15</sup>

A complaint, however, cannot make merely conclusory allegations on the elements of the claim.<sup>16</sup> A complaint that merely makes conclusory allegations must be dismissed.<sup>17</sup> Rather, a claim must allege a factual basis for each element of the claim.<sup>18</sup> Where a plaintiff fails to allege specific facts in support of each element of a claim, the action must be dismissed.<sup>19</sup> A complaint

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<sup>11</sup> *Hill v Freeman*, 117 Mich App 788, 792; 324 NW2d 504 (1982).

<sup>12</sup> *Hill*, 117 Mich App at 792.

<sup>13</sup> *Centennial Healthcare Mgmt Corp v Michigan Dep't of Consumer Industry Services*, 254 Mich App 275, 285; 657 NW2d 746 (2002); *Crancer v Board of Regents*, 156 Mich App 790, 796; 402 NW2d 90 (1986).

<sup>14</sup> *Berrios v Miles, Inc*, 226 Mich App 470, 473-474; 574 NW2d 677 (1997); *Kauffman v Shefinan*, 169 Mich App 829, 835-834; 426 NW2d 819 (1988); *State ex rel Patterson v Motorama Motel Corp*, 105 Mich App 224, 230; 307 NW2d 349 (1981).

<sup>15</sup> *Whispering Pines*, 212 Mich App at 554; *Lansing Schools Educational Ass'n*, 282 Mich App at 173, 177.

<sup>16</sup> *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006); *Demido v Attorney General*, 100 Mich App 254, 257; 299 NW2d 43 (1980).

<sup>17</sup> *Kloian*, 272 Mich App at 242; *Demido*, 100 Mich App at 257.

<sup>18</sup> *Merillat*, 207 Mich App at 248; *Eichhorn*, 166 Mich App at 546.

<sup>19</sup> *Merillat*, 207 Mich App at 248; *Eichhorn*, 166 Mich App at 546; *Demido*, 100 Mich App at 257.

that fails to establish the elements of mandamus must be dismissed.<sup>20</sup> In fact, the failure to establish even a single element of a claim, including mandamus, results in dismissal.<sup>21</sup>

Mandamus, being an extraordinary remedy, is properly granted only where there is no other legal or equitable remedy that can achieve the same result.<sup>22</sup> Essentially, a party must be bereft of any other means of redress in order for mandamus to be appropriate.<sup>23</sup> The party seeking mandamus relief bears the burden of proving that he or she is entitled to a writ of mandamus.<sup>24</sup>

To establish entitlement to mandamus relief, a Plaintiff must prove four elements<sup>25</sup>:

(1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy.

Despite this clear and readily accessible legal standard, Plaintiffs' Complaint does not specify what clear legal right they assert, or what clear legal duty DHS is required to perform. Nor does it establish the ministerial nature of DHS's action. A ministerial duty is one which the law prescribes and defines the performance with such precision and certainty, as to leave nothing to the exercise of discretion or judgment.<sup>26</sup> Finally, Plaintiffs do not allege the lack of any adequate legal or equitable remedy. The failure to allege any one of these elements or supporting facts, mandates reversal.<sup>27</sup>

In fact, Plaintiffs' Complaint fails to allege *any* of the elements of mandamus, let alone any facts that specifically support those elements. The Complaint even makes sparse mention of

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<sup>20</sup> *White-Bey v Dep't of Corrections*, 239 Mich App 221, 225-226; 608 NW2d 833 (1999).

<sup>21</sup> *Kauffman*, 169 Mich App at 835-834; *Eichhorn*, 166 Mich App at 546.

<sup>22</sup> *White-Bey v Dep't of Corrections*, 239 Mich App 221, 223-224; 608 NW2d 833 (1999).

<sup>23</sup> *Tuggle v Michigan Dep't of State Police*, 269 Mich App 657, 669; 712 NW2d 750 (2005).

<sup>24</sup> *Keaton v Village of Beverly Hills*, 202 Mich App 681, 684; 509 NW2d 544 (1993).

<sup>25</sup> *White-Bey*, 239 Mich App at 223-224.

<sup>26</sup> *Delly v Bureau of State Lottery*, 183 Mich App 258, 260-261; 454 NW2d 141 (1990).

<sup>27</sup> *Kauffman*, 169 Mich App at 835-834; *Eichhorn*, 166 Mich App at 546.

the word "mandamus," which appears only on the title page, in ¶ 1, as a title for Count I on page six and in the concluding paragraph. This wholly deficient Complaint thus fails to even rise to the level of offering merely conclusory allegations. Accordingly, their claim must be dismissed pursuant to MCR 2.116(C)(8).

A motion under MCR 2.116(C)(8) is based on the pleadings alone, which in the present case consists only of the Complaint.<sup>28</sup> Accordingly, Plaintiffs' Brief cannot be relied upon to rebut the present motion. Nonetheless, Plaintiffs' Brief, were it taken into account, would similarly fail to satisfy the (C)(8) standard. Plaintiffs' Brief improves upon their Complaint by actually stating the four elements of a mandamus action, but its discussion of mandamus stops at that point.<sup>29</sup> After that bare recitation of the elements, Plaintiffs make no attempt to argue how those elements have been met in the present case. At best, Plaintiffs' Brief offers conclusory allegations that are insufficient to survive a motion to dismiss under MCR 2.116(C)(8).<sup>30</sup>

**II. Courts are free to look beyond procedural labels to determine the gravamen of an action or the exact nature of the claim. And where this Court lacks jurisdiction over a claim, the only action it may take is to dismiss it. In the present case, Plaintiffs' label their case as an action for mandamus, but the actual claims are for declaratory and injunctive relief. This Court, however, lacks original jurisdiction over declaratory and injunctive claims, especially those claims regarding unnamed necessary parties whose presence is necessary to render complete relief and where they have not exhausted available remedies. Accordingly, this Court should dismiss Plaintiffs' Complaint pursuant to MCR 2.116(C)(4).**

This Court is free to look beyond procedural labels to determine the gravamen of an action or the exact nature of the claim.<sup>31</sup> "A court is not bound by the party's choice of labels for

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<sup>28</sup> *Meadows*, 164 Mich App at 426.

<sup>29</sup> Plaintiffs' Brief, at p 17.

<sup>30</sup> *Kloian*, 272 Mich App at 242; *Demido*, 100 Mich App at 257.

<sup>31</sup> *Parkwood Ltd v State Housing Development Authority*, 468 Mich 763, 744, n 8; 664 NW2d 185 (2003) ("nature of the claim, rather than how the plaintiff phrases the request for relief, controls how a court will characterize the claim"); *Tipton v William Beaumont Hospital*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (same principle applied in medical malpractice context).

the cause of action because to do so would exalt form over substance."<sup>32</sup> Accordingly, this Court must review a complaint as a totality to ascertain the true nature of the claim.<sup>33</sup> The allegations and underlying facts control the nature of the action rather than the label placed on the case by a plaintiff.<sup>34</sup>

Plaintiffs' Complaint actually seeks a declaration that it is unlawful for DHS to deduct union dues from their subsidy checks and asks this Court stop DHS from deducting union dues. Where a party seeks a declaration of legal rights, it is asking for declaratory judgment.<sup>35</sup> Where a party asks a court to stop another party's activity, it is asking for an injunction.<sup>36</sup> Accordingly, this Court must look beyond the label of "Complaint for Writ of Mandamus."<sup>37</sup>

The substance of Plaintiffs' argument and request for relief show that this action is actually for declaratory judgment and injunctive relief. This Court's jurisdiction over original actions, however, is very limited.<sup>38</sup> Based on MCR 7.203, this Court plainly does not have jurisdiction over an action for declaratory judgment or a request for an injunction. Since the only action that this Court can take when it lacks jurisdiction is to dismiss, this case must be dismissed pursuant to MCR 2.116(C)(4).<sup>39</sup>

A. Plaintiffs failed to join necessary parties and, once joined, those parties strip this Court of jurisdiction.

Even if Plaintiffs' Complaint could be fashioned as a mandamus claim, it does not properly belong in this Court because there are other parties whose interests make them

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<sup>32</sup> *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989).

<sup>33</sup> *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 458; 761 NW2d 846 (2008).

<sup>34</sup> *Gorzen v Westfield Ins Co*, 207 Mich App 575, 579; 526 NW2d 43 (1994).

<sup>35</sup> MCR 2.605(A)(1).

<sup>36</sup> *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 199; 378 NW2d 337 (1985).

<sup>37</sup> *Tenneco*, 281 Mich App at 458; *Tipton*, 266 Mich App at 33; *Spruytte*, 82 Mich App at 147; *Gorzen*, 207 Mich App at 579.

<sup>38</sup> MCR 7.203.

<sup>39</sup> *Fox*, 375 Mich at 242.

necessary to this action and whose claims must therefore be joined and litigated. Plaintiffs premise this Court's jurisdiction on MCR 7.203(C)(2) and MCR 3.305(A)(1), which grant this Court jurisdiction over an original action for mandamus action against a state officer.<sup>40</sup> If the action involves a party other than a state officer, however, it "must be brought in the Circuit Court."<sup>41</sup> Accordingly, once the necessary parties have been joined, this Court will no longer have jurisdiction pursuant to MCR 3.305(A)(2).

Before a Court can address Plaintiffs' claims, there must be a determination of legal obligations and legal rights of the Council, the Union, members of the Union and MERC relative to union representation and the terms of the collective bargaining agreement. These parties have a significant stake in the outcome of this litigation and are necessary to fully litigate the claims raised in Plaintiffs' Complaint. For example, the declaratory relief challenges the validity of MERC's certification of the child care providers' votes authorizing the Union to be their exclusive representative. The injunctive relief sought challenges the collective bargaining agreement between the Union and the Council, which requires DHS to deduct the union dues from the subsidy checks. Any relief for Plaintiffs may violate the legal rights of the home-based child care providers who voted in favor of union representation.

Even if the Complaint could be properly framed as a mandamus action, it is not truly an action against a state officer because of the legal interests of necessary parties that form the basis of the claim. Plaintiffs failed to join parties whose presence is essential to the Court rendering

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<sup>40</sup> Defendants do not concede their claim that this Court lacks jurisdiction based on the present case being an action for declaratory and injunctive, rather than mandamus, relief.

<sup>41</sup> MCR 3.305(A)(2).

complete relief. These parties are necessary and thus must be joined.<sup>42</sup> And once they are joined, this Court is thereby stripped of jurisdiction under MCR 3.305(A)(2).

B. Plaintiffs failed to exhaust their available remedies, mandating dismissal for lack of jurisdiction.

The Public Employee Relations Act (PERA) gives MERC the exclusive job of determining appropriate bargaining units for public employees.<sup>43</sup> MERC's exclusive jurisdiction over bargaining unit composition is well settled.<sup>44</sup> Moreover, the Legislature vested the authority for determining unfair labor practices under the PERA in MERC.<sup>45</sup> And case law is clear that jurisdiction to decide claims of unfair labor practices lies with MERC.<sup>46</sup>

Here, Plaintiffs do not allege they filed any claim with MERC regarding the matters challenged in this lawsuit. While Plaintiffs' Complaint appears to challenge MERC's 2006 certification of a union representing home-based child care providers, they waited three years to bring this present action. If Plaintiffs, who are members of the Union, claim that the deduction of dues somehow constitutes an unfair labor practice or that the union breached its duty of fair representation, they were required to file their claim six months after discovery.<sup>47</sup> Such actions must be brought either before MERC or in Circuit Court.<sup>48</sup> The Michigan Supreme Court has recognized that divesting MERC of its jurisdiction over unfair labor claims would not only "seriously erode[]" MERC's jurisdiction, but the resulting conflicting decisions of the courts and

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<sup>42</sup> MCR 2.205.

<sup>43</sup> MCL 423.213

<sup>44</sup> *St. Clair Intermediate School Dist v Intermediate Education Ass'n*, 458 Mich 540, 581 NW2d 707 (1998) (MERC has "exclusive jurisdiction" over unfair labor practices with respect to bargaining policy).

<sup>45</sup> MCL 423.216.

<sup>46</sup> *Kent County Deputy Sheriff's Assoc v Kent County Sheriff*, 463 Mich. 353, 359; 616 NW2d 677 (2000). See also *Labor Mediation Board v Jackson County Road Commissioners*, 365 Mich 645; 114 NW2d 183 (1962); *Lamphere Schools v Lamphere Federation of Teachers*, 400 Mich. 104, 118; 252 NW2d 818 (1977).

<sup>47</sup> *Silbert v Lakeview Education Ass'n, Inc*, 187 Mich App 21, 25; 466 NW2d 333 (1991).

<sup>48</sup> *Demings v City of Ecorse*, 423 Mich 49; 377 NW2d 275 (1985).



MERC would only "further confuse labor relations in the public sector," and "seriously undercut[] the statutory responsibility given to the MERC."<sup>49</sup> Accordingly, due to Plaintiffs' failure to exhaust their available remedies, Plaintiffs' Complaint must be dismissed pursuant to MCR 2.116 (C)(4) for this reason as well.

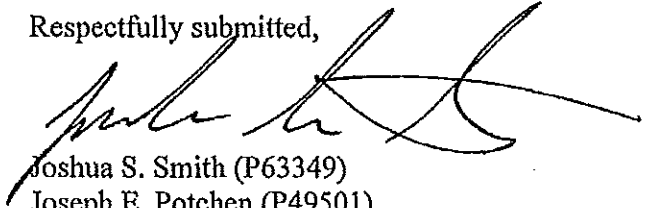
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<sup>49</sup> *Lamphere*, 400 Mich at 119.

Conclusion

Defendants Michigan Department of Human Services and Ismael Ahmed respectfully request that this Court dismiss Plaintiffs' Complaint because it fails to state a claim for mandamus on which relief can be granted and because this Court lacks jurisdiction.

Respectfully submitted,



Joshua S. Smith (P63349)  
Joseph E. Potchen (P49501)  
Assistant Attorneys General  
Attorneys for Defendants  
Health, Education & Family Services  
Division  
525 W Ottawa St Fl 3  
PO Box 30758  
Lansing, MI 48909  
517-373-7700

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