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ROY NAKADEGAWA and
TRANSPORTATION SOLUTIONS
DEFENSE AND EDUCATION FUND

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

SHERMAN LEWIS, an individual; ROY
NAKADEGAWA, an individual; and
TRANSPORTATION SOLUTIONS DEFENSE AND
EDUCATION FUND, a California non-profit public
benefit corporation,

Plaintiffs,

vs.

CASE NO.:

DECLARATION OF THOMAS A.
RUBIN

METROPOLITAN TRANSPORTATION
COMMISSION, a California state commission; STEVE
HEMINGER, Executive Director of Metropolitan
Transportation Commission; BRIAN MAYHEW, Chief
Financial Officer of Metropolitan Transportation
Commission; BAY AREA TOLL AUTHORITY, a
California state commission; ANDREW B. FREMIER,
Deputy Executive Director of Bay Area Toll Authority;
ALAMEDA COUNTY TRANSPORTATION
IMPROVEMENT AUTHORITY, a local government
entity; CHRISTINE MONSON, Executive Director of
Alameda County Transportation Improvement
Authority; TESS LENGYEL, Programs and Public
Affairs Manager for Alameda County Transportation
Improvement Authority; ANEES AZAD, Finance and
Administration Manager for Alameda County
Transportation Improvement Authority; and DOES 1
through 10, inclusive,

Defendants.

_____ /

I, THOMAS A. RUBIN, declare as follows:

1. I am a Certified Public Accountant in the State California and have been a self-employed Consultant, specializing in governmental surface transportation, finance, operations, and construction, since June of 1996. I hold professional certifications as a Certified Government Financial Manager, Certified Internal Auditor, Certified Management Accountant, Certified Management Consultant, and Certified in Financial Management.

2. I served as Controller-Treasurer (Chief Financial Officer) of the Southern California Rapid Transit District (SCR TD) from June, 1989, until April of 1993 when the district merged into the entity now known as The Los Angeles County Metropolitan Transit Authority (MTA). I continued as an MTA employee until June of 1994. As a Board-appointed and Board-accountable officer of SCR TD, my duties included responsibility for almost two hundred million dollars (\$200,000,000) a year in expenditures, responsibility for the accounting and finance, human resources, management information systems, office of management and budget, risk management, and treasury activities, with a staff of over three hundred (300) managers, professionals, and support staff.

3. The financial and planning activities of the District that I managed or had a major role in the preparation of the District's short and long range operating, capital, and financial plans and budgets.

4. From July of 1995 to June 1996 I was Assistant General Manger – Finance of the Alameda-Contra Costa Transit District (AC Transit). In this position I directed a staff of over one hundred (100) professional and clerical staff members responsible for all financial and accounting activities of the district, financial elements of short-range financial plans, plus monitoring of performance measures, as well as budgeting, employee benefits and pensions, information technology, procurement and stores, risk management, and treasury functions. The district – as well as SCR TD – was one of a handful of transit operators to receive the Government Finance Officers Association (GFOA) award for distinguished budget presentation.

5. From 1976 to 1989, I founded and directed the mass transit industry practice of what was then Deloitte Haskins & Sells (now Deloitte & Touche, LLP), which I grew to the largest consulting and auditing practice of its type, including personally selling over \$100 million of professional services and directing projects for well over 100 transit and transportation agencies. Among many other projects, I have prepared financial forecasts for the official statement for a seven hundred and seven million dollar (\$707,000,000) bond

issue for the Los Angeles County Transportation Commission. This was the second largest bond issue in the history of the United States' mass transit industry at the time.

6. I have prepared a long-term capital/operating/finance model and study for the Metropolitan Transportation Commission (MTC).

7. I have developed a manual for the National League of Cities on applying financial capacity analysis to city-owned and operated transit systems.

8. I have prepared a financing study on methods of financing rail system expansions through non-traditional ventures for the San Francisco Bay Area Rapid Transit District (BART).

9. I have prepared a long-term capital/operating financial analysis and modeling sales tax forecast for the placement of fifty-eight million seven hundred thousand dollars (\$58,700,000) of equipment trust certificates to help finance a light rail project for the Santa Clara County Transit District, the predecessor of the Santa Clara Valley Transportation Authority (VTA).

10. I prepared a study of surface transportation financing for the Transportation 2000 Project for the Santa Clara County Transportation Authority, another predecessor agency of VTA.

11. I have managed or had a major role in performance audits of several major transit systems and planning organizations, including the Chicago Transit Authority, Los Angeles County Transportation Commission, Metra (commuter rail transit operator for greater Chicago area), Metropolitan Transportation Commission (transportation planning/funding agency for nine-county San Francisco Bay Area), Miami-Dade Transportation Authority, Pace (transit operator for Chicago suburbs), Regional Transportation Authority (transit planning/funding agency for greater Chicago area), San Francisco Municipal Railway, Southern California Association of Governments, and TheBus (transit operator for Honolulu).

12. I served as an expert witness in the case of Raymond Veltman v. State of California. This lawsuit was brought to require a return of fifty million dollars (\$50,000,000) of Transportation Development Act Sales Tax Funds that were transferred from the Los Angeles County Metropolitan Transportation Authority to the County of Los Angeles.

13. I served as an expert witness in the case of Rex Foreman v. City of Los Angeles. That case involved a claim that the City of Los Angeles had improperly utilized special

parking revenue fund monies for purposes not allowed by the city ordinance that authorized creation of the fund.

14. I have assisted the cities of Fremont and Newark in analyzing the allocation of revenues, cost, and transit services to their cities over a multi-year period by the Alameda-Contra Costa Transit District in accordance with an annexation agreement.

15. In over 25 years as an auditor and consultant, specializing in the governmental surface transportation, I have served over 100 transit operators of all types, modes, and sizes throughout North America with a wide variety of projects. These clients include virtually all of the major transit operators and many of the smaller ones in the Bay Area.

**Alameda County Transit Improvement Authority Measure B funding.
BART/Warm Springs Extension Project.**

16. I have personal knowledge that the Santa Clara Valley Transit Authority (VTA) is planning on using grant funds under a federal program known as “New Starts” under the authority of 49 U.S.C 5309 in order to pay for part of the costs of the Silicon Valley Rail Transit Project which will extend BART to Santa Clara County. The VTA anticipates that 12% of the funding will come from “federal New Starts” grants. This is shown on the VTA website entitled “Project Overview – Capital Funding”. A graph shows that 12% of the funding came from Federal New Starts funds. A true and correct copy of Project Overview – Capital Funding is marked Exhibit A, attached here and incorporated by this reference.

17. In order for any agency to obtain federal New Starts funding, a contractual commitment must be obtained from the federal government. The procedure which must be followed to obtain this commitment, at a minimum, requires the execution of what is known as a full-funding grant agreement. (“FFGA”) Prior to executing and entering into a FFGA, an environmental impact statement (“EIS”) must be completed and adopted and a record of decision (“ROD”) must be obtained. These requirements are set out in a Circular Capital Investment Program Guidance and Application Instruction published by the U. S. Department of Transportation, Federal Transit Administration FTAC-9300.1(b). The current version, dated November 1, 2008, is available on-line. Pertinent portions are marked as Exhibit B and incorporated here by reference. Chapter 5. “New Starts/Small Starts Program,” shows the requirements for an EIR and ROD..

18. Page V-13 of the Capital Investment Program Guidance and Application Instructions confirms in paragraph 14 that for full funding agreements: the Federal Transit Administration uses a fully-funded grant agreement or a project construction grant agreement (PCGA) in providing federal financial assistance for construction of New Starts projects. Paragraph 14 reads as follows:

“14. FULL FUNDING GRANT AGREEMENT (FFGA) PROJECT CONSTRUCTION GRANT AGREEMENT (PCGA). FTA uses an FFGA or a PCGA in providing Federal financial assistance for construction of New Starts and Small Starts projects, respectively.”

A true and correct copy of this provision is attached as Exhibit B and incorporated here by reference.

19. The anticipated federal funding for the BART extension via the Silicon Valley Rail project is New Starts funds. A fully-funded grant agreement is the requisite contractual instrument in order for such funds to be provided. Accordingly, the applicable environmental clearance document for BART to Silicon Valley is an environmental impact statement. This requires a record of decision to be issued by the Department of Transportation.

20. A record of decision is defined in 27 CFR 771.127, which specifies:

“(a) the Administration will complete and sign a record of decision (ROD) no sooner than 30 days after publication of the final EIS notice in the FEDERAL REGISTER or 90 days after publication of a notice for the draft EIS, whichever is later. ... Until any required ROD has been signed, no further approvals may be given except for administrative activities taken to secure further project funding and other activities consistent with 40 CFR 1506.1”

21. Page V-14 of the Capital Investment Program Guidance and Application Instructions states as follows:

“Hence, FTA [Federal Transit Administration] will not enter into a FFGA/PCGA, until the environmental review process is complete (CE, FONSI, or ROD [Categorical Exception/Finding of No Significant Impact/Record of Decision]).”

A true and correct copy of page V-14 is marked Exhibit B, attached and incorporated by this reference.

22. The VTA website shows that the Environmental Impact Statement process has not been completed. Attached here and incorporated by this reference as Exhibit C from the VTA website under heading “Project Development – Environmental “the revised draft EIS as scheduled for release in early 2009.”

The VTA website also shows that final federal environmental documentation is anticipated in the Summer of 2009. Therefore a final EIS for BART to Santa Clara County has not yet been adopted.

23. Based on the above document obtained from the Valley Transit web site, and a Google search of the internet/worldwide web for any reference to the issuance of a draft or the adoption of a final revised EIS for this project, I conclude that the revised draft environmental impact statement (RDEIS) for the BART to San Jose project has not yet been released. Accordingly, it appears that the revised final EIS has not yet been adopted by the VTA nor a record of decision issued by the United States Department of Transportation.

24. Since VTA’s financial plan for BART to Silicon Valley is dependent upon significant Federal “New Starts” funding, which requires a FFGA in this regard, and sine having a Record of Decision on the EIS for the project is a requirement for receiving a FFGA, and since VTA has not yet released the Draft EIS, VTA does not currently have any enforceable agreement with the Federal government to provide such funding and, therefore, the condition that “full funding for the rail connection to Santa Clara County is assured” has not been satisfied.

25. A FFGA is a document issued by the Executive Branch of the Federal Government and is not an appropriation of Federal funds, which can only be done by the Legislative Branch of the Federal Government (Constitution, Article I, Section 8). Even with a FFGA agreement, there is no absolute assurance that the funding in the FFGA will be provided. Congress is under no obligation to honor a FFGA entered into by the Executive Branch of the Federal Government. I am aware of two “new starts” funded projects where this, in fact, occurred: the Los Angeles County Metropolitan Transportation Authority Red Line MOS-3 East Side and the Central Puget Sound Regional Transit Authority (dba “Sound Transit”) Central Link. In both cases, FFGA agreements were

issued, but later cancelled, and no funding for these projects was allocated from the Federal government under these voided FFGAs..

26. Accordingly, it is my opinion that ACTIA does not have the power to allocate funds for the BART to Warm Springs project at this time inasmuch as ACTIA Measure B Transportation Expenditure Plan provision, “Funds for construction of the first segment of the BART rail extension to Warm Springs in southern Fremont may not be used until full funding for the rail connection to Santa Clara County is assured” has not been satisfied..

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that if called to testify I could competently do so. This declaration is executed in the County of Los Angeles, State of California on the date set forth below.

Dated: February _____, 2009.

THOMAS A. RUBIN