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Transportation Solutions Defense and Education Fund
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8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SACRAMENTO**

10 TRANSPORTATION SOLUTIONS
DEFENSE AND EDUCATION FUND, a
11 California nonprofit corporation,

12 Petitioner

13 vs.

14 CALIFORNIA AIR RESOURCES BOARD,
an agency of the State of California, and
DOES 1-10, inclusive,

15 Respondents

No. 34-2014-80001974-CU-WM-GDS

Action under the California Environmental
Quality Act

Assigned for all purposes to Hon. Shelleyanne W.
L. Chang, Dept. 24

**PETITIONER'S OBJECTIONS TO
RESPONDENT'S REQUEST FOR JUDICIAL
NOTICE**

16 Date: March 17, 2017

17 Time: 10:00 AM

18 Dept. 24

Judge Hon. Shelleyanne W.L. Chang

19 Case Filed: June 23, 2014

Trial Date: March 17, 2017

20 Petitioner Transportation Solutions Defense and Education Fund ("Petitioner") hereby
21 objects to Respondent California Air Resources Board's Request for Judicial Notice in Support
22 of Opposition Brief ("ARB RJN"). More specifically, Petitioner objects to ¶ 5 of said ARB RJN
23 and Exhibit 5 attached thereto.

24 ARB cites to the letter contained in Exhibit 5 to the ARB RJN in support of its claim for
25 the adequacy of the environmental assessment for the Updated Scoping Plan. (ARB Opposition
26 at p. 16.) It claims that the letter is entitled to judicial notice under Evidence Code § 452(h),
27 which allows judicial notice of facts that are not reasonably subject to dispute. Petitioner
28 acknowledges that it is not subject to dispute that TRANSDEF sent a letter to CHSRA
29

1 commenting on the Project-level EIR for the Fresno-Bakersfield high-speed rail segment.
2 However, while the Court may generally take judicial notice of facts not subject to dispute,
3 judicial notice is only proper when the fact or document is relevant to an issue before the Court.
4 Under *Western States Petroleum Assn. v. Superior Court* (“*Western States*”) (1995) 9 Cal.4th
5 559, 573 fn. 4, “[I]t would *never* be proper to take judicial notice of evidence that (1) is absent
6 from the administrative record, and (2) was not before the agency at the time it made its
7 decision.” [emphasis added]. *Western States* went on to explain that a court may only take
8 judicial notice of relevant evidence, and when the issue is the validity of an agency’s quasi-
9 legislative decision, the only relevant evidence is evidence that is either within the administrative
10 record or was before the agency at the time it made its decision. (*Id.*)

11 It is beyond dispute that TRANSDEF’s May 5, 2014 letter to CHSRA is not part of the
12 administrative record for this case. Nor has ARB presented any evidence (and Petitioner
13 believes that there is none) to show that the letter was “before the agency at the time it made its
14 decision.” While it may be proper to ask the Court to take judicial notice of facts or documents
15 that do not meet these criteria when notice is sought on issues other than the agency’s quasi-
16 legislative decision (*See, Id.* at p. 575 fn. 5), that is not the case here. Judicial notice must
17 therefore be denied.

18 Dated: February 22, 2017

19 Respectfully submitted,

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Stuart M. Flashman
22 Attorney for Petitioner
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