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EXEMPT FROM FEES PER GOVERNMENT CODE §6103

Attorneys for Plaintiffs
JOHN TOS; AARON FUKUDA;
AND COUNTY OF KINGS

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

JOHN TOS, AARON FUKUDA, and COUNTY OF KINGS,
Plaintiffs

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY *et al.*,
Defendants

No. 34-2011-00113919 filed 11/14/2011
Judge Assigned for All Purposes:
HONORABLE MICHAEL P. KENNY
Department: 31

NOTICE OF MOTION AND MOTION TO COMPEL FURTHER RESPONSES; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Date: May 29, 2015
Time: 9:00 AM
Dept. 31
Judge: Hon. Michael P. Kenny
Trial Date: Not Yet Set

TO ALL PARTIES OF RECORD HEREIN AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 29, 2015, at 9:00 AM or as soon thereafter as the matter may be heard in Department 31 of the above-entitled Court, located at the 720 Ninth Street, Sacramento, California, Plaintiffs John Tos *et al.* ("Plaintiffs'), will move the Court for an order compelling Defendants California High-Speed Rail Authority *et al*. ("Defendants") to further respond to discovery requests propounded by Plaintiffs in this case.

This motion is made on the grounds that discovery is proper in this case, that Defendants have resisted the requested discovery, and that the discovery requests for which responses are

requested are relevant to the subject matter involved in this case and the responses will either be admissible evidence or are reasonably calculated to lead to the discovery of admissible evidence.

This motion is based on this Notice, the accompanying Memorandum of Points and Authorities, the accompanying Declarations, the complete files of this case, and on any evidence or argument which the Court may entertain at the hearing on this motion.

Pursuant to Local Rule 3.04, the court will make a tentative ruling on the merits of this matter by 2:00 p.m., the court day before the hearing. To receive the tentative ruling, call the department in which the matter is to be heard at 448-8239 (Department 53) or 448- 8234 (Department 54) or 874-6353 (Department 31). If you do not call the court and the opposing party by 4:00 p.m. the court day before the hearing, no hearing will be held. The text of the tentative ruling may also be accessed at the Court's website: http://www.saccourt.com/courtrooms/trulings/dept31view.asp.

Dated: May 4, 2015

Michael J. Brady

Law Offices of Stuart M. Flashman
Stuart M. Flashman

Attorneys for Plaintiffs Jon Tos *et al*.

By: Stuart M. Flashman
Stuart M. Flashman

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The motion is brought to compel Defendants to respond to discovery requests, consisting of requests for admissions and form interrogatories, that were propounded and served over two years ago. Defendants initially responded by objections, but did not provide any substantive responses. After meeting and conferring, counsel agreed to defer any further demands for responses until the initial mandamus phase of the case was fully and finally decided. That did not happen until February of this year, when the Court filed its order vacating its prior order granting a writ of mandate.

Subsequent to that action, Plaintiffs renewed their request for responses to their discovery requests. After months of delay, Defendants eventually flatly refused to provide any responses, asserting that no discovery was allowed in this case. Consequently, Plaintiffs have no choice but to seek the Court's order compelling Defendants to respond.

STATEMENT OF FACTS

The facts underlying this motion are fairly simple, as are the issues involved. As the Court is aware, this portion of the case involves four issues: 1) Does Defendants' proposed high-speed rail project comply with Proposition 1A's requirement that it be consistent with the project described in the 2005 and 2008 EIRs for the project; 2) Does Defendants' proposed high-speed rail project comply with the 2 hour 40 minute nonstop travel time requirement for travel between San Francisco and Los Angeles, as prescribed in Streets & Highways Code § 2704.09(b)(1) of Proposition 1A; 3) Is Defendants' proposed high-speed rail project financially viable, including not requiring an operating subsidy, as required by Streets & Highways Code § 2704.09(c)(2)(J), and 4) If any of 1) through 3) is not satisfied, does the expenditure of federal grant funds on a project that cannot be completed constitute a wasteful expenditure of public funds under Code of Civil Procedure § 526a?

On February 13, 2013, Plaintiffs served on counsel for Defendants discovery requests consisting of thirty-five requests for admissions and related form interrogatories.[1] (Exhibits A and B to the Declaration of Michael J. Brady in Support of Motion to Compel ("Brady Decl.").)

[1] Specifically, Interrogatories 1.0 and 17.1.

On March 19, 2013, Defendants served their responses, which consisted solely of objections. (Exhibits C and D to Brady Decl.)

With a hearing on Plaintiff's Motion for Peremptory Writ of Mandate pending, and recognizing that some, if not all, of the interrogatories might be rendered moot by the decision on that motion, the parties orally stipulated that Plaintiffs would not insist on any further response to the discovery requests until at least fifteen days after the motion for the peremptory writ was finally decided. (Brady Decl., ¶ 4.)

Further proceedings, both in the trial court and in the Third District Court of Appeal ultimately led, near the beginning of this year, to the Court entering an order vacating its prior order granting a writ of mandate. Subsequently, Plaintiffs renewed their request for responses to the discovery requests. (Declaration of Stuart M. Flashman in Support of Motion to Compel ("Flashman Decl."), ¶ 3.)

Defendants initially questioned whether the discovery requests were still relevant, given the court of appeal's ruling. (Flashman Decl., ¶ 3.) Plaintiffs reviewed their requests and agreed to withdraw a number of them as no longer relevant. Id., ¶ 3 and Exhibit A.) Plaintiffs insisted, however, that portions of the discovery requests were relevant to the still-pending claims and needed to be responded to. (Id.)

After several reminders for Plaintiffs, Defendants finally responded by asserting that the case was a mandamus action that would be decided based entirely on an administrative record and therefore discovery could not be had. (Exhibit B to Flashman Decl.) That assertion has prompted this motion to clarify whether discovery, and specifically Plaintiffs' long-pending discovery requests, is allowable and proper.

ARGUMENT

I. IN A CASE SUCH AS THIS, DISCOVERY IS PROPER.

A. DISCOVERY IS PROPER IN A CASE BROUGHT UNDER CODE OF CIVIL PROCEDURE §526a.

Plaintiffs' Second Amended Complaint for Declaratory Relief; for Mandamus/ Prohibition; for Relief pursuant to 526a; for Preliminary and Permanent Injunctive Relief; for Relief under the Private Attorney General Doctrine ("SAC") included claims not only for mandamus, injunctive, and declaratory relief, but also, under C.C.P. §526a, for injunctive relief

based on actual and threatened illegal and wasteful expenditure of public funds. (See, SAC, introductory paragraph, ¶¶ 2, 12, 16, 18. 19, and 69, and Prayer for relief, ¶3.) It is well established that in a challenge to expenditures under C.C.P. §526a, evidence is not limited to an administrative record unless the agency actions involved are limited to formal actions subject to mandamus relief. (*See, e.g., Van Atta v. Scott* (1980) 27 Cal.3d 424, 433 [case under C.C.P. §526a decided after seven-day bench trial]; *Common Cause v. Bd. Of Supervisors* (1989) 49 Ca.3d 432, 437 [in case under C.C.P. §526a, plaintiffs and defendants submitted statistical evidence and declarations on motion for injunctive relief]; *Hayward Area Planning Association v. Alameda County Transportation Authority ("HAPA")* (1999) 72 Cal.App.4th 95, 110 fn.9 [case remanded for trial on disputed factual issues]; *but see*, *Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013 [where agency's formal administrative decision triggered §526a claim, case decided based on administrative record]; *see also*, *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 775 [in administrative mandamus action, discover generally not appropriate to seek to discover evidence outside of administrative record].)

Once it is clear that a case is not being decided based solely on an administrative record, it is equally clear that discovery is not limited to the circumstances set forth in C.C.P. §1094.5(e), or the corresponding rationale set forth in *Western States Petroleum Assn. v. Superior Court ("WSPA")* (1995) 9 Cal.4th 559. (*See, e.g., Stockton Citizens for Sensible Planning v. City of Stockton ("Stockton Citizens")* (2010) 48 Cal.4th 481, 493 fn. 4; *California Oak Foundat. v. Regents of Univ. of California* (2010) 188 Cal.App.4th 227, 254-256.)

B. EVEN IF THIS CASE IS CONSIDERED AS ONE FOR DECLARATORY OR MANDAMUS RELIEF, DISCOVERY IS STILL PROPER.

Defendants have argued that C.C.P. §526a is not a cause of action, but only a basis to allow taxpayer standing. Even if that were true (which Plaintiffs do not concede), Plaintiffs would still be entitled to pursue discovery, given the nature of this case.

1. DISCOVERY IS PROPER IN AN ACTION FOR DECLARATORY RELIEF.

Plaintiffs' SAC explicitly asserted claims for declaratory relief under Code of Civil Procedure §1060. Plaintiffs assert that there is a present controversy between themselves and Defendants over whether the high-speed rail system that Defendants have chosen to construct

complies with the requirements of Proposition 1A. Such a controversy is unquestionably one that may be determined by an action for declaratory relief. (*Shaw v. People Ex Rel. Chiang* (2009) 175 Cal.App.4th 577, 616 [ordering judgment entered declaring legislature's actions invalid as violative of ballot measure provisions].) It is also beyond question that in an action for declaratory relief, discovery is appropriate to elucidate the facts underlying the dispute. (*See, e.g., Grenall v. United of Omaha Life Ins. Co*. (2008) 165 Cal.App.4th 188 [discovery related to declaratory relief claim on insurance policy].)

2. DISCOVERY IS PROPER IN A MANDAMUS ACTION BASED ON VIOLATION OF A MANDATORY DUTY THROUGH INFORMAL DECISIONS.

Even if this action were considered solely as an action in traditional mandamus, discovery would still be appropriate. In *WSPA, supra*, 9 Cal.4th at p.576, the court noted, "However, we will continue to allow admission of extra-record evidence in traditional mandamus actions challenging ministerial or informal administrative actions if the facts are in dispute." In doing so, it was following up on its earlier observation that the available record in cases involving informal or ministerial actions is often inadequate, making acceptance of extra-record evidence appropriate. (*Id*. at p. 575.) Here, as in *Stockton Citize*ns and *HAPA*, *supra*, informal decision-making was involved. Consequently, contrary to Defendants' contention, the record herein should not be limited to an administrative record.

Once the limitation to an administrative record is eliminated, the propriety of conducting discovery is clear. Not only can discovery requests uncover and identify relevant and admissible evidence to be used on the Court's determination of the action, but, particularly in the case of requests for admission such as those at issue in this motion, they can, "eliminate the need for proof in certain areas of the case." (*Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 157.) Thus, as the California Supreme Court long ago observes, they, "are primarily aimed at setting at rest a triable issue so that it will not have to be tried." (*St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 775, quoting from *Cembrook v. Superior Court* (1961) 56 Cal.2d 423, 429.)

II. THE SPECIFIC REQUESTS FOR ADMISSION AND INTERROGATORIES ARE APPROPRIATE.

To begin with, Plaintiffs have, at the request of Defendants, reconsidered the Requests for Admission that were propounded in 2013 and have agreed to drop the following as no longer

being relevant or likely to lead to discovery of relevant and admissible evidence: Numbers 1, 2, 3, 5, 8, 9, 11, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 30, 31, 32, 33, 34, and 35. For the remaining requests for admission, Plaintiffs assert that they are relevant.

Under the California Discovery Act, the scope of discovery is broad and expansive. (Emerson Electric Co. v. Superior Court (Grayson) (1997) 16 Cal.4th 1101, 1108.) That was true in 1996 and is equally true under the revisions of 2004. Here, Plaintiffs have alleged that Defendants' proposed high-speed rail project violates three provisions of Proposition 1A. Those provisions involve: whether the project conforms to the project described in the 2005 and 2005 EIRs; whether it will be financially viable; and whether it will meet the Los Angeles – San Francisco travel time requirements of the measure. In addition, Plaintiffs allege that, if one of these three requirements was not met, the federal grant funds provided to the California High-Speed Rail Authority ("Authority"), $3.2 billion, would not suffice, in the absence of bond funding, to build a useful project, making their expenditure by the Authority a waste of public funds. Thus, any discovery relevant to one of these claims that might lead to admissible evidence would be proper. The basis for each discovery request will be explained in these terms.

RFA #4 - Admit that IOS-South is intended to be a "usable segment"– This is relevant to the question of whether IOS-South, as a usable segment, will be financially viable and a portion of the ultimate route for the Phase I project. This goes to whether Defendants' proposed high-speed rail system will be, in all of its various phases, financially viable.

#6 – Admit that the iCS is not a "usable segment" – This is relevant to confirm that Defendants do not intend to use the ICS as a usable segment. This goes to whether Plaintiffs need to consider the financial viability of operation of the ICS.

#7 – Admit that the ICS will not be used for high-speed rail operation until completion of the IOS-South – This is relevant to confirm that the ICS will not be used for high-speed rail until the IOS-South is completed. This goes to whether Plaintiffs need to consider the financial viability of operation of the ICS

#10 - Admit that cost to construct IOS-South will be $31.3 billion - This is relevant to confirming the cost for completing the IOS-South, which, in turn, goes to the overall cost of construction of the Phase I project, which, in turn, goes to whether that project will be financially viable.

#12 – Admit that there is a funding gap of $25.3 billion to complete the IOS-South – This is relevant to confirming the unavailable construction cost for IOS-South, which, in turn, goes to whether that project will be financially viable..

#13 – Admit that Authority does not have firm commited funds to complete IOS-South – This is relevant to confirming that Defendants do not have funding for completion of a usable segment, which, in turn, goes to whether that project will be financially viable..

#14 – Admit that, until IOS-South is completed, any completed portion of the ICS will noly be used for non-high-speed rail uses – This is relevant to confirm that, pending completion of IOS-South, the ICS will be used for non-high-speed rail (and not for high-speed rail) use. This goes to whether Plaintiffs need to consider the financial viability of operation of the ICS

#23 – Admit that the high-speed rail alignment through Kings, Tulare, and Kern Couthies does not follow existing transportation or utility corridors – This is relevant to confirm the proposed location of the right of way for the ICS through Kings, Tulare, and Kern Counties, which, in turn, goes to both the expected nonstop travel time between Los Angeles and San Francisco and the financial viability of the proposed Phase I project.

#24 – Admit that Defendants' use of the ICS between Madera and north of Bakersfield, prior to the completion of IOS-South will not be financially viable - This is to confirm that Defendants do not contend that operation of the ICS, prior to completion of the IOS-South, will be financially viable.

#28 – Admit that the proposed nonstop high-speed rail service will not be capable of making the trip between San Francisco and Los Angeles Union Station in a time not to exceed two hours and 40 minutes. – This is to determine whether Defendants assert that the proposed Phase I high-speed rail project can meet the nonstop travel time requirement of Streets & Highways Code §2704.09 subd. (b)(1) – one of the central issues in this lawsuit..

#29 – Admit that Defendants are not in possession of any studies or reports demonstrating or confirming that Defendants' proposed nonstop high-speed rail service will be capable of making the trip between San Francisco and Los Angeles Union Station in a time not exceeding two hourse and 40 minutes. – This is to determine whether Defendants admit to having no studies or reports that confirm the ability of Defendants' proposed Phase I high-speed rail project can meet the nonstop travel time requirement of Streets & Highways Code §2704.09 subd. (b)(1), one of the central issues in this lawsuit.

Finally, Form Interrogatories number 1 and 17.0 are relevant in that number 1 will identify who provided the answers and allows Plaintiffs to determine the extent that they have sufficient personal knowledge to provide those answers, and number 17.0 will indicate, for those requests for admissions that are denied, the evidentiary basis for that denial, which will be helpful to Plaintiffs in understanding what evidence Defendants intend to rely upon in their defense against Plaintiffs' claims.

CONCLUSION

Contrary to Defendants' protestations and objections, given the nature of this case, discovery is proper. Further, Plaintiffs' discovery requests are relevant and appropriate to the issues raised in the case. Responses are long overdue, and Defendants should not be allowed to continue to delay completion of discovery. Consequently, Plaintiffs' should be granted and Defendants should be ordered to respond to the substance of the requests as propounded.

Dated: May 4, 2015

Respectfully submitted,

Michael J. Brady

Stuart M. Flashman

Attorneys for Plaintiffs John Tos et al.

By: Stuart M. Flashman

PROOF OF SERVICE BY OVERNIGHT DELIVERY AND ELECTRONIC MAIL

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above-titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On May 4, 2015, I served the within NOTICE OF MOTION AND MOTION TO COMPEL FURTHER RESPONSES; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF STUART M. FLASHMAN IN SUPPORT OF MOTION TO COMPEL FURTHER RESPONSES; DECLARATION OF MICHAEL J. BRADY IN SUPPORT OF MOTION TO COMPEL FURTHER RESPONSES on the parties listed below by depositing true copies thereof enclosed in sealed envelopes with next day delivery charges thereon fully prepaid, at a Federal Express office at Berkeley, California addressed as follows:

Sharon O'Grady,
Office of California Attorney General
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102-7004
Sharon.OGrady@doj.ca.gov

Raymond L. Carlson
Griswold, LaSalle, Cobb, Dowd & Gin LLP
111 East Seventh Street
Hanford, CA 93230
carlson@griswoldlasalle.com

In addition, on the above-same day, I also sent electronic copies of the above-same documents, converted to "pdf" format, as e-mail attachments, to the above-same parties at the e-mail addresses shown above.

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on May 4, 2015.

Stuart M. Flashman