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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, AARON FUKUDA; AND COUNTY OF KINGS, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA, Plaintiffs, **v.** **CALIFORNIA HIGH SPEED RAIL AUTHORITY; JEFF MORALES, CEO OF THE CHSRA; GOVERNOR JERRY BROWN; STATE TREASURER, BILL LOCKYER; DIRECTOR OF FINANCE, ANA MATASANTOS; SECRETARY (ACTING) OF BUSINESS, TRANSPORTATION AND HOUSING, BRIAN KELLY; STATE CONTROLLER, JOHN CHIANG; AND DOES I-V, INCLUSIVE,** Defendants.	Case No. 34-2011-00113919 **DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO PLAINTIFFS' "PART I" OPENING BRIEF IN SUPPORT OF PETITION FOR WRITS OF MANDATE; DECLARATION OF COUNSEL** Date: May 31, 2013 Time: 9:00 a.m. Dept: 31 Judge: Hon. Michael P. Kenny Trial Date: May 31, 2013 Action Filed: November 14, 2011

REQUEST FOR JUDICIAL NOTICE

Defendants request pursuant to Evidence Code section 452 that the Court take judicial notice of eight documents that are relevant to resolution of plaintiffs' petition for writs of mandate in the operative second amended complaint, as specified in the following declaration of defendants' counsel.

The court may take judicial notice of official acts of executive departments of the State of California. (Evid. Code, § 452, subd. (c).) Two of the documents (Exhibits 1 and 3 below) document official acts of defendant California High-Speed Rail Authority (hereinafter "Authority"), the state department authorized to plan and construct the train system. (Pub. Util. Code, § 185032.) Exhibit 1 is a pertinent part of the Authority's Request for Proposal for Design-Build Services (also known as construction package no. 1) to build the first phase of the first segment of high-speed rail to be constructed in the central valley. Exhibit 3 is a memorandum, with an attached technical assessment of travel times for the blended Phase I corridor, from Frank Vacca, Chief Program Manager to defendant Jeff Morales, Chief Executive Officer. Neither document is a part of the administrative record of the underlying proceedings because the documents were produced after the events challenged in plaintiffs' petition for writs of mandate. However, they are relevant to defendants' defense against plaintiffs' writ claims because they show, in the case of Exhibit 1, that work to develop a request for proposal is a planning activity, not a construction activity, and in the case of Exhibit 3, that the blended Phase I corridor can be designed to meet the maximum nonstop travel times required by Proposition 1A.

The court may also take judicial notice of official acts of judicial departments of the State of California. (Evid. Code, § 452, subd. (c).) Six of the documents (Exhibits 2, 4, 5, 6, 7 and 8 below) document official acts of the Superior Court of California, County of Sacramento, in *Town of Atherton, et al v. California High Speed Rail Authority*, Case No. 43-2008-80000022. Exhibits 2, 5 and 7 are written rulings of the court. Exhibits 4, 6 and 8 are the final judgments, or notice of entry of orders issued after these rulings. These documents are not a part of the administrative record because they were not presented to or considered by the Authority in connection with the funding plan which plaintiffs seek to overturn by writ of mandate. However,

defendants ask the court to judicially notice the documents because they show that the Authority's ridership and revenue forecasts for purposes of its environmental analysis were litigated and found to be reliable after a full disclosure of supporting data to the public.

Accordingly, defendants respectfully request that the court grant defendants' request for judicial notice of Exhibits 1-8.

Dated: April 15, 2013

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General

S. MICHELE INAN
Deputy Attorney General
Defendants California High-Speed Rail Authority, Chief Executive Officer Jeff Morales, Governor Edmund G. Brown Jr., State Treasurer Bill Lockyer, Director of Finance Ana Matosantos, Acting Secretary of Business, Transportation and Housing Brian Kelly and State Controller John Chiang

DECLARATION OF COUNSEL

I, S. Michele Inan, declare:

1. I am one of the Deputy Attorneys General assigned to represent the defendants in the above-entitled matter. I have personal knowledge of the matters set forth in this declaration and could competently testify if called as a witness.

2. A true and correct copy of the following documents is attached to this declaration as Exhibits 1 through 6:

Exhibit 1: Pertinent parts of a Request for Proposal for Design-Build Services (also known as construction package no. 1) to construct the first phase of high-speed rail in the central valley. The request for proposal was obtained from the official website of the Authority.

Exhibit 2: Ruling of the Superior Court of California, County of Sacramento, in *Town of Atherton, et al v. California High Speed Rail Authority*, Case No. 43-2008-80000022, filed on August 26, 2009, provided by counsel for the Authority in that proceeding to this counsel.

Exhibit 3: Memorandum from Frank Vacca to Jeff Morales dated February 11, 2013, with an attached written technical assessment of travel times for the blended Phase I corridor, provided by the Authority's Chief Counsel to this counsel.

Exhibit 4: Judgment of the Superior Court of California, County of Sacramento, in *Town of Atherton, et al v. California High Speed Rail Authority*, Case No. 43-2008-80000022, filed November 3, 2009, provided by counsel for the Authority in that proceeding to this counsel.

Exhibit 5: Ruling of the Superior Court of California, County of Sacramento, in *Town of Atherton, et al v. California High Speed Rail Authority*, Case No. 43-2008-80000022, filed August 20, 2010, provided by counsel for the Authority in that proceeding to this counsel.

Exhibit 6: Notice of Entry of Order Denying Petition for Writ of Error Coram Nobis and Motion to Take Discovery, in *Town of Atherton, et al v. California High Speed Rail Authority*, Case No. 43-2008-80000022, filed September 15, 2000, provided by counsel for the Authority in that proceeding to this counsel.

Exhibit 7: Ruling of the Superior Court of California, County of Sacramento, in *Town of Atherton, et al v. California High Speed Rail Authority*, Case No. 43-2008-80000022, filed November 10, 2011, provided by counsel for the Authority in that proceeding to this counsel.

Exhibit 8: Proof of Service of Notice of Entry of Order filed February 14, 2012 in *Town of Atherton, et al v. California High Speed Rail Authority*, Case No. 43-2008-80000022 following the ruling which is Exhibit 7, provided by counsel for the Authority in that proceeding to this counsel.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 15, 2013 at San Francisco, California.

S. MICHELE INAN

SA2011103275

EXHIBIT 1

California High-Speed Train Project

Request for Proposal for Design-Build Services

RFP No.: HSR 11-16
Book 1, Part A: Instructions to Proposers

Revision(s)	Date	Description
0	3/19/2012	Initial Release, R0

Note: Signatures apply for the latest technical memorandum revision as noted above.

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PART A. Instructions to Proposers

1 Introduction and Purpose of Solicitation

1.1 Authority, System and Project Overview

1.1.1 Authority

Established in 1996 by State legislation, the California High-Speed Rail Authority (Authority) has a statutory mandate to plan, build, and operate a high-speed rail system to be coordinated with California's existing transportation network, particularly intercity rail and bus lines, commuter rail lines, urban rail transit lines, highways, and airports. The Authority is seeking competitive proposals to provide design-build services (Proposals) for Construction Package 1 (Project) of the Initial Construction Segment (ICS) of the California High-Speed Train System (System) in California's Central Valley. This procurement is conducted in accordance with the Authority's contracting power described in Section 185036(a) of the California Public Utilities Code.

1.1.2 System

The System goal is to increase and maintain California's mobility, vital to our economy's health, as the population grows from 38 million today to a projected 50 million by 2035. The planned System length is approximately 800 miles from Sacramento to San Diego, with nine (9) segments running through the Bay Area, Central Valley, Inland Empire, and Southern California. The train will travel at speeds up to 220 miles per hour with approximately 15 stops. A key performance goal is to make the trip from San Francisco to Los Angeles within 2 hours and 40 minutes. The initial operating segment (IOS) will run through the Central Valley, and includes the ICS. Completion of the Project represents the first step toward delivery of the System.

1.1.3 Project

The Project is located within the Counties of Madera to the north and Fresno to the south, and the City of Fresno in the southern area. It is composed of one base alignment and two alignment options:

- Construction Package (CP) 1A (including the hybrid alternative) – Approximately twenty-three (23) miles, from south of Avenue 17 to north of Stanislaus Street (base alignment)
- CP 1B – Approximately one (1) mile, from north of Stanislaus Street to south of Santa Clara Street (option)
- CP 1C – Approximately five (5) miles, from south of Santa Clara Street to south of East American Avenue (option)

This Project is also subject to U.S. Department of Labor, Contract Compliance Provisions as set forth in 41 C.F.R. Part 60 and Exec. Order No. 11246, unless otherwise noted. The selected Contractor shall comply with the Contract Compliance provisions set forth in the Technical Assistance Guide for Federal Construction Contractors and for a Mega Project.

The Contractor must also comply with all other applicable federal labor requirements, including those set forth in Book 2, Part B, General Provisions, Sections 46.14-16. Copies of the prevailing rate of per diem wages are on file at Authority's offices, and they will be made available to any interested party on request.

7.11.4 Equal Employment Opportunity and Nondiscrimination

The Proposer will be required to follow State and Federal Equal Employment Opportunity and Nondiscrimination laws and regulations.

The Proposer shall not discriminate against any employee or applicant for employment, or harass or allow harassment of any employee because of race, religion, color, ethnicity, gender, disability, sex, age or national origin. The Proposer shall ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, religion, color, ethnicity, gender, disability, sex, age or national origin. Such actions shall include, but are not limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

The Proposers are also more specifically advised that the Contractor must comply with Section 1735 of the California Labor Code, which reads as follows:

> "A contractor shall not discriminate in the employment of persons upon public works on any basis listed in subdivision (a) of Section 12940 of the Government Code, as those bases are defined in Sections 12926 and 12926.1 of the Government Code, except as otherwise provided in Section 12940 of the Government Code. Every contractor for public works who violates this section is subject to all the penalties imposed for a violation of this chapter."

Nondiscrimination requirements are included in Book 2, Part B, General Provisions, Section 46.7.

7.12 Payment for Work Product

The Authority will provide a payment for work product as follows:

- The payment for work product upt to $2 Million. Proposer will not be compensated if the Proposal, including the Price Proposal, is determined by the Authority to be non-responsive, or if the Authority cancels the procurement prior to the due date for Proposals.

- If the Authority awards the Contract to Proposer, Proposer will not be entitled to compensation hereunder.
- Payment will be owing hereunder only after receipt and approval of goods and services by the Authority, and will be made within 60 days after receipt of a proper invoice submitted to the Authority under this paragraph 3(c). Such invoice may not be submitted until one Working Day after the earlier to occur of (i) award of the Contract, (ii) decision not to award the Contract, or (iii) expiration of the time period for award stated in the RFP, as the same may have been extended by the Authority pursuant to the terms of the RFP. The Authority will advise Proposer when said Contract is executed. Any Proposer that contests the award will not be eligible to receive a stipend.

This Agreement involves the submission of a Proposal by Proposer that must be received by the due date set forth in the RFP and determined responsive by the Authority as a condition of payment. A responsive Proposal that complies in all material respects with the requirements of the RFP. An executed Payment for Work Product Agreement in the form provided as Exhibit 3 to this ITP on or prior to the Proposal Deadline

Authority will issue payment within sixty (60) days of a Proposer's request for payment of work product except that no payments will be distributed until after the date of Contract execution by the Contractor or rejection of all Proposals by Authority. This offer of payment for work product entitles Authority to use work product and ideas contained in any unsuccessful Proposal. Authority acknowledges that the use of any of the work product by Authority or the Contractor is at the sole risk and discretion of Authority and the Contractor, and shall in no way be deemed to confer liability on the unsuccessful Proposer. All parties acknowledge that the due date for payment for work product will occur after the execution date for the Contract or date of rejection of all Proposals.

In no event shall any Proposer that is selected for award but fails to satisfy the award conditions set forth in the RFP be entitled to receive a payment for work product.

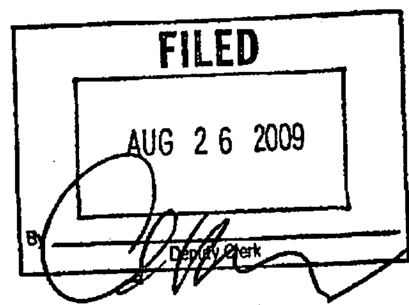
7.13 Protest Procedures

This section sets forth the exclusive protest remedies available with respect to this RFP. Each Proposer, by submitting its Proposal, expressly recognizes the limitation on its rights to protest contained herein, expressly waives all other rights and remedies, and agrees that the decision on any protest, as provided herein, shall be final and conclusive unless wholly arbitrary. These provisions are included in this RFP expressly in consideration for such waiver and agreement by the Proposers.

7.13.1 Protest Regarding the RFP Documents or the Procurement Process

Prior to the deadline for submission of Proposals, a Proposer may submit to Authority protests regarding the procurement process or on items in the RFP or Contract Documents. Protests regarding this RFP shall be filed only after the Proposer has informally discussed the nature and

EXHIBIT 2



SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

TOWN OF ATHERTON, a Municipal Corporation,
PLANNING AND CONSERVATION LEAGUE, a California nonprofit corporation,
CITY OF MENLO PARK, a Municipal Corporation,
TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California nonprofit corporation,
CALIFORNIA RAIL FOUNDATION, a California nonprofit corporation,
and BAYRAIL ALLIANCE, a California nonprofit corporation, and other similarly situated entities,

Petitioners and Plaintiffs,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity, and DOES 1-20, inclusive,

Respondents and Defendants.

Case No.
34-2008- 80000022

RULING ON SUBMITTED MATTER

This matter came on for hearing on May 29, 2009. The matter was argued and submitted. The Court took the matter under submission. The Court, having considered the papers, the administrative record which was admitted into evidence

at the hearing, and the arguments of the parties, makes its ruling as follows.

Petitioners challenge the decision of respondent and defendant California High Speed Rail Authority ("CHSRA" or "the Authority") to approve the Bay Area to Central Valley High Speed Train Project ("the Project"), including specifically choosing an alignment for the Project. Respondent chose an alignment running through Pacheco Pass rather than the other major alternative alignment which ran through Altamont Pass.

Petitioners contend that respondent has not provided legally adequate review under the California Environmental Quality Act, Public Resources Code section 21000 et seq. ("CEQA"). Petitioners contend that respondent's actions are illegal as they violate CEQA and the California Code of Regulations, Title 14, section 15000 et seq. ("CEQA Guidelines").

Petitioners contend that the Final Program Environmental Impact Report ("FPEIR") for the Project was inadequate in several respects. They contend that it failed to include an adequate description of the project and feasible alternatives. They contend it failed to adequately identify and mitigate the Project's significant impacts, and that its alternatives analysis was inadequate and improperly predisposed towards the Pacheco alignment. Petitioners also contend that respondent Authority improperly refused to recirculate the Draft Program Environmental Impact Report ("DPEIR") after Union Pacific Railroad announced it was unwilling to allow use of its right-of-way, and that

respondent Authority failed to consider or respond to Menlo Park's comment letter on the DPEIR.

I. STANDARD OF REVIEW

Petitioners contend that this challenge is governed by Public Resources Code section 21168. Petitioners contend that under that standard of review, "the courts' inquiry shall extend only to whether there was a prejudicial abuse of discretion. Such an abuse is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Petitioners' opening brief, 8:24-9:2, citing *Ebbets Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 944.)

Respondent contends that its action was quasi-legislative and that review is governed by Public Resources Code section 21168.5, which limits the Court's inquiry to whether there was a prejudicial abuse of discretion. Respondent states that under this standard, a prejudicial abuse of discretion is established if the agency has not proceeded in a manner required by law or if the decision is not supported by substantial evidence. Respondent further states that a prejudicial abuse of discretion is established if the agency has not proceeded in a manner required by law or if the decision is not supported by substantial evidence. (Respondent's brief in Opposition to Petition, 6:25-7:3, citing *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 [Goleta II].)

The Court concludes that respondent's action was quasi-legislative and that review is governed by Public Resources

Code section 21168.5. However, the two code sections embody essentially the same standard of review, i.e., whether substantial evidence supports the agency's determination. (*Laurel Heights Improvement Assn. v. Regents of the University of California* ("*Laurel Heights II*") (1993) 6 Cal.4th 112, 1133, fn. 17; *Laurel Heights Improvement Assn. v. Regents of the University of California* ("*Laurel Heights I*")(1988) 47 Cal.3d 376, 392, fn. 5.) Thus petitioner's reliance on section 21168 in its brief does not affect the outcome of this case.

An EIR is presumed adequate, and the plaintiff in a CEQA case has the burden of proving otherwise. (*Al Larson Boat Shop v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 749.)

II. ADEQUACY OF THE FINAL PROGRAM ENVIRONMENTAL IMPACT REPORT FOR THE PROJECT

A. WHETHER THE FPEIR FAILED TO INCLUDE AN ADEQUATE DESCRIPTION OF THE PROJECT AND FEASIBLE ALTERNATIVES

1. One of petitioners' principal contentions is that the project description in the FPEIR failed to provide sufficient detail on the Pacheco alignment to determine the project's impacts in displacing residents and businesses. The FPEIR and the Authority's findings assume that most, if not all, of the proposed high-speed rail line in the area between San Jose and Gilroy would be built within existing right-of-way, "the existing Caltrain corridor." (AR A000031; see also B004187.) However, Union Pacific Railroad had informed the Authority just prior to the publication of the FPEIR that it would not allow the Authority to use any of its right-of-way for the Project. (AR E000027.) And

after the FPEIR was released, but before the Authority certified the FPEIR and made the related findings and decisions, Union Pacific submitted a longer letter reiterating its unwillingness to share its tracks with High-Speed Rail vehicles. (AR E000003-E0000004.)

However, the FPEIR appears to show that the portion of the chosen Pacheco alignment between San Jose and Gilroy follows the Union Pacific right-of-way (AR B003944, B003955, B003961, B005105-5109, B006293.) In many places it shares the right-of-way with the Union Pacific line (e.g., AR B005292, B005298, B005300) and is sandwiched between the Union Pacific right-of-way and Monterey Road/Highway (AR B005300, G001425-G001437). If Union Pacific will not allow the Authority to use its right-of-way, it appears it will be necessary for the Authority to obtain additional right-of-way outside of this area, requiring the taking of property and displacement of residents and businesses. However, none of this was addressed in the FPEIR.

Respondent argues that a programmatic EIR does not need to contain a high degree of detail, and that detailed information can be deferred to a later site-specific project EIR. (CEQA Guidelines, sections 15146, 15152; *In re Bay Delta Programmatic Environmental Impact Report Cases* (2008) 43 Cal.4th 1143, 1169-1172.) Respondent contends that the Project description in the FPEIR contains an adequate level of detail for a programmatic EIR. It argues that this EIR was intended to support the Authority in making the fundamental choice of a preferred alignment and station locations, but not select a precise footprint for high speed train facilities. More importantly, respondent argues, the

FPEIR does not assume use of the Union Pacific right-of-way between San Jose and Gilroy, but rather that it depicts the HST tracks adjacent to Union Pacific's right-of-way; see, e.g., Figure PP-6 at B005292. Respondent contends that this figure also shows there is room for the HST tracks between the Union Pacific right-of-way and Monterey Highway (B005292).

Petitioners contend that Figure PP-6 (AR B005292) identifies "Existing ROW" for "Monterey Road" but does not explicitly identify the existing right-of-way for the UP tracks. Petitioners contend that Figures PP-12 (AR B005296) and PP-14 (AR B005298), by contrast, clearly show the HST right-of-way as lying within that existing right-of-way. Several maps show little room between the existing UP tracks and the Monterey Highway (e.g. AR G001432-G001435.) Respondent, in oral arguments, argued a different interpretation of Figure PP-14.

The Court concludes that the description of the alignment of the HSR tracks between San Jose and Gilroy was inadequate even for a programmatic EIR. The lack of specificity in turn results in an inadequate discussion of the impacts of the Pacheco alignment alternative on surrounding businesses and residences which may be displaced, construction impacts on the Monterey Highway, and impacts on Union Pacific's use of its right-of-way and spurs and consequently its freight operations.

2. Petitioners contend that the project description failed to provide an adequate explanation or delineation of the project's costs. They contend that the cost estimates in the FPEIR were inaccurate and skewed to favor the Pacheco

Pass alignment alternative by significantly understating the acquisition costs for permanent right-of-way and temporary construction-period right-of-way. They also contend that the cost analyses for Altamont Pass alignment alternatives considered only the cost of a new high or low bridge but not the option of "piggybacking" on the existing Dumbarton rail bridge.

The authorities cited by petitioners do not require project cost information to be in an EIR; case authority does, however, hold that cost information is required to support a lead agency's CEQA findings when it rejects alternatives as economically infeasible. (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587; *Citizens of Goleta Valley v. Board of Supervisors* ("*Goleta I*") (1988) 197 Cal.App.3d 1167.) The Authority did not reject all of the Altamont alternatives as economically infeasible. Furthermore, the Court finds that the FPEIR's cost information is supported by substantial evidence. The evidence includes Chapter 4 (B004624-647) which in turn refers to Appendices 4A and B (B005971-6086, B006087-6180); and Appendix D (B004637; B004646; B006243).

3. Petitioners contend that the FPEIR failed to accurately and impartially describe the operating characteristics of the project alternatives. They contend that the FPEIR failed to accurately describe the frequency of service for the Altamont and Pacheco alternatives in that it did not consider "train-splitting."

The Court finds that the EIR provides an adequate description of HSR operations, supported by substantial evidence. The ridership forecasts were developed by experts

in the field of transportation modeling and were subject to three independent peer review panels. (See C001886-88, C001879-964, C001954-60, E004118-148; E004149-187; E004188-97.) Substantial evidence supports respondent's approach of not using train-splitting on main trunk service. Evidence in the record, including evidence submitted by petitioners, shows that train-splitting and coupling is operationally disruptive, and that while some HST systems worldwide use train-splitting and coupling, the use is very limited. (See B004716, B006694, B008032, B008035-36, B008037.)

Petitioners also contend that the FPEIR failed to adequately and fairly describe the ridership of the Altamont and Pacheco alternatives. They contend the Pacheco alignment would not draw significant additional recreational ridership because the limited number of stops on the HSR would make it less attractive than the already-existing Caltrain "baby bullet" route, and any additional ridership would be at the expense of Caltrain ridership rather than taking cars off the road.

The Court finds that the ridership modeling and forecasts performed by the Authority and the MTC are substantial evidence to support the FPEIR's description of the Pacheco alternative as having higher "recreational and other" ridership than Altamont pass. The ridership analysis concluded that it taps into a very wide market in Santa Clara County (B006696) and also creates a sizeable HST market to and from the Monterey Bay area, a market virtually non-existent for the Altamont Pass alternative (B006695). The ridership analysis also suggests that some individuals will pay a premium to ride the HST rather than Caltrain in

this corridor based on the service being faster and more reliable. (B006696.)

B. WHETHER THE FPEIR AND THE AUTHORITY'S FINDINGS FAILED TO ADEQUATELY IDENTIFY AND MITIGATE THE PROJECT'S SIGNIFICANT IMPACTS

Petitioners contend the Authority understated the project's potentially significant impacts and overstated the degree to which those impacts would be adequately mitigated. Petitioners' primary contentions regarding impacts concern biological impacts, growth-inducing impacts, and local impacts along the San Francisco Peninsula (noise, vibration, visual, taking of property and severance impacts, and impacts on mature and heritage trees).

1. Exhaustion of administrative remedies: Respondent contends that petitioners failed to exhaust administrative remedies as to any defect in the respondent's CEQA findings on impacts and mitigation, and that therefore the exhaustion of administrative remedies doctrine codified in Public Resources Code section 21177 bars petitioners' claim that respondent's CEQA findings on impacts and mitigation are not supported by substantial evidence. The authorities cited by respondent, including *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 447, do not support respondent's contention that it was necessary to specifically object to proposed findings. The Court concludes that the criticisms, comments and objections made to the EIR were sufficient to exhaust administrative remedies as to the issues raised in this case.

2. Biological impacts: Petitioners contend that the analysis and mitigation of the impacts to the Grasslands

Ecological Area ("GEA") along the Pacheco alignment and to the Don Edwards National Wildlife Refuge ("Refuge") along the Altamont alignment were not adequate, were neither equal nor impartial, and were lacking in detail. Petitioners also contend that certain factors are considered for the GEA but not for the Refuge, and that respondent did not adequately consider comments that replacing an existing bridge embankment with an elevated structure on piles would actually enhance conditions in the Refuge.

The Court finds that substantial evidence supports respondent's treatment of biological impacts to the GEA and the Refuge. The impacts analysis and mitigation section of the EIR (see generally AR B004462-4538), read together with the responses to comments (see B006584 et seq.; G000807-00814 [Summary of Key Issues on the DPEIR]) constitutes an adequate and impartial analysis of the biological impacts on the two areas. The same methodology was used throughout the area. The level of detail was adequate for a programmatic EIR. The FPEIR's identification of a more detailed mitigation strategy for the GEA (AR B004537) but not for the Refuge is not unreasonable because the lands within the Refuge boundary are already protected. The record does not support petitioners' contention that the inclusion of a more detailed mitigation strategy for the GEA and not the Refuge was the cause of concerns expressed by the U.S. Fish and Wildlife Service (B006366) and the U.S Environmental Protection Agency (B006358) about use of areas within the refuge.

3. Growth-inducing impacts: Petitioners contend that the analysis of growth-inducing impacts was not

adequate. They contend that there was not a sufficient analysis of the impacts in three rural counties—San Benito, Santa Cruz, and Monterey Counties. Petitioners contend that the HSR will extend the area in which existing employees can live and commute to a job in a distant urban center, and that such growth is not analyzed in the FPEIR. Instead, there was analysis as to eleven other counties and San Benito, Santa Cruz, and Monterey Counties were merely included in "the rest of California."

The Court finds that the FPEIR contains an analysis of growth-inducing impacts which is sufficient to satisfy CEQA. (Pub. Resources Code, sec. 21100, subd. (b)(5); CEQA Guidelines, sec. 15126(d), 15126.2(d).) Nothing in the Guidelines or in the cases requires more than a general analysis of projected growth. (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369.) Respondent relied on established modeling programs, the Transportation and Economic Development Impact System (TREDIS) and the California Urbanization and Biodiversity Analysis (CURBA). Stations will be located in already-urbanized areas and thus the bulk of the growth increase will occur in already urbanized areas. Petitioners' claim that the HSR will result in greater development in the three more distant rural counties is based on speculation, not matters as to which they have technical expertise or which are based on relevant personal observations. (See *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 583.) Respondent's responses to comments explained that the system would not result in a significant increase in commute accessibility to the Bay Area for a

number of reasons, including the limited number of stations, the localized accessibility benefits provided by these limited stations, the lack, of local transit options in outlying areas, the higher cost of HST use for shorter trips compared to auto use, and time considerations. (B006647-48; B006712-13.) The Court finds the analysis to be sufficient.

4. Local impacts along the San Francisco Peninsula

—

Petitioners contend that the Project will result in significant noise, vibration, and visual impacts; that it will result in significant land use impacts, including specifically taking of property and severance impacts; and that it will impact mature and heritage trees along the right-of-way:

a. Noise, Vibration, and Visual Impacts

Petitioners contend that section 3.4 of the FPEIR, addressing the project's noise and vibrational impacts, failed to identify specific quantifiable standards or criteria used to determine whether the impacts would be significant, and that it identified qualitative criteria but failed to provide evidence by which the public could determine whether these criteria had been met. Further, respondent found that vibrational impacts would be reduced to a level of insignificance (AR000024), but petitioners contend there is no evidence in the record to support this finding.

As for noise and vibration impacts, petitioners contend that the FPEIR does not provide appropriately detailed information to show that noise impacts will be reduced below a level of significance. The FPEIR also identifies the need for extensive soundwalls of up to 16 feet in height, but petitioner contends respondent does not address the potential visual impact of these barriers and improperly puts off consideration of such impacts to the project level environmental review.

The Court finds that the FPEIR contains an adequate level of detail regarding noise for a program EIR. The analysis used Federal Railroad Administration and Federal Transit Administration criteria and tools to assess noise. (B004100-4105.) The FRA manual contemplates that the evaluation will first look at general questions. (C008070.) It concluded that grade separations at existing crossings would result in noise benefits, and listed mitigation strategies, including design practices, to reduce impacts. (B004120-4137.)

The FPEIR also considered all HST alternatives to result in significant noise and vibration impacts for purposes of the programmatic analysis. (B004129.) It noted that more detailed mitigation strategies for noise and vibration impacts would be developed in the next stage of environmental analysis. (B004129-30.) Response to comments noted that project-level environmental review will consider design and profile variations to reduce impacts, as well as design options for noise barriers. (B006480, B006538-40.) The FRA manual identifies means of mitigating vibrational

impacts (C008147; C008176-8180) and noise impacts (C008085, C008117-8122).

However, with regard to vibration impacts, the FPEIR states:

> "Although mitigation measures will reduce vibration impact levels, at the programmatic level *it is uncertain whether the reduced vibration levels will be below a significant impact*. The type of vibration mitigation and expected effectiveness to reduce the vibration impacts of the HST Alignment Alternatives to a less-than-significant level will be determined as part of the second-tier project-level environmental analyses." (B004131 [emphasis added].)

Nevertheless, the Authority, in its CEQA Findings of Fact, found that, as to the impact of vibrations, specified mitigation strategies "*will* reduce this impact to a less-than significant level." (A000025 [emphasis added].)

The Court finds that in light of this contradiction between the FPEIR and the CEQA Findings, the Authority's finding that the mitigation strategies will reduce the vibration impact to a less-than-significant level is not supported by substantial evidence.

Visual impacts: The FPEIR recognizes that sound barriers may be necessary mitigation measures along some portions of the HST route through the Peninsula. Petitioners contend that the visual impacts of these barriers should have been analyzed in more detail. However, the extent to which noise barriers would be used could not be known until the next stage of environmental analysis, when engineering and design considerations will be applied on a site-specific basis. (B004129-30.) Sound barriers are

discussed in FPEIR section 3.9, Esthetics and Visual Resources, along with mitigation strategies. (B004305-4307.) Visual and esthetic impacts were considered significant and unavoidable. (B004307.) The FPEIR identified subsequent analysis which should be performed. (*Id.*) Respondent found that as part of the site-specific design, many of the impacts on aesthetics and visual resources can be avoided or substantially mitigated, but that it did not have sufficient evidence to make that determination on a program-wide basis. Therefore, for purposes of this programmatic EIR, esthetic and visual impact was considered significant and unavoidable. (A000041.) Respondent adopted a Statement of Overriding Considerations. (A000104-109.)

The Court finds that petitioners have failed to establish that respondent failed to adequately analyze the visual impacts of the Project or that it otherwise abused its discretion.

b. Land Use Impacts

Petitioners contend that the Project will result in significant land use impacts, including taking of property and severance impacts. Atherton contended in its comment letter that the proposed four-track alignment would result in the need to take additional property beyond the existing right-of-way. (B006530.) However, the response to this comment (B006537-40) and the CEQA findings (A000029-33) indicated that the HST tracks were expected to fit within the Caltrain right-of-way.

As discussed elsewhere in this Court's ruling, Union Pacific has stated it is unwilling to allow its right-of-way

to be used for the project. The need for the taking of additional property is a related issue that will be required to be analyzed in connection with further analysis of the impact of Union Pacific's denial of use of its right-of-way.

c. Mature and Heritage Trees

Petitioners contend that the Project will impact mature and heritage trees along the right-of-way. But the FPEIR's response to Atherton's comments indicates, in part, that a more detailed review of the impacts on mature and heritage trees would be performed at a project level environmental review (B06538) and that the HST is not expected to require the removal of trees along the right-of-way in Atherton (B006538).

The Court finds that respondent did not need to conduct a more detailed review of the impacts on trees at this level and properly deferred such analysis to project-level environmental review.

C. WHETHER THE FPEIR'S ALTERNATIVES ANALYSIS WAS INADEQUATE AND IMPROPERLY PREDISPOSED TOWARDS THE PACHECO ALIGNMENT

Petitioners contend that the Authority's findings improperly determined that all Altamont alternatives were infeasible. Petitioners contend that it improperly determined that there were cost and regulatory obstacles to a Dumbarton Bay crossing; that the decision to eliminate several Altamont choices because of lower ridership and frequency of service was not supported by substantial evidence; and that construction difficulties for the Altamont alternatives should not have been the basis for

eliminating those alternatives. Petitioners contend solutions and answers existed to meet each of the issues. Petitioners further contend that the Authority's decision to dismiss an alternative using the median of U.S. Highway 101 or 1-280 through the Peninsula without analysis violated CEQA.

The Court finds that the FPEIR studied a reasonable range of alternatives and presented a fair and unbiased analysis. There were dozens of different ways to build the HST to connect the Bay Area and the Central Valley. The EIR divided the study area into six study corridors, examined different alignment alternatives and station locations options within each corridor, and further broke down the alignment alternatives into segments.

Substantial evidence supports the FPEIR's discussion of operational and environmental issues related to the Altamont Pass alternatives. The potential environmental impacts of the alternatives were discussed in Chapter 3 of the FPEIR. Chapter 7 of the EIR summarizes and compares the environmental consequences of 21 representative network alternatives, defining the major tradeoffs among the possible network alternatives. This fostered informed public participation and decision-making. (*Laurel Heights Improvement Assn. v. Regents of the University of California* ("*Laurel Heights I*")(1988) 47 Cal.3d 37, 404.)

The Court finds that substantial evidence in the record supports the FPEIR's explanation that putting the HST system over the existing, out-of-service Dumbarton Rail Bridge is not reasonable. (See, e.g., GB003926-27 [existing retrofit plans involve only a single track], B006687 [HST requires

two separated and dedicated tracks], B006368, B006687, B006742.) The EIR reasonably concludes that a shared Caltrain/HST Dumbarton crossing would require at least a new double track bridge. (B003926-927, B006687; G000809.) The Bay Area regional Rail Plan reached the same conclusion. (D001484.) Furthermore, the existing Dumbarton Rail Bridge has two swing bridges that pivot to allow ship traffic, a systemic vulnerability which is inconsistent with the speed, reliability and safety requirements of the HST system. (B006687, B004044.)

The Court also finds that the FPEIR reasonably concluded that train-splitting was not a reasonable alternative, and that avoiding additional branch splits would benefit train operations and service. The FPEIR and the CEQA Findings treat the branch issue equally for both Altamont Pass and Pacheco Pass.

The Court also finds that the FPEIR accurately describes construction challenges for the Altamont Pass with a Bay crossing or using the I-880 median. The challenges for a Bay crossing include loss of wetland habitats in the Bay associated with a new Bay crossing, the potential difficulty of obtaining the types of permits and environmental clearances needed to build a new Bay crossing because of the limits which federal law imposes on activities within the Don Edwards National Wildlife Refuge, and the permitting jurisdiction of the Bay Conservation and Development Commission. The record shows that the construction challenges for use of the I-880 median are complex - a complexity also recognized by the Metropolitan Transportation Commission.

The Court further concludes that the record supports the Authority's decision to exclude from further detailed study an alternative using the median of U.S. Highway 101 or 1-280 through the Peninsula. The primary reason for eliminatıng these alignment alternatives was the need to construct an aerial guideway for the train adjacent to and above the existing freeway, while maintaining freeway access and capacity during construction. Such need would result in substantially increased construction costs and constructability ıssues. These alıgnments would also have significant or potentially significant environmental impacts, due to height and proximity to wildlife preserves. The evidence supports the elimination of the 101 and 280 alignment alternatives from detailed study.

III. WHETHER THE AUTHORITY IMPROPERLY REFUSED TO RECIRCULATE THE DRAFT PROGRAM EIR AFTER UNION PACIFIC'S ANNOUNCEMENT OF ITS UNWILLINGNESS TO ALLOW USE OF ITS RIGHT-OF-WAY

Petitioners contend that portions of the Pacheco alignment as analyzed by respondent are dependent upon the use of Union Pacific Railroad's right-of-way, and that respondent improperly refused to recirculate the DPEIR after Union Pacific Railroad announced its unwillingness to allow use of its right-of-way shortly before respondent's approval of the Pacheco alignment.

Respondent contends that the alignment is not dependent upon the use of Union Pacific's right-of-way.

However, this Court concludes that various drawings, maps and photographs within the administrative record strongly indicate that it is. The record further indicates

1 that if the Union Pacific right-of-way is not available,
2 there may not be sufficient space for the right-of-way
3 needed for the HST without either impacting the Monterey
4 Highway or without the takings of additional amounts of
5 residential and commercial property.

6 These are significant impacts which were sufficient to
7 trigger the recirculation of the FPEIR. However, respondent
8 failed to take such further action after it received Union
9 Pacific's statement of its position.

10 IV. <u>WHETHER THE AUTHORITY FAILED TO CONSIDER OR RESPOND TO</u>
11 <u>MENLO PARK'S COMMENT LETTER ON THE DPEIR</u>

12 This issue is moot in light of the Court's ruling
13 denying the motion to augment the administrative record. In
14 that ruling, the Court determined that the evidence was
15 insufficient to establish that Menlo Park's comment letter
16 was received by the Authority. The Authority was not
17 required to consider or respond to a comment letter it did
18 not receive.

19 V. <u>RESPONDENT'S CONTENTION THAT PETITIONERS FAILED TO</u>
20 <u>EXHAUST ADMINISTRATIVE REMEDIES</u>

21 Respondent contends that petitioners failed to exhaust
22 administrative remedies as to any defect in the respondent's
23 CEQA findings on impacts and mitigation, and that therefore
24 the exhaustion of administrative remedies doctrine codified
25 in Public Resources Code section 21177 bars petitioners'
26 claim that respondent's CEQA findings on impacts and
27 mitigation are not supported by substantial evidence. As
28 stated in the Court's discussion of arguments concerning
impacts, *supra*, the Court concludes that petitioners

1 exhausted their administrative remedies as to the issues
2 raised in this case.
3
4
5 VI. PALO ALTO'S AMICUS CURIAE BRIEF

6 Palo Alto was granted leave to file an amicus brief.
7 However, its brief has raised legal issues not raised and
8 briefed by the parties, including challenges to the use of a
9 second program EIR, the Authority's treatment of land use
10 compatibility, and an alleged failure to consult Palo Alto.
11 For this reason its arguments have been disregarded by the
12 Court.

VII. CONCLUSION

13 The Court finds petitioners have met their burden of
14 showing that the EIR contains an inadequate description of
15 the project, that respondent's finding that mitigation
16 strategies will reduce the vibration impact to a less-than-
17 significant level is not supported by substantial evidence,
18 that as a result of the FEIR's inadequate description of the
19 project its land use analysis was inadequate, and that
20 respondent improperly failed to recirculate the FPEIR upon
21 receipt of Union Pacific's statement of its position
22 regarding its right-of-way. The petition for writ of
23 mandate is granted on these grounds.

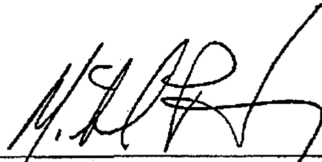
24 Petitioners' other contentions are without merit.

25 VIII. DISPOSITION

26 Petitioners shall prepare a judgment consistent with
27 this ruling and in accordance with California Rules of
28 Court, rule 3.1320 and Local Rule 9.16. Petitioners shall
also prepare a writ for issuance by the clerk of the court.

Petitioners shall recover their costs pursuant to a memorandum of costs.

DATED: August 26, 2009



MICHAEL P. KENNY
JUDGE OF THE SUPERIOR COURT

<u>**CERTIFICATE OF SERVICE BY MAILING**</u>

(C.C.P. Sec. 1013a(3))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing **RULING** by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below.

Stuart Flashman
Attorney at Law
5626 Ocean View Drive
Oakland, CA 94618

Jeff Hoffman
Attorney at Law
132 Coleridge Street #B
San Francisco, CA 94110

Danae Aitchison
Attorney at Law
1300 I Street #Suite 125
Sacramento, CA 94244

Kristina Lawson, Arthur Coon
Attorney at Law
1331 N California Blvd., Fifth Floor
Walut Creek, Ca 94596

I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Superior Court of California,
County of Sacramento

Dated:

Deputy Clerk

z4

EXHIBIT 3

CALIFORNIA High-Speed Rail Authority

EDMUND G. BROWN JR.
GOVERNOR

Memorandum

DATE: 02/11/13

TO: Jeff Morales

FROM: Frank Vacca

SUBJECT: Phase 1 Blended Travel Time

I have reviewed the analysis completed by our Program management Team of PB America, utilizing the Berkeley Simulation Software known as Rail Traffic Controller (RTC) and conclude that a trip time of 2hr and 40 min. between San Francisco and Los Angeles and 30 minutes between San Francisco and San Jose was shown to be achievable for the Phase 1 Blended Service with appropriate assumptions for train performance, operating characteristics and compliance with Federal and State regulations. The trip times comply with section 2704.09 of Proposition 1A.

Further improvements may be achievable through improved train performance, use of tilt technology, more aggressive alignments and higher maximum speeds. The engineering team will remain vigilant as we continue to refine proposed alignments and operating parameters to continue to reduce trip times where possible. Final environmental process, along with community preferences may alter or refine the proposed assumptions and alignment studied.

12 February 2013

Phase 1 Blended Travel Time Assessment

Purpose
The purpose of this memo is to present a technical assessment of the travel times and assumptions for a Phase 1 Blended service between San Francisco and San Jose and between San Francisco and Los Angeles. This assessment is based on the results of computer model simulations that demonstrate the "pure run time" of the modeled trains operating on a blended system can meet the Prop 1A mandates to design for a maximum 30 minutes of travel time for a non-stop SF-SJ and a 2hr 40min for non-stop San Francisco – Los Angeles service.

Assessment of Phase 1 Blended Modeling
Phase 1 Blended infrastructure consists of proposed full high-speed rail only improvements between San Jose and Los Angeles combined with blended service alignments on the Caltrain Corridor between San Francisco and San Jose. Travel times are generated from the California High-Speed Train Project (CHSTP) computer simulation model[1].

The travel times generated from the computer model account for the physical characteristics of the proposed route geometry and the times are considered "pure" travel time, or best time that might be achieved under the current proposed alignment and conditions. Actual travel times will be based on the final alignment in the approved environmental documents.

Travel times between San Francisco and Los Angeles include the blended service between San Francisco and San Jose with a 110 mph maximum speed with an unimpeded path for a non-stop HST service options in the SF-SJ corridor.

Travel Time	SF-SJ	SF-LA
Phase 1 Blended *(No Midline Overtake)*	30	2:32

Assumptions
Following are the assumptions made in CHSTP model for calculating these travel times:

- Pure run time is calculated based on modeled trainset performance over a given segment of the alignment geometry.
- Travel times are for representative alignments based on alternatives included in the environmental documents. Alternative alignment may alter travel time.
- Advancement in train technology would allow train to operate safely at 220 mph on sustained steep grades. For example, the grade between Bakersfield and the Tehachapi Mountains requires a sustained average grade ranging of 2.5%-2.8% of approximately 20 miles. A speed restriction to approximately 150 mph may be required to mitigate a safety issue related to wheel adhesion in the

[1] Berkeley Simulation Software (BSS) Rail Traffic Controller (RTC) railroad operations simulation model software was used to produce the San Francisco – Los Angeles travel time in this analysis. The Train Performance Calculator (TPC) feature in the RTC model is capable of accurately representing the train movements over alignments with different complexity, such as grades, curves, and speed limits, based on the available tractive and braking effort specified for the train set technology taking into account the high-speed rail vehicle rolling resistance coefficients.

downhill direction at very high-speeds. If required, this speed reduction would increase the northbound travel time by approximately two to three minutes.

- FRA strategies and regulations are in place to support mixed fleet traffic (freight, conventional passenger, high-speed passenger) to operate at speeds up to 110 mph.
- Caltrain train service will allow for a high-speed express train to run unimpeded between SF and SJ.
- Track infrastructure will be constructed or upgraded, as required, to achieve FRA/CPUC regulatory requirements and AREMA standards for the speeds modeled.

Conclusion

Based on the CHSTP computer model simulations and stated assumptions, a 2hr 40 min travel time between San Francisco and Los Angeles and 30-minute travel time between San Francisco and San Jose can be achieved for the Phase 1 Blended service.

Attachments

1. Train Performance Curve – LA to SF – Phase 1 Full
2. Train Performance Curve – SF to LA – Phase 1 Full
3. Train Performance Curve – SF to SJ

Train Performance Curve (CHSTP Model) – LA to SF – Phase 1 Full

CAHSR.
LA-SF EXPRESS Consist: 5 cars (5L + 0E) 459 tons 656 feet 61.00 HP/ton Locos: 6 Opr AGV's

Train Performance Curve (CHSTP Model) –SF to LA – Phase 1 Full

CAHSR.
SF-LA_EXPRESS Consist: 5 cars (5L + 0E) 459 tons 656 feet 61.00 HP/ton Locos: 6 Opr AGV's

Train and Track Speeds (MPH)

Elevation (FT)

None

Cumulative HH:MM:SS

Train Performance Curve (CHSTP Model) –SF to SJ – 110 mph

CAHSR.
Consist: 5 cars (5L + 0E) 459 tons 656 feet 61.00 HP/ton Locos: 6 Opr AGV's

Train and Track Speeds (MPH): 250, 225, 200, 175, 150, 125, 100, 75, 50, 25, 0

Elevation (FT): -100, 0

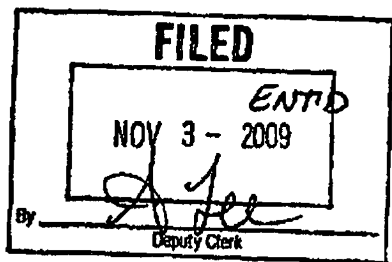
Display nodes: San Francisco; Santa Clara (CT); EOPSantaJoseSB

Cumulative HH:MM:SS: 0; 27:51; 30:22

0; 233085; 252587

Case: C:\RTC\CAHSR12\Phase1-12 RTC run: 08 February 2013 16:16:27

EXHIBIT 4



IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

TOWN OF ATHERTON, a Municipal Corporation, PLANNING AND CONSERVATION LEAGUE, a California nonprofit corporation, CITY OF MENLO PARK, a Municipal Corporation, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California nonprofit corporation, CALIFORNIA RAIL FOUNDATION, a California nonprofit corporation, and BAYRAIL ALLIANCE, a California nonprofit corporation, and other similarly situated entities, Petitioners and Plaintiffs v. CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity, and DOES 1-20, Respondents and Defendants	No. 34-2008-80000022 ~~[proposed]~~ FINAL JUDGMENT (Costs Posted - DEC - 4 2009)

This action came on regularly for hearing on May 29, 2009 in Department 31 of the Superior Court, the Honorable Michael P. Kenny presiding. Petitioners and Plaintiffs TOWN OF ATHERTON, PLANNING AND CONSERVATION LEAGUE, CITY OF MENLO PARK, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, CALIFORNIA RAIL FOUNDATION, and BAYRAIL ALLIANCE appeared by counsel Stuart Flashman. Respondent and Defendant CALIFORNIA HIGH SPEED RAIL AUTHORITY appeared by Deputy Attorneys General Danae Aitchison and Christine Sproul. The Court having considered the papers submitted by the parties, the administrative record, which was admitted into evidence

at the hearing, and the arguments of the parties at hearing, issued its Ruling on Submitted Matter on August 26, 2009.

Pursuant to the Court's Ruling on Submitted Matter and based upon the pleadings, evidence and argument submitted in this case, it is ordered, adjudged and decreed as follows:

1. On the First Cause of Action, Petitioners and Plaintiffs TOWN OF ATHERTON, PLANNING AND CONSERVATION LEAGUE, CITY OF MENLO PARK, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, CALIFORNIA RAIL FOUNDATION, and BAYRAIL ALLIANCE shall have judgment against Respondent and Defendant CALIFORNIA HIGH-SPEED RAIL AUTHORITY. A Peremptory Writ of Mandate shall issue under seal of the Court, ordering Respondent and Defendant CALIFORNIA HIGH-SPEED RAIL AUTHORITY to rescind and set aside Resolution 08-01 certifying the Final Environmental Impact Report/Environmental Impact Study ("EIR/EIS") for the Bay Area to Central Valley High-Speed Rail Project, approving the Pacheco Pass Network Alternative Serving San Francisco and San Jose Termini, and approving preferred alignment alternatives and station location options. Respondent and Defendant CALIFORNIA HIGH SPEED RAIL AUTHORITY shall file a written return to said writ demonstrating its compliance on or before the seventieth day following service of the writ upon the Respondent.

2. On the Second Cause of Action, Petitioners and Plaintiffs TOWN OF ATHERTON, PLANNING AND CONSERVATION LEAGUE, CITY OF MENLO PARK, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, CALIFORNIA RAIL FOUNDATION, and BAYRAIL ALLIANCE shall have judgment against Respondent and Defendant CALIFORNIA HIGH-SPEED RAIL AUTHORITY. A Peremptory Writ of Mandate shall issue under seal of the Court, ordering Respondent and Defendant CALIFORNIA HIGH-SPEED RAIL AUTHORITY to rescind and set aside Resolution 08-01 certifying the Final Environmental Impact Report/Environmental Impact Study ("EIR/EIS") for the Bay Area to Central Valley High-Speed Rail Project, approving the Pacheco Pass Network Alternative Serving San Francisco and San Jose Termini, and approving preferred alignment alternatives and station location options Respondent and Defendant CALIFORNIA HIGH-SPEED RAIL

AUTHORITY shall file a written return to said writ demonstrating its compliance on or before the seventieth day following service of the writ upon Respondent.

3. On the Third Cause of Action, Petitioners and Plaintiffs TOWN OF ATHERTON, PLANNING AND CONSERVATION LEAGUE, CITY OF MENLO PARK, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, CALIFORNIA RAIL FOUNDATION, and BAYRAIL ALLIANCE shall have judgment against Respondent and Defendant CALIFORNIA HIGH-SPEED RAIL AUTHORITY. A Peremptory Writ of Mandate shall issue under seal of the Court, ordering Respondent and Defendant CALIFORNIA HIGH-SPEED RAIL AUTHORITY to rescind and set aside Resolution 08-01 approving Findings of Fact and a Statement of Overriding Considerations under the California Environmental Quality Act for the Bay Area to Central Valley High-Speed Train Project. Respondent and Defendant CALIFORNIA HIGH SPEED RAIL AUTHORITY shall file a written return to said writ demonstrating its compliance on or before the seventieth day following service of the writ upon Respondent.

4. On the Fourth Cause of Action, Petitioners and Plaintiffs TOWN OF ATHERTON, PLANNING AND CONSERVATION LEAGUE, CITY OF MENLO PARK, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, CALIFORNIA RAIL FOUNDATION, and BAYRAIL ALLIANCE shall have judgment against Respondent and Defendant CALIFORNIA HIGH-SPEED RAIL AUTHORITY. The Court hereby declares that:

a) The project approval for the Bay Area to Central Valley High-Speed Train Project failed to comply with the requirements of CEQA and the CEQA Guidelines;

b) The Final EIR/EIS for said project failed to comply with the requirements of CEQA and the CEQA Guidelines;

c) The environmental findings issued by Respondent in support of its approval of said Project failed to comply with the requirements of CEQA and the CEQA Guidelines.

The details of Respondent's lack of compliance are laid out in the Court's Ruling on Submitted Matter, a copy of which is attached to this Judgment as Exhibit A and is incorporated herein by

this reference. The writ of mandate that shall issue pursuant to this judgment shall require that the defects identified in the Court's Ruling on Submitted Matter shall be corrected prior to Respondent's reconsideration of certification of the EIR/EIS and approval of the Project.

5. TOWN OF ATHERTON, PLANNING AND CONSERVATION LEAGUE, CITY OF MENLO PARK, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, CALIFORNIA RAIL FOUNDATION, and BAYRAIL ALLIANCE, as the prevailing parties, shall recover their costs of suit against Respondent and Defendant CALIFORNIA HIGH-SPEED RAIL AUTHORITY in the amount of $ 992.55.

6. The right of Petitioners and Plaintiffs TOWN OF ATHERTON, PLANNING AND CONSERVATION LEAGUE, CITY OF MENLO PARK, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, CALIFORNIA RAIL FOUNDATION, and BAYRAIL ALLIANCE to recover their attorneys' fees from Respondent and Defendant CALIFORNIA HIGH-SPEED RAIL AUTHORITY under Code of Civil 1021.5 is hereby reserved for later determination in accordance with California Rule of Court 3.1702.

IT IS SO ORDERED.

Date: 11/3/09

Michael P. Kenny
Judge of the Superior Court

Approved as to form

Date: 11/03/09

Danae J. Aitchison
Deputy Attorney General
Attorneys for Respondent and Defendant
CALIFORNIA HIGH-SPEED RAIL AUTHORITY

DEC - 4 2009
A. WOODWARD
Memo of Costs Clerk

EXHIBIT 5

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME	:	AUGUST 20, 2010	DEPT. NO	:	31
JUDGE	:	MICHAEL P. KENNY	CLERK	:	B. FRATES
REPORTER	:	B. HENRIKSON, #11373	BAILIFF	:	D. GREENWOOD

TOWN OF ATHERTON, et al.,
Plaintiffs and Petitioners,

VS. Case No.: 34-2008-80000022

CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity,
Defendants and Respondents.

PRESENT:
STUART M. FLASHMAN

DANAE J. AITCHISON;
CHRISTINE SPROUL

Nature of Proceedings: COURT RULING-PETITION FOR WRIT OF ERROR CORAM NOBIS; and MOTION TO TAKE DISCOVERY AND SHORTEN TIME FOR RESPONSES

TENTATIVE RULING

The following shall constitute the Court's tentative ruling on: (1) Plaintiffs and Petitioners' Petition for Writ of Error *Coram Nobis;* and (2) Plaintiffs and Petitioners' Motion to Take Discovery and Shorten Time for Responses, currently scheduled to be heard by the Court on August 20, 2010, at 9:00 a.m., in Department 31. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

In the event that a hearing is requested, oral argument shall be limited to no more than 20 minutes per side.

BACKGROUND FACTS AND PROCEDURE

Petitioners filed the underlying action in August 2008 to challenge the adequacy of Respondent's Final Programmatic Environmental Impact Report/Environmental Impact Statement ("PEIR/EIS") approving the Pacheco Alignment for the Central Valley High-Speed Train Project (the "Project"). (Petition at ¶¶ 2, 3, 7.) The case was fully briefed and heard by the Court on May 29, 2009. (Petition at ¶ 7.)

In August 2009, the Court issued its decision upholding some aspects of the PEIR/EIS, but finding it defective in its treatment of land use and right-of-way impacts, as well as its failure to acknowledge the significance of the Project's vibration impacts. (Petition at ¶ 7.) In November 2009, the Court entered a final judgment in the case in accordance with its decision. (Petition at ¶ 8.) The Court also issued a peremptory writ of mandate ordering Respondent to rescind its certification of the PEIR/EIS and its approval of the Project, remanding the matter to Respondent for reconsideration and revision in accordance with the Court's final judgment. (Petition at ¶ 8.)

On approximately February 1, 2010, after expiration of the time to move for reconsideration, a new trial, or to file an appeal of the final judgment, Petitioners learned of newly-discovered evidence indicating that the ridership and revenue modeling used in the PEIR/EIS, and upon which Respondent relied in choosing the Pacheco Alignment, is flawed. (Petition at ¶ 10.)

The newly discovered evidence relates to the parameters used for the modeling that produced the ridership and revenue data included in the PEIR/EIS. (Petition at ¶ 11.) The mathematical model used to estimate ridership and revenue had been prepared by Cambridge Systematics, Inc. ("Cambridge"), a private consulting firm working under contract with the Metropolitan Transportation Commission ("MTC"). Cambridge prepared an initial model, which was peer-reviewed and found acceptable, and thereafter Cambridge published the parameters for the model in August 2006. (Petition at ¶ 12.)

Petitioners allege that this model, when applied to the data for the Project, did not provide results that were acceptable to MTC and Respondent. (Petition at ¶ 13.) Consequently, Cambridge changed the modeling parameters to produce a revised model. (Petition at ¶ 13.) This revised model was neither peer reviewed nor published. (Petition at ¶ 14.) The revised model was not included in the administrative record in the underlying action. (Petition at ¶ 14.) A January 29, 2010 transmittal memorandum from Cambridge to Respondent states that Cambridge forwarded the revised modeling parameters to MTC, but that MTC elected not to update the published modeling report to include the revised parameters. (Petition at ¶ 15.) However, the ridership results obtained using the revised model were included in the PEIR/EIS for the Project. (Petition at ¶ 14.)

Petitioners' Petition omits any reference to how Petitioners discovered the existence of the revised modeling parameters and their use in calculating the ridership estimates relied upon in the PEIR/EIS. However, supporting documents reveal that the revised modeling parameters were discovered by Elizabeth Alexis, a founding member of Californians Advocating Responsible Railroad Design, a group of professionals living in the San Francisco Peninsula with an interest in promoting open and rational discussion of rail service options for California. (Declaration of Elizabeth Goldstein Alexis in Support of Petition ("Alexis Decl.") at ¶ 1; Memorandum at 4:14-18.)

Ms. Alexis first became aware of the Project in January 2009. (Alexis Decl. at ¶ 5.) In September 2009, Ms. Alexis began studying the publicly available ridership and revenue modeling information for the Project and developed some concerns about the studies. (Alexis Decl. at ¶ 5.) Ms. Alexis attempted to follow up on her concerns with Respondent and the California Department of Transportation ("Caltrans"). (Alexis Decl. at ¶ 6.) Based on her review of Respondent's August 2009 Board minutes, Ms. Alexis believed that Caltrans was working on a new ridership study as part of a Statewide Travel Model that was being developed by UC Davis. (Alexis Decl. at ¶ 6.) After contacting Professor Mike McCoy, the principal investigator for the modeling effort at UC Davis, Ms. Alexis learned that UC Davis was not moving forward with the modeling study. (Alexis Decl. at ¶ 7.) Based on Professor McCoy's comments, Ms. Alexis' concerns regarding the study increased. (Alexis Decl. at ¶ 7.) On November 2, 2009, Ms. Alexis sent a brief summary of her concerns to Chad Baker, the Caltrans representative heading the Statewide Travel Model effort. (Alexis Decl. at ¶ 8.)

Upon review of Respondent's 2009 Business Plan, which was released in December 2009, Ms. Alexis discovered that the business plan contained new ridership estimates, which Ms. Alexis presumed resulted from the original, published model. (Alexis Decl. at ¶ 9.) At that time, Ms. Alexis decided to make her concerns public because it appeared that Respondent was relying on a model that she thought had serious deficiencies. (Alexis Decl. at ¶ 9.)

On approximately December 22, 2009, Ms. Alexis contacted George Mazur, the lead person on the ridership modeling project at Cambridge. (Alexis Decl. at ¶ 10.) Through her review of various documents, Ms. Alexis learned that Cambridge had developed the ridership model under contract with MTC.

(Alexis Decl. at ¶ 10.) Mr. Mazur was familiar with the concerns expressed by Ms. Alexis in her prior emails to Respondent, but refused to provide Ms. Alexis with copies of his responses to her email inquiries. (Alexis Decl. at ¶ 11.) Ms. Alexis then attempted to obtain copies of Mr. Mazur's responses to her email inquiries from Nick Brand, Respondent's consultant. (Alexis Decl. at 11.)

On approximately December 30, 2009, Ms. Alexis was contacted by Jeffrey Barker, Respondent's deputy general manager, who requested the two meet to discuss her concerns. (Alexis Decl. at ¶ 12.) Ms. Alexis made receipt of Mr. Mazur's responses to her email inquiries, as well as a copy of the final model coefficients, a condition of any meeting with Respondent and Cambridge. (Alexis Decl. at ¶ 12.)

As Ms. Alexis continued to review the published information on the ridership modeling, she came to the conclusion that the results could not have been obtained with the model included in Respondent's published reports. (Alexis Decl. at ¶ 13.) Among other issues, Ms. Alexis' attempts to recreate a key data table in one of the modeling reports based on the published model information failed. (Alexis Decl. at ¶ 13.) In particular, some of the table values differed from her calculations by a factor of ten, indicating that the figures had been entered by hand and allowing for typographical errors to occur. (Alexis Decl. at ¶ 13.) According to Ms. Alexis, this also meant that data manipulation could have occurred. (Alexis Decl. at ¶ 13.) In addition, the high degree of sensitivity shown in the results did not appear explainable based on the published model parameters. (Alexis Decl. at ¶ 14.)

Ms. Alexis continued to follow up with Mr. Barker regarding her request for Mr. Mazur's responses to her previous email inquiries. (Alexis Decl. at ¶¶ 14-15.) On January 21, 2010, Ms. Alexis received an email from Mr. Barker indicating that he was gathering information for her. (Alexis Decl. at ¶ 16.) That same day, Mr. Barker emailed Mr. Mazur's responses to Ms. Alexis' initial comments on the ridership model. (Alexis Decl. at ¶ 16.) In that same email, Mr. Barker responded to Ms. Alexis' request for the final model coefficients, indicating that there was no document that responded to her request and that Cambridge was putting together the information for her. (Alexis Decl. at ¶ 16.)

After reviewing Mr. Mazur's responses to her previous email inquiries, Ms. Alexis developed additional concerns regarding the ridership model and

requested further details about how the survey results were incorporated into the modeling effort. (Alexis Decl. at ¶ 17.) On January 31, 2010, Ms. Alexis received the final model from Mr. Baker, along with a memorandum indicating that Cambridge had forwarded the revised modeling parameters to MTC, but that MTC elected not to update the published modeling report to include the revised parameters. (Alexis Decl. at ¶ 18.)

After reviewing the model coefficients and comparing them with the published model coefficients, Ms. Alexis concluded that the model had been significantly changed after the peer review process had ended and that the new model coefficients were highly questionable. (Alexis Decl. at ¶ 19.) During her review, Ms. Alexis noticed that one of the parameters had changed by an extraordinarily high amount and, recalling her observations on other Cambridge-prepared tables, Ms. Alexis suspected that there might have been a typographical error. (Alexis Decl. at ¶ 20.) Ms. Alexis contacted Respondent and Cambridge regarding this issue, and received an email response confirming that the one coefficient Ms. Alexis had identified had been erroneously increased by a factor of ten. (Alexis Decl. at ¶ 20.)

On February 1, 2010, Ms. Alexis contacted counsel for Petitioners regarding her discovery. (Alexis Decl. at ¶ 19; Flashman Decl. in Support of Petition ("Flashman Petition Decl.") at ¶ 2.) Mr. Flashman then provided the modeling coefficients to Petitioner Transportation Solutions Defense and Education Fund ("TSDEF"), who had recently retained a transportation modeling consultant, Norman Marshall. (Petition at ¶ 16; Flashman Petition Decl. at ¶; Declaration of Norman Marshall in Support of Petition at ¶¶ 3-5.) Mr. Norman concluded that the revised model contains major flaws and errors that make its results untrustworthy. (Petition at ¶ 16; Norman Decl. at ¶ 5.)

Petitioners subsequently sought to obtain additional documentation from Respondents through Public Records Act requests to substantiate Ms. Alexis' concerns and Mr. Norman's findings regarding the modeling coefficients. (Petition at ¶ 17; Flashman Petition Decl. at ¶¶ 6-16.)

On May 6, 2010, Petitioners filed their Petition for Writ of Error *Coram Nobis* ("Petition"), contending that had the revised model been published during the administrative process, Petitioners would have had the opportunity to evaluate the model and to point out its inadequacies to Respondent. (Petition at ¶ 18.) As a consequence of the concealment of the

revised model, Petitioners allege they were deprived of the opportunity to present this issue to Respondent or the Court, thereby rendering the trial of the case and the resulting judgment unfair. (Petition at ¶ 18.) Petitioners seek a writ of error *coram nobis* vacating the final judgment in the underlying action and reopening the proceedings to consider the newly-discovered evidence. (Petition, Prayer for Relief at ¶ 1.)

In connection with their Petition, Petitioners filed a Motion to Take Discovery and Shorten Time for Responses ("Discovery Motion"). In order to assist Petitioners in gaining "a better understanding of the facts and contentions involved in the Petition," TSDEF served on Respondent a set of discovery requests consisting of form interrogatories, requests for admissions, and special interrogatories. (Discovery Motion at 3:13-23.)

On July 12, 2010, Respondent notified counsel for Petitioner that Respondents did not intend to respond to the discovery requests on the ground that discovery is permitted only in a pending action, which no longer exists because a final judgment was entered in the litigation on November 3, 2009. (*See* Declaration of Stuart Flashman in Support of Discovery Motion at Exh. "B.") Petitioners acknowledge that their Discovery Motion is moot if the Court summarily grants or denies Petitioners' Petition; discovery would only be allowed if the Court found that Petitioners established a *prima facie* case in support of their Petition and set the matter for hearing. (*See* Discovery Motion at 1:26-2:1.)

DISCUSSION

I. The Writ of Error *Coram nobis*, generally.

A writ of *coram nobis*[1] is considered to be a limited and drastic remedy that will be issued only if a number of requirements have been satisfied. (*In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1296; *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 228 (citation omitted).) Frequently invoked in criminal proceedings in California, the use of *coram nobis* in civil proceedings is rare. (*L.A. Airways, Inc. v. Hughes Tool Co.* (1979) 95 Cal.App.3d 1, 9.) The writ of error *coram nobis* generally issues to "'correct an error of fact which was unrecognized prior to the final

[1] The writ of error *coram nobis*, which is addressed to the trial court that rendered the judgment, is identical to the writ of error *coram vobis*, which is addressed to an appellate court. (*In re Derek W* (1999) 73 Cal App 4th 828, 832 n 3) (citation omitted))

disposition of the proceeding. It is not intended as a means of revising findings based on known facts, or facts that should have been known by the exercise of ordinary and reasonable diligence.' [Citation omitted.] Accordingly, the scope of the writ is extremely narrow and it may not be used where some other remedy is available." (*In re Derek W., supra*, 79 Cal.App.4th at 831-32 (citation omitted); *see also People v. Kim* (2009) 45 Cal.4th 1078, 1093 ("'[t]he remedy does not lie to enable the court to correct errors of law'") (citation omitted).)

In view of the strict requirements for writs of *coram nobis*, "it will often be readily apparent from the petition and the court's own records that a petition for *coram nobis* is without merit and should therefore be summarily denied." (*People v. Shipman* (1965) 62 Cal.2d 226, 230.) "[P]etitions for writ of *coram nobis* made on the ground of newly discovered evidence [require] a far greater showing of diligence on the part of the party seeking relief . . . ." (*Page v. Ins. Co. of North America* (1969) 3 Cal.App.3d 121, 128; *see also id.* at 129 ("[T]he claim of newly discovered evidence has not been looked upon with favor and a strong showing of the essential requirements has been demanded").)

"When, however, facts have been alleged with sufficient particularity [citation omitted] to show that there are substantial legal or factual issues on which availability of the writ turns, the court must set the matter for hearing. These issues may be decided on the basis of memoranda of points and authorities, affidavits, and other written reports." (*Shipman, supra*, 62 Cal.2d at 230.) In effect, the issuance of a writ of *coram nobis* reopens the judgment for the trial court to consider the new evidence at issue. (*See In re Rachel M., supra*, 113 Cal.App.4th at 1296 ("In effect, the writ [of *coram vobis*] *remands* the case to the trial court for the purpose of *reopening the judgment* . . . to consider the new evidence") (citation omitted).)

The most recent iteration of the requirements to obtain a writ of *coram nobis* is contained in the California Supreme Court's opinion in *People v. Kim*, (2009) 45 Cal.4th 1078. There, quoting *People v. Shipman, supra*, the Supreme Court stated:

> 'The writ of [error] *coram nobis* is granted only when three requirements are met. (1) Petitioner must "show that some fact existed which, without any fault or negligence on his part, was

> not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment."[2] [Citations.] (2) Petitioner must also show that the "newly discovered evidence … [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial." [Citations.] This second requirement applies even though the evidence in question is not discovered until after the time for moving for a new trial has elapsed or the motion has been denied. [Citations.] (3) Petitioner "must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ . . . .""

(*Kim, supra*, 45 Cal.4th at 1092-93 (citation omitted).) Additionally, no other remedy may be available to the petitioner in order for a writ of error *coram nobis* to issue. (*See Kim, supra*, 45 Cal.4th at 1094-95 (citation omitted); *In re Rachel M., supra*, 113 Cal.App.4th at 1296 (citation omitted).)

The parties appear to agree on all but one of the above-outlined requirements for issuance of a writ of error *coram nobis*. Respondent argues, and Petitioners disagrees, that in order to fulfill the third requirement, Petitioners must demonstrate that the proffered new evidence was unavailable to Petitioners as a result of extrinsic fraud committed by Respondent. Relying on *Los Angeles Airways, Inc. v. Hughes Tool Company, supra*, and its progeny, Respondent contends that Petitioners failed to establish a *prima facie* case in support of their Petition because Petitioners fail to allege and cannot establish extrinsic fraud.

Respondent also contends the Petition fails because Petitioners have not alleged and/or cannot establish the other criteria for issuance of a writ of *coram nobis* because: (1) Petitioners have an alternative, adequate remedy to address their concerns; (2) Petitioners fail to plead or establish that they acted with reasonable diligence; (3) Petitioners fail to demonstrate that the new evidence would compel or make probable a different result; and (4) the new evidence relates to an issue adjudicated by the Court.

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[2] *See also In re Rachel M, supra*, 113 Cal App 4th at 1296 ("The proffered new evidence will either compel or make probable a different result in the trial court") (citation omitted))

II. The Petition fails on both procedural and substantive grounds and Petitioners are not entitled to a writ of error *coram nobis*.

A. The Petition fails because Petitioners cannot establish the first requirement for issuance of a writ of error *coram nobis* - that some fact existed, which, without any fault or negligence on Petitioners' part, was not presented to the Court at the trial on the merits and which, if presented, would have prevented the rendition of the judgment.[3]

1. Petitioners fail to demonstrate that the proffered new evidence will compel or make probable a different result.

"To qualify for issuance of the writ, the alleged facts must be such that '"if presented would have prevented the rendition of the judgment"'" (*Kim, supra*, 45 Cal.4th 1078 (citation omitted)) or would "either compel or make probable a different result in the trial court." (*In re Rachel M., supra*, 113 Cal.App.4th at 1296 (citation omitted)).

Petitioners fail to present any argument or evidence in support of this particular requirement despite the fact that Respondents expressly challenge the sufficiency of the Petition on this ground. Petitioners contend that Cambridge's "ridership analysis was based on a model that was unavailable to the public. If it had been made available, the substantiality of that evidence could have been called into question, as it now has." (Reply at 5:11-13.) These conclusory statements, however, do not establish that the Court's consideration of this new evidence would compel or make probable a different result in the trial court.

In their Petition for Peremptory Writ of Mandate, Petitioners asserted four causes of action. Petitioners prevailed at trial, and on November 3, 2009, a Judgment was entered in favor of Petitioners on all four causes of action. Pursuant to the Peremptory Writ of Mandate that followed, Respondents were directed to "rescind and set aside your Resolution NO. 08-01 certifying the Final Environmental Impact Report/Environmental Impact Study ("EIR/EIS") for the Bay Area to Central Valley High-Speed Train

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[3] Whether the failure to discover the new evidence results from Petitioners' fault or negligence directly relates to the third requirement for issuance of a writ of error *coram nobis* – whether the fact could not in the exercise of due diligence have been discovered by Petitioners – and is accordingly discussed in Section II C , *infra*, herein

Project, approving the Pacheco Pass Network Alternative Serving San Francisco and San Jose Termini, and approving preferred alignment alternatives and station location options." (Peremptory Writ of Mandate at ¶ 1.) Petitioners have given the Court no information regarding precisely how the underlying Judgment and Writ would differ if the Court were to consider the new evidence proffered by Petitioners.

B. The Petition successfully establishes the second requirement for issuance of a writ of error *coram nobis* - that the newly discovered evidence does not go to a factual issue previously adjudicated by the Court.

In order to obtain a writ of error *coram nobis*, "Petitioner must also show that the 'newly discovered evidence . . . [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial." (*Shipman, supra*, 62 Cal.2d at 229 (citation omitted).)

Petitioners acknowledge that "the Court, in its ruling of August 26, 2009, stated that, "The ridership forecasts were developed by experts in the field of transportation modeling and were subject to three independent peer review panels." (Reply at 5:21-23.) Petitioners contend, however, that the Court did not address the validity of the final ridership/revenue model because the model used to compute the Final PEIR/PES's results was neither peer reviewed nor reviewed by the Court; the model revisions remained undiscovered until after the Court issued its Judgment and Writ. (Reply at 5:24-6:3.) The Court agrees that the validity of the ridership/revenue model was not actually adjudicated by the Court. For purposes of the underlying action, the validity and accuracy of the ridership/revenue model appears to have been presumed. Instead, the Court was tasked with the responsibility of determining whether the model constituted substantial evidence in support of Respondent's decision to select the Pacheco Alignment.

The Court's holding in this regard, however, does not relieve Petitioners of the responsibility to demonstrate that Petitioners' failure to discover the new evidence regarding the revenue/ridership model prior to issuance of the Court's Judgment and Writ did not arise from Petitioners' negligence, fault, or failure to exercise due diligence. As discussed further below, Petitioners' failure to establish this element, as well as other required elements, is fatal to their Petition.

C. The Petition fails because Petitioners cannot establish the third requirement for issuance of a writ of error *coram nobis* - that the new evidence was not known to Petitioners and could not have been discovered by Petitioners in the exercise of due diligence.

Relying on *Los Angeles Airways, Inc. v. Hughes Tool Company*, *supra*, and its progeny, Respondents contend that Petitioners are required to demonstrate that Petitioners were unable to discover the alleged new evidence as a result of extrinsic fraud on the part of Respondent. Because Plaintiffs fail to allege extrinsic fraud and, more importantly, have no evidence establishing extrinsic fraud, Respondents contend that the Petition should be denied. (Opposition at Section III.)

Petitioners rely on the California Supreme Court's decision in *People v. Kim*, *supra*, to contend otherwise, stating: "It should be noted, however, that although the ground for issuance of the writ are sometimes stated as extrinsic fraud [citation], and there is no question that extrinsic fraud can justify its issuance, actual fraudulent intent is not required. It is enough that the evidence was hidden from petitioner, regardless of intent to deceive." (Memorandum at 7:6-11.)

The significance of the California Supreme Court's decision in *Kim* does not go unnoticed by this Court. The *Kim* decision is the most recent iteration of the requirements for issuance of a writ of error *coram nobis* from the highest judicial authority in the state. The Supreme Court's analysis supporting its denial of the issuance of writ of error *coram nobis* on the facts before it is thoughtful and detailed. However, this Court cannot ignore the fact that *Kim* was a criminal proceeding and the express language of the Supreme Court's decision limits its scope to such criminal proceedings. Although acknowledging that a writ of error *coram nobis* is "technically [] available" in civil cases, the Supreme Court addressed "in this case the availability of the writ in criminal cases only."[4] (*Kim*, *supra*, 45 Cal.4th at 1091 n.9.)

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[4] In a 1951 decision, the California Supreme Court addressed the issuance of a writ of error *coram nobis* in a civil matter, implying an extrinsic fraud requirement

> As disclosed in those and other cases the truth or falsity of the testimony before the court is not a matter which can be relitigated through the office of this writ, at least in the absence of a deprivation of the legal rights of the petitioner through extrinsic causes Mere mistake or negligence of herself or her attorney in the procurement of

Setting forth the parameters of its decision, the Supreme Court addressed only criminal precedent for issuance of a writ of *coram nobis* and relied on *People v. Shipman, supra*, another criminal case, as the source for the three preconditions for issuance of a writ of *coram nobis*. The Supreme Court does not address cases addressing the issuance of a writ of error *coram nobis* in the civil context, such as *Los Angeles Airways, Inc., supra*, and others addressed by Respondent.

The Court finds Petitioners' attempts to distinguish the line of civil *coram nobis* cases relied upon by Respondents unconvincing.[5] The Court agrees with Respondents that Petitioners must demonstrate extrinsic fraud in order to obtain a writ of error *coram nobis*.[6] (*See also, e.g., L.A.*

> evidence or witnesses on the 1941 trial is not such a cause The record shows and the petitioner admits that neither the court nor the district attorney had anything to do with the nonattendance of the daughter at the former hearing Neither does an extrinsic cause appear because the medical diagnosis concerning the petitioner's real condition was not then obtained

(*In re Sprague* (1951) 37 Cal 2d 110, 115)

[5] For example, Petitioners attempt to distinguish the *Los Angeles Airways* decision on the following grounds "However, *Los Angeles Airways* mentions extrinsic fraud in the context of the intrinsic/extrinsic fraud rule That earlier discussion noted the plentiful authority that while extrinsic fraud may be grounds for relief from a judgment, intrinsic fraud (e g , perjury) is not [Footnote omitted] The court then concluded that the case at the bar constituted intrinsic, rather than extrinsic, fraud, and relief was therefore unavailable " (Reply at 7 12-19) Petitioners ignore that the *Los Angeles Airways* court addressed three separate methods of collaterally attacking a judgment, expressly finding that extrinsic fraud is a requirement for issuance of a writ of error *coram vobis*

> Accordingly, in any attempted collateral attack based on lately discovered evidence, it is crucial to be able to demonstrate what amounts to due process deprivation that the issue in question was never really litigated in any meaningful fashion
>
> We thus proceed to discuss, in the other proceeding from most general to most specific area of law the extrinsic/intrinsic fraud rule, the collateral estoppel analogy, and finally, writs of error *coram vobis*

(*L A Airways, supra*, 95 Cal App 3d at 7)

[6] Petitioners emphasize that the *Kim* "makes no mention of an extrinsic fraud requirement " Petitioners continue "Indeed the case's illustrative listing of earlier precedential cases is replete with examples from both the Supreme Court and lower courts where the writ was issued without extrinsic fraud being involved " (Reply at 6 11-17) However, the fact that the *Kim* court did not expressly require a demonstration of extrinsic fraud prior to the issuance of a writ of error *coram nobis* is not determinative The Supreme Court acknowledged the heighted burden a petitioner must meet in order to obtain a writ of error *coram nobis* "As noted, *ante*, facts that

Airways, Inc. v. Hughes Tool Co. (1979) 95 Cal.App.3d 1; *In re Rachel M.* (2003) 113 Cal.App.4th 1289; *Daniels v. Robbins* (2010) 182 Cal.App.4th 204; *Mullen v. Dept. of Real Estate* (1988) 204 Cal.App.3d 295; *Betz v. Pankow* (1993) 16 Cal.App.4th 931; *Philippine Export and Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058.)

The reasoning of the Court of Appeal, Second Appellate District's decision in *Los Angeles Airways, Inc., supra,* resonates with this Court. There, the court distinguished the Court of Appeals, First Appellate District's decision in *Rollins v. City and County of S.F.,* (1974) 37 Cal.App.2d 145 - the only case that this Court is aware of that issued a writ of error *coram nobis* in a civil matter without a showing of extrinsic fraud - as "an abrupt departure from precedent in the area and, at least on the face of the opinion, the departure is not explicitly considered or justified." (*L.A. Airways, supra*, 95 Cal.App.3d at 9.) The *Los Angles Airways* court stated:

> With all due respect, we decline to follow *Rollins*. A rule permitting the criteria for a new trial to govern a case where the evidence is discovered later, has no basis in the statutes or in any other case. It would extend the time for a motion for a new trial by pure judicial fiat. Such an extension not only is beyond our power to create but there is good reason to limit the time within which a new trial may be requested: the fresher in memory are the events of the trial, the more rationally may the trial court exercise the broad discretion it has under Code of Civil Procedure section 657 to grant a new trial. That discretion depends on multiple considerations. Many of those considerations depend on actual perceptions throughout the trial which are not preserved on the cold record. Accordingly, there is good reason to limit the time within which such broad discretion may be exercised, and to apply the stricter doctrines of extrinsic fraud which favor finality once we go beyond that limited time. The Legislature has in fact set such limit. We should not ignore it.

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have justified the issuance of the writ in the past have included a litigant's insanity or minority, that the litigation had never been properly served, and that a defendant's plea was procured through extrinsic fraud or mob violence " (*Kim, supra*, 45 Cal 4th at 1102)

(*L A Airways*, *supra*, 95 Cal App.3d at 9-10.) Thus, to "warrant issuance of the writ of coram [nobis] [] the standard is whether denial of the writ amounts to due process deprivation: '[I]n any attempted collateral attack based on lately discovered evidence, it is crucial to be able to demonstrate what amounts to due process deprivation: that the issue in question was never really litigated in any meaningful fashion '" (*Chuidian*, *supra*, 218 Cal.App.3d at 1090-91 (citation omitted).)

In their Petition, Petitioners fail to allege extrinsic fraud on the part of Respondent. Petitioners therefore request leave to amend their Petition "to allege such fraud based on information and belief and seek further substantiating evidence through discovery." (Reply at 9:12-24.) Petitioners assert that they "now have reason to believe that Respondent was complicit in MTC's actions." Complacency, however, does not equate to extrinsic fraud. Petitioners present no evidence that Respondent actively concealed the revised ridership/revenue model from Petitioners.

Even if Petitioners were not required to demonstrate extrinsic fraud and the Court accepted the less stringent requirements for issuance of a writ of error *coram nobis* outlined by Petitioners, the Court finds that the Petition still fails. Petitioners fail to demonstrate that the new evidence could not have been discovered by Petitioners in the exercise of due diligence.

"It is well settled that a showing of diligence is prerequisite to the availability of relief by motion for *coram nobis*." (*Kim*, *supra*, 45 Cal.4th at 1096 (citation omitted).) "The diligence is not some abstract technical obstacle placed randomly before litigants seeking relief, but instead reflects the balance between the state's interest in the finality of decided cases and its interest in providing a reasonable avenue of relief for those whose rights have allegedly been violated." (*Id.* at 1097.)

"Because of the policy of the law that final judgments ought not to be set aside lightly on unsubstantial grounds, both from the standpoint of fairness and from the standpoint of orderly administration of justice, the claim of newly discovered evidence has not been looked upon with favor and a strong showing of the elements has been demanded." (*Page*, *supra*, 3 Cal.App.3d at 129 (citations omitted). "'Coupled with this well-settled principle is the policy of the law that the claim of newly discovered evidence as a ground for a new trial is uniformly looked on by the courts with distrust and disfavor. It is said that public policy requires a litigant to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf." (*Ibid.* (citation omitted).)

In accordance with these principles, "[a] review of the decisions dealing with . . . with petitions for writ of *coram nobis* made on the ground of newly discovered evidence reveals that a far stronger showing of diligence on the part of the party seeking relief has been uniformly required." (*Id.* at 128.)

Petitioners initiated the underlying action in August 2008 by filing a Petition for Peremptory Writ of Mandate and Complaint for Injunctive and Declaratory Relief. In its original petition, Petitioners alleged that "[w]hile the Project entailed many studies, analyses, and choices, perhaps the single biggest choice was between two major alternative alignments: the "Pacheco Alignment" running north and westward from the Central Valley main line south of Merced . . . and the "Altamount Alignment" running north and westward from the Central Valley main line north of Modesto . . . ." (Petition for Peremptory Writ of Mandate at ¶ 4.)

Petitioners presented a number of challenges to Respondent's selection of the Pacheco Alignment, and alleged that Respondent's "consideration of these two major alternatives was neither fair nor complete, but, instead, improperly distorted the analysis of benefits and impacts, and ultimately of feasibility and desirability to unfairly and improperly bias the analysis in favor of approving the Pacheco Alignment." (Petition for Peremptory Writ of Mandate at ¶ 5.) More specifically, Petitioners contended that:

> The Project description failed to include relevant information about essential characteristics of the project, including specifically operational characteristics such as the projected ridership for the various alternative alignments along with a clear explanation of the methodology used to calculate those ridership figures.
>
> The Project description failed to include an explanation of what portions of projected ridership would occur regardless of whether the Project was approved or regardless of the alignment alternative chosen.

(Petition for Peremptory Writ of Mandate at ¶ 46; *see also* Petitioners' Statement of Issues at 2:8-14.) Accordingly, Petitioners sought a peremptory writ of mandate from the Court ordering Respondent to "vacate and set aside its determinations approving the project, including its

determination to choose the Pacheco Pass alignment for the Project . . . ." (Petition for Peremptory Writ of Mandate, Prayer for Relief at ¶ 1.) These issues were fully briefed, heard by the Court, and ruled upon by the Court in its Judgment and subsequent Writ.

Despite the significance of Respondent's selection of the Pacheco Alignment and Petitioners overwhelming concerns regarding issues related to the ridership modeling purportedly supporting Respondent's selection, Petitioners present no evidence demonstrating that their failure to previously discover this new evidence was not the result of Petitioners' negligence, fault, or lack of due diligence. Instead, the record compels a contrary conclusion.

In their Petition, Petitioners allege only that, "[o]n or about February 1, 2010, after the expiration of any recourse other than this Petition, Petitioners learned of newly-discovered evidence that indicates that the ridership and revenue modeling used in the PEIR/EIS, and upon which Respondent relied in making decisions on a choice of alignment for the Project is seriously flawed. (Petition at ¶ 10.) While Petitioners allege that the "evidence was not previously available to Petitioners, nor to the public," Petitioners fail to detail any evidence that they sought and were denied this information in connection with the prosecution of their Petition. (*See* Petition at ¶ 11.) The declaration of Mr. Flashman is of no assistance to Petitioners as Mr. Flashman attests only that he "first became aware of there being potential problems with the high-speed rail ridership and revenue modeling done for the Programmatic EIR/EIS that is the subject of this case through a telephone call from Ms. Elizabeth Alexis on February 1, 2010." (Flashman Decl. in Support of Petition at ¶ 2.)

The declaration of Ms. Alexis goes to great lengths to establish her apparent diligence in discovering what Petitioners contend is new evidence. However, the diligence of Ms. Alexis does not equate to diligence on behalf of the Petitioners. Petitioners failed to present any evidence supporting a conclusion that they themselves exercised due diligence in attempting to obtain the new evidence prior to issuance of the Court's Judgment and Writ or the expiration of the time periods to move for a new trial or appeal.

Significantly, Ms. Alexis' declaration establishes that Petitioners' failure to previously discover this new evidence resulted from Petitioners' lack of diligence in investigating and prosecuting their claims. Ms. Alexis began her own independent investigation into the Project in

September 2009 when she "began studying the ridership and revenue modeling" being done by Respondents. (Alexis Decl. at ¶ 5.) Ms. Alexis attests that her "review of the _publicly available_ ridership and revenue model information led me to have some concerns about the studies." (Alexis Decl. at ¶ 5 (emphasis added).) Ms. Alexis further attests:

> As I continued to review the _published information on the ridership modeling, I came to realize that the results could not have been obtained with the model included in the Authority's published reports_. Among other things, my attempts to recreate a key data table included in one of the modeling reports based on the published model information failed. In particular, some of the table values differed from my calculations by a factor of ten, indicating that the figures had been entered by hand, allowing typographical errors to occur. This also meant that data manipulation could have occurred. In addition, the high degree of headway sensitivity shown in the results did not appear explainable based on the published modeling parameters.

(Alexis Decl. at ¶ 13 (emphasis added).)

Petitioners present no evidence explaining why Petitioners and/or its consultants or experts could not have conducted a similar analysis. Instead, Petitioners argue that they are not experts in computer modeling, "[n]or do Petitioners believe that expertise in computer modeling should be required for reasonable diligence." (Reply at 4:3-4.) Unexplained in Petitioners papers, however, is why Petitioners failed to retain an expert to review the ridership and revenue models supporting Respondent's selection of the Pacheco Alignment, especially in light of the significance of the issue in Petitioners' underlying Petition. This is even more troubling where Petitioners readily had access to Mr. Marshall - a transportation modeling consultant recently hired by the TSDEF in preparation for the project-level environmental studies. (Flashman Decl. in Support of Petition at ¶ 4.) Petitioners evidently understood the need for experts such as Mr. Marshall in analyzing such a complex project, but failed to consult such an expert in litigating its underlying petition.

Petitioners also contend that they exercised reasonable diligence "given the relevant presumptions." (Reply at 3:16-17.) "During the administrative process, Petitioners took for granted, as is presumed, that Respondent was properly fulfilling its duties under CEQA." (Reply at 3:18-

20.) Accordingly, "Petitioners, like everyone else, assumed that a published and peer reviewed model was acceptable . . . ." (Reply at 4:8-10.) This argument, however, is unconvincing when the entire premise of Petitioners' underlying Petition alleges numerous violations of CEQA, including Respondent's alleged failure to describe the Project properly, fully disclose and adequately analyze the Project's significant environmental impacts, adequately mitigate the Project's significant impacts, adequately analyze the Project alternatives, adequately respond to comments on the DPEIR/S. Petitioners were thus required "to exhaust every reasonable effort to produce . . . all existing evidence" on their behalf. (*See Page*, *supra*, 3 Cal.App.3d at 129 (citation omitted).)

D. The Petition fails because Petitioners have an alternate legal remedy available to them, which they are pursuing.

"[T]he writ of error *coram nobis* is unavailable when a litigant has some other remedy at law." (*Kim*, *supra*, 45 Cal.4th at 1093; *see also In re Derek W.*, *supra*, 73 Cal.App.4th at 831-32 ("[T]he scope of the writ [of error *coram nobis*] is extremely narrow and it may not be used where some other remedy is available") (citation omitted).) As the Supreme Court recently summarized in the criminal context:

> 'The writ of error *coram nobis* is not a catch-all by which those convicted may litigate and relitigate the propriety of their convictions ad infinitum. In the vast majority of cases a trial followed by a motion for a new trial and an appeal affords adequate protection to those accused of crime. The writ of error *coram nobis* serves a limited and useful purpose. It will be used to correct errors of fact which could not be corrected in any other manner. But it is well-settled law in this and in other states that where other and adequate remedies exist the writ is not available.'

(*Kim*, *supra*, 45 Cal.4th at 1094 (citation omitted).)

Here, although Petitioners fail to expressly allege that no other remedies at law are available to them to address their grievances, Petitioners do allege that "the time to move for reconsideration or a new trial and the time for filing an appeal of the final judgment have expired. Consequently, the case is essentially closed." (Petition at ¶ 9.)

Nevertheless, Respondent contends that Petitioners' can avail themselves, and have availed themselves, of the CEQA compliance process over which this Court has continuing jurisdiction. Among other actions, the Final Judgment and Writ issued by the Court required Respondent to "rescind and set aside [its] Resolution No. 05-01 certifying the Final Environmental Impact Report/Environmental Impact Study ("EIR/EIS") for the Bay Area to Central Valley High-Speed Train Project, approving the Pacheco Pass Network Alternative Serving San Francisco and San Jose Termini, and approving preferred alignment alternatives and station location options." (Peremptory Writ of Mandate at ¶ 1 (Nov. 3, 2009).)

Pursuant to this directive, Respondent "rescinded its certification of the Final Bay Area to Central Valley HST Program EIR, its approval of the Pacheco Pass Network Alternative serving San Francisco via San Jose, and related documents. [Respondent circulated] Revised Draft Program EIR Material as part of its compliance with the court judgment." (Reply at 3 n.2 (attaching "Notice of Availability and Notice of Public Meeting Bay Area to Central Valley Revised Draft Program Environmental Impact Report Material" ("Public Notice")).) Respondents accepted comments regarding the Revised Draft Program EIR Material for a 45-day period between March 11, 2010, and April 26, 2010. (*Ibid.*)

Petitioners admit that they participated in the public comment period and "have submitted a comment letter" on the Revised Draft Program EIR Material. However, Petitioners contend that Respondent eliminated the CEQA review process as an alternate legal remedy because the Public Notice states:

> Pursuant to CEQA Guidelines section 15088.5, subdivision (f)(2), the Authority requests that reviewers limit the scope of their comments to the revised materials contained in this document. The Authority is only obligated to respond to those comments received during the circulation period that relate to the content of this Revised Draft Program EIR Material.

(*Ibid.*) "Since the [Revised Draft Program EIR Material] makes no changes to the ridership/revenue modeling contained in the prior Final PEIR, Respondent has made it clear that it will not respond to comments about the recently-disclosed defects in the modeling, including those submitted by Petitioner." (Reply at 3:2-4.)

Petitioners' argument that it has no alternative legal remedy is too speculative at this time to support the issuance of a writ of error *coram nobis*. Petitioners fail to present any actual evidence that Respondent will not consider or has not considered Petitioners' comments regarding the allegedly flawed ridership/revenue modeling relied on by Respondent to select the Pacheco Pass Network Alternative. Pursuant to the Writ, the Court required Respondent to rescind and set aside Resolution No. 05-01 approving the Pacheco Pass Network Alternative Serving San Francisco and San Jose Termini. (Peremptory Writ of Mandate at ¶ 1 (Nov. 3, 2009).) Petitioners' contentions regarding the ridership/revenue modeling relied upon by Respondent to select the Pacheco Pass Network Alternative appear relevant.

Moreover, Petitioner argues that "under *Laurel Heights Improvement Association v. Board of Regents*, (1993) 6 Cal.4th 1112, Respondent must respond to the new information of the newly-discovered revised model and its infirmity." Importantly, Respondent itself asserts in its Opposition that it is required to consider Petitioners' comments. (Opposition at 9:24-10:1.) At this time, the Court cannot conclude that Petitioners are without an alternative, viable legal remedy to address their grievances.

DISPOSITION

Petitioners' Petition and Discovery Motion are DENIED. In accordance with Local Rule 9.16, counsel for Respondent is directed to prepare a formal order consistent with this ruling, incorporating this Court's ruling as an exhibit; submit it to opposing counsel for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit it to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

COURT RULING

The matter is argued and submitted.

The Court takes the matter under submission.

CASE NUMBER: 34-2008-80000022 **DEPARTMENT:** 31
CASE TITLE: TOWN OF ATHERTON vs. CALIFORNIA HIGH SPEED RAIL AUTHORITY
PROCEEDINGS: PETITION FOR WRIT OF ERROR CORAM NOBIS; and MOTION TO TAKE DISCOVERY AND SHORTEN TIME FOR RESPONSES

COURT RULING ON SUBMITTED MATTER

The tentative ruling is affirmed with the following modifications:

The last sentence of the second paragraph in Sec. II on page 7, which read as follows, is deleted: "These conclusory statements, however, do not establish that the Court's consideration of this new evidence would compel or make probable a different result in the trial court."

The following sentences are added in its place: "This statement by Petitioners is simply conclusory. Petitioners fail to present evidence to support their conclusion."

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Superior Court of California,
County of Sacramento

BY: B. FRATES,

Deputy Clerk

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled **COURT RULING-PETITION FOR WRIT OF ERROR CORAM NOBIS; and MOTION TO TAKE DISCOVERY AND SHORTEN TIME FOR RESPONSES** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

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Dated: August 23, 2010

Superior Court of California,
County of Sacramento

By: B. FRATES, B. Frates
Deputy Clerk

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