FILED/ENDORSED
AUG 1 8 2015
By S. Lee, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, AARON FUKUDA, and COUNTY OF KINGS, **Plaintiffs,** **v.** **CALIFORNIA HIGH SPEED RAIL AUTHORITY *et al.*,** **Defendants.**	**Case No. 34-2011-00113919-CU-WM-GDS** **RULING ON SUBMITTED MATTERS: MOTION TO AUGMENT ADMINISTRATIVE RECORD AND MOTION TO COMPEL FURTHER RESPONSES**

Factual And Procedural Background

Plaintiffs' complaint alleges "[i]n the year 2008, the voters of the state of California passed Proposition 1A…Proposition 1A authorized the construction of a high speed rail system (HSR system") in California. Proposition 1A defined HSR as an electrified system with a list of required components."[1] Plaintiffs filed this matter on November 14, 2011, claiming that the Central Valley high-speed rail project from Merced to Bakersfield is not eligible to receive funds from the Proposition 1A bond funds. Accordingly, Plaintiffs allege it would be illegal for such funds to be distributed to Defendants for the purpose of constructing the subject high speed rail system in the Central Valley.

[1] Second Amended Complaint, p. 4.

On August 13, 2014, the Court granted Defendants' motion to limit the scope of evidence at trial to the Administrative Record. Pursuant to the Court's order, the scope of evidence at trial in this case shall include the administrative record for the Court's writ proceedings of May 31, 2013, together with the administrative record before the Authority (hereinafter the "Authority") for the 2014 Business Plan. This order was subject to the right of the parties to file motions to augment the record.

Plaintiffs filed the instant motion to augment the administrative record on March 18, 2015. Plaintiffs contend they have received Defendants' index to their proposed Administrative Record and have identified "many additional relevant documents that had not been included." Defendants have filed an opposition. On April 10, 2015, the Court heard oral argument on Plaintiffs' motion. The Court ordered the parties to engage in an additional meet and confer process to narrow the scope of disputed documents, and ordered the parties to submit additional briefing providing specific arguments for each disputed document.

On June 8, 2015, Plaintiffs filed a supplemental brief in support of their motion to augment the administrative record. On July 6, 2015, Defendants filed a response to Plaintiff's supplemental brief. Plaintiffs contend the parties spent April and the first half of May engaging in meet and confer efforts. Plaintiffs provide that they "agreed to withdraw some documents from consideration, and Defendants did agree to accept a small number of documents to augment the record, [however] the range of documents has not changed appreciably from what was placed before the Court in April." (Supplemental Brief, p. 1.)

The Court's review of the "meet and confer" matrix attached as Exhibit "B" and letter attached as Exhibit "C" to the Supplemental Declaration of Stuart M. Flashman in support of Plaintiffs' motion to augment provide that the following documents have either been withdrawn, or Defendants have agreed to add them to the administrative record:

040, 041, 51, 61, 64, 81.2a, 90, 107, 108, 109, 120, 121, 136, 137, 138, 140, 141, 147, 148, 157, 162, 163, 175, 185, 188, 189, 197, 202, 203, 204[2], 206, 217, 220, 221, 226, 297, 297, 407, 419, 421, 422, 423.

On May 5, 2015, Plaintiffs filed a notice of motion and motion to compel further responses. At issue are Plaintiffs' February 13, 2013 Request for Admissions, Set One, and Form Interrogatories. The Authority served responses on March 19, 2013. These responses consisted of objections, including that civil discovery is "not permitted in this action challenging the Authority's quasi-legislative decisions."

Counsel for Plaintiffs contends that following receipt of the responses, he engaged in a meet and confer process with counsel for Plaintiffs. Counsel provides, "[a]t the end of that process, I proposed as a compromise, because a hearing was already pending on the mandamus challenge to Defendants' approval of the preliminary funding plan for the initial operating segment of Defendants' high-speed rail system, that Plaintiffs would not require any response to the discovery requests until fifteen days after the court had rendered a final decision in that proceeding. I received no response from Ms. Inan to this proposal, which I took to indicate its acceptance." (Declaration of Michael J. Brady, ¶ 4.)

Plaintiffs argue their pursuit of these discovery responses was postponed while the Court heard their writ petition, with such a "stay" continuing while further proceedings took place in the Third District Court of Appeal. On July 31, 2014, the Court of Appeal issued a decision ordering this Court to: (1) vacate its November 25, 2013 order in this action and the writ of mandate issued thereon; and (2) enter judgment on the complaint in the Validation Action. The Court issued an order so vacating and withdrawing the writ on February 3, 2015.

Plaintiffs contend they then began again pursuing the subject discovery requests, and

---

[2] At oral argument, Defendant asserted their belief that documents 202, 203, and 204 had been withdrawn by Plaintiffs. Plaintiffs were unable to confirm at the hearing. The parties subsequently met and agreed that the three documents had been withdrawn and were not included in the motion to augment.

again engaged in meet and confer efforts with counsel for Defendants. On April 27, 2015, Plaintiffs contend counsel for Defendants indicated that no further discovery responses would be provided. (The Declaration of Stuart M. Flashman provides that it attaches copies of meet and confer emails as exhibits A and B. The Court did not receive copies of these exhibits with the paperwork filed.) Plaintiffs argue these ongoing discussions with counsel for Defendants extended the deadline within which they were required to file a motion to compel.

On July 30, 2015, the Court issued a tentative ruling denying the motion to compel and ordering the parties to appear to discuss the motion to augment the administrative record. The parties appeared and presented oral argument concerning the motion to augment

Discussion

Motion to Augment the Administrative Record

It appears to the Court that the fundamental question that the Court will decide in this case is: Has the Authority made a decision that currently precludes compliance with Proposition 1A?

Accordingly, the record before the Court will need to consist of the documents relied upon by the Authority in making the decisions being challenged in this matter. (See *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 366-67.) The Court acknowledges that "extra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 579.)

In its tentative ruling, the Court addressed the following questions to the parties concerning the motion to augment:

1. Are there documents that were properly submitted to the California High-Speed Rail Authority to be considered in making the decisions at issue in this matter that have not been included in the administrative record?

2. Are there documents that were in existence, yet not available to be placed before the California High-Speed Rail Authority despite the exercise of reasonable diligence, at the time the subject decisions were made?

During oral argument, Plaintiffs addressed three categories of documents they contended should properly be included in the administrative record pursuant to the Court's questions. These categories are:

1. Documents which were listed by URL in footnotes contained in documents submitted to the Authority.
2. Expert declarations that were submitted to counsel for the Authority in connection with this litigation.
3. The "Jones Declaration"

With regard to those documents not addressed at oral argument on this motion, the Court finds Plaintiffs have failed to carry their burden to prove that the administrative record should be augmented. The Court finds they are neither documents that were properly submitted to the Authority or were in existence, yet not available to be placed before the Authority despite the exercise of reasonable diligence at the time the subject decisions were made. (*Western States Petroleum Assn.*, 9 Cal.4th at 576-579.) To the extent Plaintiffs allege this extra-record evidence should be admitted to challenge informal decisions made by Defendants, Plaintiffs have failed to produce evidence to substantiate that any such decisions have been made. It appears the Authority is considering *options* in certain informal meetings and proceedings. Plaintiffs have presented no evidence that any *final decisions* have been made in these alleged informal proceedings such that the Court can address Proposition 1A compliance preclusion in connection with these decisions/adoptions within the context of this litigation. The Court also applies this finding to its analysis of the three document categories listed above and detailed below.

///

1. Documents which were listed by URL in footnotes contained in documents submitted to the Authority.

Plaintiffs contend, pursuant to *Consolidated Irrigation Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, the administrative record should include copies of all documents that were listed by URL in the footnotes of documents, including articles, that were submitted to the Authority. In *Consolidated Irrigation*, the court held that those documents cited in a comment letter by a specific URL which will take the reader directly to the document location on the internet, were properly part of the record of proceedings under Public Resources Code section 211676.6, subdivision (e)(7). (*Id.* at 724.)

The Court acknowledges that *Consolidated Irrigation* involved a CEQA challenge, something that is not at issue in this case. However, this case is unique as the high-speed rail project is an ongoing process that may take decades to complete, and the Court finds it is appropriate to apply the analysis used in *Consolidated Irrigation* to this category of documents at issue in this case. For purposes of the instant matter, the Court has limited the record to those documents that were properly before the authority as of the adoption of the 2014 Business Plan. Plaintiffs contend, and the Court agrees, that any document identified within a document submitted to the Authority as part of public comment in connection with either the 2012 or 2014 Business Plan, with a citation to its URL, is a document that should be included in the administrative record.

2. Documents that were submitted to counsel for the Authority as part of this litigation.

Plaintiffs contend that a number of expert declarations, submitted by Plaintiffs to counsel for the Authority in connection with the May 31, 2013 writ proceedings, were properly before the Authority for purposes of the 2014 Business Plan. Plaintiffs do not cite to any legal authority that documents given to an agency's counsel in connection with litigation are considered to have been presented to the agency in connection with administrative proceedings.

The Court is not persuaded. Plaintiffs admit that they had the opportunity to present the expert declarations as part of the public comment period for the 2014 Business Plan. Plaintiffs chose not to do so. Accordingly, the expert declarations were not before the Authority in connection with any decision made that is at issue in this litigation. The documents are not part of the administrative record.

3. The "Jones" Declaration

Lastly, Plaintiffs argue a declaration of Dr. Paul Jones, along with supporting maps regarding San Francisco-Los Angeles nonstop service travel time should be included in the administrative record. Plaintiffs argue this information would have been provided to the Authority prior to the adoption of the 2014 Business Plan if not for the Authority's refusal to provide the underlying data in a timely manner. Consequently, Plaintiffs contend this information falls within the exception described by *Western States Petroleum* as evidence that existed before the agency made its decision and "it was not possible in the exercise of reasonable diligence to present this evidence to the agency *before* the decision was made so that it could be considered and included in the administrative record." (*Western States Petroleum*, 9 Cal.4th at 578.)

Plaintiffs argue they requested the data underlying the "Vacca" declaration well before the 2014 Business Plan's adoption. However, Plaintiffs contend they were informed that this data was part of a proprietary program and/or otherwise could not be presented. Plaintiffs admit that they had the actual Vacca declaration and analysis, which was published in February 2013, but contend they needed additional information to allow Mr. Jones to perform his complete critique of the travel time analysis performed by Mr. Vacca. Defendants admit that the information claimed to have been proprietary was not provided until after the adoption of the 2014 Business Plan. Plaintiffs contend this amounts to agency misconduct, and the extra-record evidence should be admitted. (*Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609,

1621)("...arguably, extra-record evidence may be admissible to show 'agency misconduct.'")

It appears to the Court that Plaintiffs were timely provided access to at least some of the data necessary to perform a critique of Mr. Vacca's analysis, including the actual declaration and analysis itself. This information was published in February 2013, before the 2014 Business Plan adoption date. Consequently, Plaintiffs could have presented a critique of the Vacca analysis to the Authority as part of the public comments on the 2014 Business Plan, to the extent they had *some* information available to them at that time. They chose not to, instead waiting until the full extent of the data was provided. This decision undermines Plaintiff's contention.

Plaintiffs have failed to prove that the data contained in the Jones Declaration was in existence but unavailable to them at the time the 2014 Business Plan was adopted such that they were unable to provide any analysis in properly submitted public comments. The Court declines to augment the record with the Jones Declaration.

Motion to Compel

Neither party raised any argument concerning the motion to compel at the hearing on this matter. Accordingly, the Court affirms its tentative ruling, which is restated herein.

A motion to compel further responses to interrogatories or requests for admission must be brought within 45 days of service of the responses or objections. (See Code Civ. Proc. §§ 2030.300, subd. (c), 2033.290, subd. (c).) This deadline may be extended only by written stipulation. (*Id.*) There is no evidence before the Court that such a written stipulation exists in this matter.

Even accepting that the clock did not begin to run on the motion to compel deadline until the Court's February 3, 2015 order withdrawing the writ of mandamus, the deadline to file a motion to compel was March 20, 2015. Plaintiffs filed the instant motion to compel on May 5, 2015.

Plaintiffs argue equitable estoppel should apply to prevent Defendants from asserting the deadline for filing a motion to compel. To support this argument Plaintiffs cite to *Sears Roebuck & Co v. National union Fire Insurance Co.* (2005) 131 Cal.App.4th 1342. In *Sears Roebuck & Co*, the party responding to discovery had repeatedly provided that he was going to comply with the discovery requests, and it was because of these "evasions and false assurances" that the moving party failed to comply with the discovery motion cutoff date. (*Id.* at 1351-52.) Here, there is no evidence that Defendants promised Plaintiffs they were going to comply with the requests, thus providing false assurances that substantive responses were forthcoming.[3]

It was incumbent upon Plaintiffs to obtain a written extension of the motion to compel deadline in order to continue any meet and confer efforts they may have been pursuing. Their failure to do so renders the instant motion untimely. Consequently, the Court must deny the motion. (See *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1409.)

Conclusion

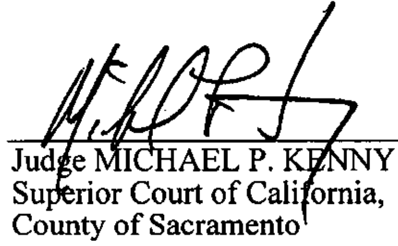
The motion to augment is **GRANTED** in part and **DENIED** in part. The motion is granted as to all documents identified within a document submitted to the Authority as part of public comment in connection with any Business Plan, with a citation to its URL. The parties are to meet and confer as to the identity of these documents and include them in the administrative record. The motion to augment is denied in all other regards.

The motion to compel is **DENIED**.

In accordance with Local Rule 1.06, counsel for Plaintiffs is directed to prepare an order granting in part and denying in part the motion to augment and denying the motion to compel, incorporating this ruling as an exhibit to the order; submit them to counsel for Defendants for

[3] As provided above, the exhibits purportedly attached to the declaration of Stuart M. Flashman were not filed with the Court. Consequently the Court has been unable to determine to what extent these documents demonstrate such false assurances.

1 approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the
2 Court for signature and entry in accordance with Rule of Court 3.1312(b).
3
4 DATED: August 18, 2015



Judge MICHAEL P. KENNY
Superior Court of California,
County of Sacramento

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 **RULING ON SUBMITTED MATTER** 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 720 9th Street, Sacramento, California.

STUART M. FLASHMAN
Attorney at Law
5626 Ocean View Drive
Oakland, CA 94618-1533

MICHAEL J. BRADY
Attorney at Law
1001 Marshall Street, Suite 500
Redwood City, CA 94063-2052

SHARON L. O'GRADY
Deputy Attorney General
455 Golden Gate Avenue, Ste 11000
San Francisco, CA 94102-7004

DOUGLAS J. WOODS
Senior Assistant Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

RAYMOND L. CARLSON, ESQ.
Griswold LaSalle Cobb Dowd & Gen LLP
111 E. Seventh Street
Hanford, CA 93230

THOMAS FELLENZ
Chief Legal Counsel
770 L Street, Suite 800
Sacramento, CA 95814

Superior Court of California,
County of Sacramento

Dated: August 18, 2015

By: S. LEE
Deputy Clerk