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Attorneys for Plaintiffs SHERMAN LEWIS,
ROY NAKADEGAWA, and
TRANSPORTATION SOLUTIONS
DEFENSE AND EDUCATION FUND

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

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

Plaintiffs,

vs.

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

Defendants.

NO.

VERIFIED PETITION
FOR INJUNCTIVE AND
DECLARATORY RELIEF
AND WRIT OF
MANDATE
[Code Civ. Proc. §§ 526(a),
1060]

Unlimited Jurisdiction

Plaintiffs hereby allege as follows:

1. Plaintiff Sherman Lewis (“LEWIS”) is a resident of Alameda County, California, and, in the year preceding the filing of this petition, has paid tolls to cross the San Francisco-Oakland Bay Bridge.
2. Plaintiff Roy Nakadegawa (“NAKADEGAWA”) is a resident of Alameda County, California, and, in the year preceding the filing of this petition, has paid tolls to cross the San Francisco-Oakland Bay Bridge.
3. Plaintiff Transportation Solutions Defense and Education Fund (“TRANSDEF”) is a California non-profit public benefit corporation, organized under the laws of the State of California and has qualified as an Internal Revenue Code section 501(c)(3) organization. TRANSDEF exists as a regional advocate to promote transportation solutions favoring transit over new highway capacity, development around transit stops rather than sprawl into the Bay Area’s open spaces, and more market-oriented pricing of private motor vehicle travel. TRANSDEF advocates on behalf of its members and the public at large for effective regional planning, smart growth, improved transit service, and cleaner air. TRANSDEF has participated in the development of the 2001, 2005 and 2009 Bay Area Regional Transportation Plans and Transportation Improvement Programs. TRANSDEF has actively engaged in numerous public agency proceedings involving transportation and air quality issues. TRANSDEF, in the year preceding the filing of this petition, has paid tolls to cross the San Francisco-Oakland Bay Bridge and the Richmond –San Rafael Bridge.
4. Defendant Metropolitan Transportation Commission (“MTC”) is a state commission established pursuant to California Government Code §§ 66500 et seq. as the transportation planning, coordinating and financing agency for the nine-county San Francisco Bay Area, including Alameda County. MTC is responsible for allocating funds collected pursuant to Regional Measure 2 (“RM2”) approved by the

voters in the San Francisco Bay Region in March, 2004, which increased tolls on the region's state-owned bridges by \$1.00 to fund various transportation projects, including the Dumbarton Rail Corridor Project ("DUMBARTON RAIL") and the Bay Area Rapid Transit District ("BART") extension to south Fremont to connect to a Santa Clara County extension sponsored by the Valley Transit Authority (VTA). The BART extension is denominated the Warm Springs Extension Project ("WSX").

5. Defendant Steve Heminger ("HEMINGER") is the Executive Director of MTC. Defendant Brian Mayhew ("MAYHEW") is the Chief Financial Officer of MTC. The plaintiffs are informed and believe, and thereon allege, that defendants HEMINGER and MAYHEW are the MTC officials authorized and empowered to implement the reallocation/transfer of funds as hereinafter described.

6. Defendant Bay Area Toll Authority ("BATA") is a state commission created by the California Legislature in 1997. Among its duties is to collect tolls on the region's state-owned bridges, a portion of which it provides to MTC to finance certain transportation projects identified in RM2. The RM2 projects to which the portion of the bridge tolls collected by BATA can be applied include the DUMBARTON RAIL project and the WSX project.

7. Defendant Andrew B. Fremier ("FREMIER") is the Deputy Executive Director of BATA. The plaintiffs are informed and believe, and thereon allege, that defendant FREMIER is the BATA official authorized and empowered to implement the reallocation/transfer of funds as hereinafter described.

8. Defendant Alameda County Transportation Improvement Authority ("ACTIA") is a local government entity located in Alameda County, California that was created to administer the funds collected from the half-cent sales tax authorized by the passage of Alameda County Measure B in 2000. ACTIA was created to deliver certain transportation projects. Among those projects are the DUMBARTON RAIL project and the WSX project.

9. Defendant Christine Monson (“MONSON”) is the Executive Director of ACTIA. Defendant Tess Lengyel (“LENGYEL”) is the Programs and Public Affairs Manager for ACTIA. Defendant Anees Azad (“AZAD”) is the Finance and Administration Manager for ACTIA. The plaintiffs are informed and believe, and thereon allege, that defendants MONSON, LENGYEL and AZAD are the ACTIA officials authorized and empowered to implement the reallocation/transfer of funds as hereinafter described.

10. Plaintiffs are ignorant of the true names and capacities of defendants sued herein as DOES 1 to 10, inclusive, and therefore sue these defendants by such fictitious names. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained.

11. California Streets and Highways Code, Division 17, Toll Bridges, Toll Ferries and Toll Roads; Chapter 4, San Francisco Bay Area Bridges, sections 30910-30922 provide for authorized expenditures from monies received from toll bridge revenues for bridges within Metropolitan Transportation Commission’s geographic jurisdiction as described in section 30910. (All further references are to the Streets and Highway Code unless otherwise identified.)

12. Section 30914 describes projects and programs that may be funded from toll bridge revenues.

13. Section 30914 (c) provides that:

“§ 30914. Additional major projects that may be funded from toll bridge revenues

...(c) If the voters approve a toll increase in 2004 pursuant to Section 30921, [which establishes a procedure for a special election which approved RM2] the authority shall, consistent with the provisions of subdivisions (d) and (f), fund the projects described in this subdivision and in subdivision (d) that shall collectively be known as the Regional Traffic Relief Plan by bonding or transfers to the Metropolitan Transportation Commission. These projects have been determined to reduce congestion or to make

improvements to travel in the toll bridge corridors, from toll revenues of all bridges:

(1) BART/MUNI Connection at Embarcadero and Civic Center Stations. ...

(2) MUNI Metro Third Street Light Rail Line. ...

(3) MUNI Waterfront Historic Streetcar

Expansion....

(4) East to West Bay Commuter Rail Services over the Dumbarton Rail Bridge. Provide funding for the necessary track and station improvements and rolling stock to interconnect the BART and Capitol Corridor at Union City with Caltrain services over the Dumbarton Rail Bridge, and interconnect and provide track improvements for the ACE line with the same Caltrain service at Centerville. Provide a new station at Sun Microsystems in Menlo Park. One hundred thirty-five million dollars (\$135,000,000). The project is jointly sponsored by the San Mateo County Transportation Authority, Capitol Corridor, the Alameda County Congestion Management Agency, and the Alameda County Transportation Improvement Authority....

(31) BART Warm Springs Extension. Extension of the existing BART system from Fremont to Warm Springs in southern Alameda County. Ninety-five million dollars (\$95,000,000). Up to ten million dollars (\$10,000,000) shall be used for grade separation work in the City of Fremont necessary to extend BART. The project would facilitate a future rail service extension to the Silicon Valley. ...”

14. Section 30914(f) provides in pertinent part that:

“(f) The Metropolitan Transportation Commission shall annually assess the status of programs and projects and shall allocate a portion of funding made available under Section 30921 or 30958 for public information and advertising to support the services and projects identified in subdivisions (c) and (d). If a program or project identified in subdivision (c) ...cannot be completed or cannot continue due to delivery or financing obstacles making the completion or continuation of the program or project unrealistic, the commission shall consult with the program or project sponsor. After consulting with the sponsor, the commission shall hold a public hearing concerning the program or project. After the hearing, the commission may vote to modify the program or the

project's scope, decrease its level of funding, or reassign some or all of the funds to another project within the same bridge corridor. If a program or project identified in subdivision (c) is to be implemented with other funds not derived from tolls, the commission shall follow the same consultation and hearing process described above and may vote thereafter to reassign the funds to another project consistent with the intent of this chapter.”

15. On or about January 19, 2009, defendant MTC approved a resolution to reallocate/transfer funds it had collected for the Dumbarton Rail project to the WSX project, despite multiple testimonies by TRANSDEF and a detailed comment letter.

16. MTC's action in transferring funds from the Dumbarton Rail Corridor Project to the Warm Springs Extension Project is unsupported by the facts and in violation of the provisions of section 30914(f) above. Plaintiffs allege that although there is a provision to allow reassignment of funds from one project to another when a project is to be implemented with other funds not derived from tolls, the reassignment must be consistent with the intent of Division 17, Chapter 4. Defendants' actions do not comport with the intent of Division 17, Chapter 4 as above described.

17. Section 30914(f) does not give MTC authority to re-order projects simply to further perceived effectiveness in overall project delivery by MTC. MTC does not have the discretion to choose among projects to further its strategic plans. The voters enacted a specific schema of projects, with strict rules about funding changes. Had the voters intended to empower MTC to exercise its discretion there would have been no need for stated procedures regarding funding changes.

18. Section 30914(f) further provides that even for projects which are unrealistic, modifications of the program, project scope, or decrease in funding level or re-assignment of some or all of the funds to another project must be done “within the same bridge corridor.” WSX is not part of the same bridge corridor. The Dumbarton Rail Corridor is an east-west corridor. WSX is a north-south corridor.

There is no connection between WSX and the Dumbarton Corridor. Funds may not be re-assigned to WSX even if there were grounds to claim that the Dumbarton Rail Project is unrealistic.

19. In 2006, the Legislature amended the voter-approved language of Section 30914(f) to add a new alternative for reassigning funds: “If a program or project identified in subdivision (c) is to be implemented with other funds not derived from tolls, the commission shall follow the same consultation and hearing process described above and may vote thereafter to reassign the funds to another project consistent with the intent of this chapter.” (Emphasis added.) This new language deviated from the original public transportation program provisions presented to the voters in 2004, in reliance on which they approved an increase to the bridge tolls to fund that program. Moreover, the legislature did not enact a code section setting forth the “...intent of this chapter.” And as a practical matter, the new language makes the original language obsolete, inasmuch as all of the projects identified in Section 30914(c) require funds in addition to the RM2 toll revenues, and are thus “...to be implemented with other funds not derived from tolls.” The amendment thus drastically increased MTC’s discretion to reassign funds between projects beyond what the voters originally approved in 2004. And the voters have never voted to ratify or approve the changes that were made by the Legislature

20. The January 28, 2009 MTC memorandum essentially characterizes the shift of RM2 funds from the Dumbarton Rail Corridor Project to the WSX Project as a “funds swap”. In so doing, the MTC is impermissibly creating a rationale for the shift in RM2 funds that is not set forth in Section 30914(f). Any such transfer in funds based on that rationale also fails to account for the escalation in the cost of the Dumbarton Rail Corridor Project as a result of the delay in its construction occasioned by robbing it of its current funding allocation. Funds taken from the Dumbarton Rail Corridor Project now to be “swapped back” sometime between 2019

and 2027 will leave that project radically under-funded at that time, compared to what the voters approved, thus jeopardizing its construction at all.

21. MTC's reassignment of the Dumbarton Rail Corridor Project funds, even under the authorities that they now assert, still violates Section 30914(f). First, that authority only allows the reassignment of funds if a project is to "be implemented with other funds not derived from tolls." It is beyond the realm of reasonableness for MTC to argue that its funding decision, which will not provide the Dumbarton Rail Corridor Project with funds allocated by the voters until sometime between 2019 and 2027, can seriously be characterized as "implementing" this project. That section requires that the any such funds be reassigned to another project "...consistent with the intent of this chapter". The intent of this chapter is established by the original language of Section 30914(f) as approved by the voters which required that such funds be reassigned to another project "within the same corridor". This same intent was reworded and continued in the 2006 amendment to state, "...to another project within the same bridge corridor".

22. The WSX Project is not "within the same bridge corridor" as the Dumbarton Rail Corridor Project. As described in Sections 30914(c)(31) and 30914(c)(4), respectively, the WSX Project is an extension of a North-South corridor, while the Dumbarton Rail Corridor Project is an East-West corridor. Nor is there any direct connection between either end of the proposed WSX Project improvements and the Dumbarton Rail Corridor that crosses the San Francisco Bay.

23. The MTC's reassignment of the subject RM2 funds is not consistent with the intent of Streets and Highways Code Division 17, Chapter 4, "San Francisco Bay Area Bridges" (commencing at Section 30910) as suggested by the MTC.

- First, shifting the funds to the WSX Project would not fund another project in the same bridge corridor as the Dumbarton Rail Corridor Project. Thus, it is not “consistent with the intent of this chapter” as required by Section 30914(f).

- Second, the WSX Project will not solve one of the most serious problems facing BART, namely, the inadequate capacity in the transbay corridor between the East Bay and San Francisco. In contrast, the Dumbarton Rail Corridor Project will offer a new alternative for a mass-transit link crossing the San Francisco Bay that is specifically intended to interconnect with multiple mass-transit systems, including Caltrain on the San Francisco peninsula, the existing BART station in Union City, the Capitol Corridor Amtrak train service that runs between San Jose and Sacramento, and the Altamont Commuter Express (“ACE”) train service that connects Stockton and San Jose (*See*, Section 30914(c)(4)). Its operation will enable the existence of a flexible transit network based on conventional gauge rail, which is dramatically less expensive than BART extensions.

- Third, the WSX Project is merely an extension of the existing BART line that currently ends in Fremont. By itself, it does nothing towards meeting the goals set forth in Section 30914.5(d). That section calls for a “regional transit connectivity plan” that will improve transit system connections by creating a network of key transit hubs connecting regional rapid transit services to one another, and to feeder transit services. Once again, the Dumbarton Rail Corridor Project is intended to connect existing BART service, Capitol Corridor train service, ACE train service and Caltrain service, while the WSX Project is merely an extension of the existing BART line from Fremont, but makes no further connections to any existing regional rapid transit services.

24. Section 30914.5(d) provides that the MTC shall adopt a regional transit connectivity plan by May 1, 2006. The commission shall develop a plan that

identifies and evaluates opportunities for improving transit connectivity and shall include, but not be limited to, the following components:

(1) A network of key transit hubs connecting regional rapid transit services to one another and to feeder transit services. “Regional rapid transit” means long-haul transit service that crosses county lines, and operates mostly in dedicated rights of way, including freeway high occupancy vehicle lanes, crossing a bridge, or on the bay.” The Dumbarton Rail Project is a project meeting these criteria as opposed to the short dead-end extension of BART to Warm Springs.

25. The aforementioned reallocation/transfer, if allowed to occur, is an illegal expenditure of public funds and would cause injury to the public because such reallocation/transfer violates § 30914(f).

26. On or about January 22, 2009, ACTIA adopted a full funding plan for the BART Extension to WSX. In adopting the plan, ACTIA made no findings of compliance with the requirement by the voters of County Measure B approved by the voters of Alameda County at the general election of November 7, 2000.

27. The approval of Measure B extended for another 20 years an existing half-cent sales/use tax dedicated to local transportation projects. Section 14 of Measure B entitled “Use of Proceeds” specifically provided that the proceeds of the taxes imposed by this ordinance shall be used solely for the projects and purposes set forth in the 20-Year Transportation Expenditure Plan and for the administration thereof.

28. The County 20-year transportation expenditure plan dated July, 2000, published along with the text of Measure B and provided to the voters in advance of the election described BART Capital Projects, including the WSX project. Projected at a cost of \$546,300,000, the project was described as funding the first phase of a rail extension that would ultimately extend into Santa Clara County. The expenditure plan specifically informed Measure B voters that: “Funds for

construction of the first segment of the BART rail extension to Warm Springs in southern Fremont may not be used until full funding for the rail connection to Santa Clara County is assured.” Plaintiffs contend that, notwithstanding any definition of “full funding” that might be adopted by ACTIA, “full funding” must be interpreted by the Court as having the commonsense meaning an average voter would attribute to it.

29. Measure B requires assured VTA funding for a project that would take the rail line across the county line from Alameda County to Santa Clara County. Plaintiffs are informed and believe and on such information and belief allege that funding for the rail connection to Santa Clara County is not assured. Plaintiffs are further informed and believe and thereon allege that the VTA which is responsible for the Silicon Valley Rapid Transit Project (“SVRT”), adopted on January 8, 2009, a Funding Plan for an Operable BART Segment, in which 29.6% of the funding for the project, consisting of some \$750,000,000, was to come from a federal New Starts grant.

30. The SVRT would extend BART from Warm Springs south to San Jose and Santa Clara, although the first phase of the project known by VTA as the New Starts Candidate Project, would terminate in Berryessa. VTA’s website contains a schedule which indicates the project will “Enter federal New Starts process” in Spring 2009, following “Draft federal environmental document (FEIS) anticipated for public review and comment” in March/April 2009. This shows that VTA has not yet even submitted a grant application for the New Starts program. With New Starts funding being merely speculative, this leaves a giant \$750 million “hole” in the “assured” funding.

31. The full funding plan that ACTIA adopted for the WSX project on or about January 22, 2009, was dependent on the requirements of Measure B and RM2 being met. This has not yet properly been done by Defendants for the reasons

stated above. The ACTIA Board chose to approve that funding plan, despite testimony by TRANSDEF that the funding for the VTA project was clearly not “assured.”

32. ACTIA has scheduled a Board of Directors Meeting for February 26, 2009, at 1:45 p.m. in which it intends to consider “Approval of Necessary Funding Actions to Commit ACTA and ACTIA Measure B Funds to the Project.” Based upon the foregoing allegations, Plaintiffs assert that the will of the voters approving Measure B and RM2 has been ignored and thwarted by actions of Defendants as alleged. A declaration confirming this is appropriate and necessary. Accordingly, Plaintiffs pray for a declaration that the acts of Defendant(s) ACTIA in authorizing the expenditure of Measure B funds for WSX construction in the absence of full funding for the SVRT Project, violates the clear intent of Measure B and is unauthorized. Plaintiffs further request the declaration from this court that the transfer of funds from the Dumbarton Rail Project to WSX violates the intent of Division 17, Chapter 4 of the Streets and Highways Code, sections 30910-30922 and, specifically, section 30914(f). Because such transfer and allocation is without proper authority it should be enjoined, or set aside if it has already occurred. Defendants dispute these allegations and maintain that their actions are appropriate, despite testimony and letters by TRANSDEF to the contrary. A judicial declaration to resolve this controversy is necessary and appropriate.

33. Plaintiffs have been obliged to incur attorney’s fees and costs to protect the public funds and thus the Defendants and each of them should be ordered to reimburse the plaintiffs for all attorney’s fees and costs they incur in this case.

WHEREFORE, plaintiffs pray that judgment be entered against the defendants, and each of them, as follows:

1. For a temporary restraining order, preliminary injunction and permanent injunction enjoining the defendants, and each of them, and their agents, servants,

and employees, and all persons acting under, in concert with, or for them, from transferring funds from the Dumbarton Rail Project to the WSX project;

2. In the alternative, that the Court issue an order to Defendants requiring them to show cause, if any they have, why pending the final determination in this action they, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them, should not be restrained and enjoined from transferring funds from the Dumbarton Rail Project to the WSX Project.

3. For a temporary restraining order, preliminary injunction and permanent injunction enjoining the defendants, and each of them, and their agents, servants and employees, and all persons acting under, in concert with, or for them, from transferring Alameda County Measure B funds to the WSX project;

4. In the alternative, that the Court issue an order to Defendants requiring them to show cause, if any they have, why pending the final determination in this action they, and each of them, and their agents, servants and employees, and all persons acting under, in concert with, or for them, should not be restrained and enjoined from transferring funds from Alameda County Measure B to the WSX Project.

5. For a Writ of Mandate rescinding ACTIA's approval of the BART Warm Springs Extension Project (ACTIA 2) – Approval of Full Funding Plan.

6. For reasonable attorney's fees incurred herein;

7. For costs of suit incurred herein; and

8. For such other and further relief as the court may deem proper.

Dated: February 25, 2009 ATKINSON-FARASYN, LLP

By _____
Marc G. Hynes, Attorneys for Plaintiffs