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STAND FOR SAN JOSE, EILEEN HANNAN,
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8

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF SANTA CLARA

12 _____
13 STAND FOR SAN JOSE; EILEEN
HANNAN; MICHELLE BRENOT;
14 ROBERT BROWN; KAREN SHIREY;
FRED SHIREY; and ROBERT SHIELDS,
15 Petitioners and Plaintiffs,
16 v.
17 CITY OF SAN JOSE; CITY COUNCIL OF
THE CITY OF SAN JOSE;
18 REDEVELOPMENT AGENCY OF THE
CITY OF SAN JOSE; DIRIDON
19 DEVELOPMENT AUTHORITY; DOES 1
through 10, inclusive,
20 Respondents and Defendants.
21 _____

22 ATHLETICS INVESTMENT GROUP LLC;
DOES 11 through 20, inclusive,
23 Real Parties in Interest.
24 _____

Case No. 111-CV-214196, related to and
consolidated with
Case No. 113-CV-250372

PETITIONERS' OPPOSITION TO
MOTION TO CONTINUE TRIAL
DATE

Date: May 19, 2014
Time: 9:00 a.m.
Dept. 21
Judge: Honorable Joseph Huber

Actions Filed: 12/2/2011; 7/30/13

1 Petitioner Stand for San Jose, Eileen Hannan, Michelle Brenot, Robert Brown,
2 Karen Shirey, Fred Shirey, and Robert Shields (collectively, "SFSJ" or "Petitioners")
3 respectfully submit the following opposition to Respondents' Motion to Continue Trial
4 Date ("Motion").

5 I. INTRODUCTION.

6 Respondents' Motion seeks to delay, yet again, the hearing of Petitioners'
7 claims in a mandamus case nearly three years old. This includes Petitioners' California
8 Environmental Quality Act ("CEQA") claims which are entitled by law to preference.¹
9 It would seem Respondents' strategy is to delay trial in these cases so long that they
10 might become moot - if AIG does not renew the Option Agreement by November 7 -
11 and Respondents' actions thus might evade judicial review altogether.

12 Except for a modest schedule adjustment, the motion should be denied because
13 good cause has not been shown by the Oversight Board or other Respondents² for a trial
14 continuance. Trial continuances are disfavored and the moving party must make an
15 affirmative showing of good cause. Furthermore, the party "must make the motion or
16 application *as soon as reasonably practical* once the necessity for the continuance is
17 discovered." Cal. Rules of Court, Rule 3.1332(b) (emphasis added). The Oversight
18 Board was named as a defendant-respondent and served with the summons and
19 complaint when the *SFSJ II* suit was filed in July 2013, more than nine months ago.
20 The August 8 trial date was set in February of this year. In March 2014, all parties
21 including the Oversight Board stipulated to a briefing schedule based on the August 8
22 trial date.

23 _____
24 ¹ Cal. Pub. Res. Code § 21167.1 (for any CEQA actions, "courts in which the action or
25 proceeding is pending shall give the action or proceeding preference over all other civil
26 actions, in the matter of setting the action or proceeding for hearing or trial, and in
hearing or trying the action or proceeding, so that the action or proceeding shall be
quickly heard and determined").

27 ² Respondents are the City of San Jose, City Council for the City of San Jose, Successor
28 Agency to the Redevelopment Agency of the City of San Jose, Oversight Board of the
Successor Agency ("Oversight Board"), and Diridon Development Authority.

1 Ever since the *SFSJ II* suit was filed and served on the Oversight Board in July
2 2013, the Oversight Board has been aware of Petitioners' claims and the pendency of
3 the *SFSJ II* litigation. Furthermore, before the trial date was set and before the parties
4 agreed to the briefing schedule, the Oversight Board was aware of a possible conflict
5 and potential desire for independent counsel. Yet Respondents, including the Oversight
6 Board, did not object to the trial setting or briefing schedule on the basis of a possible
7 conflict and/or time needed to obtain independent counsel.

8 If Respondent Oversight Board believes now that it desires separate counsel
9 from the City Attorney's Office, that is a circumstance of its own making and new
10 counsel for the Board should be required to take the cases as they find them.
11 Accordingly, we submit the Court should grant only a modest continuance to account
12 for the delay associated with this motion - moving the filing and service of the Opening
13 Brief to May 30 and keeping the 30-day opposition/21-day reply briefing intervals
14 intact,³ while setting a new hearing date convenient to the Court as soon as possible
15 following close of briefing.

16 II. THE MOTION FOR TRIAL CONTINUANCE IS A TACTICAL
17 MANEUVER TO DELAY, AND ATTEMPT TO PREVENT, PETITIONERS'
18 CLAIMS FROM BEING HEARD ON THE MERITS.

19 It is fair to say that the Motion is the latest in a series of delaying actions by
20 Respondents since *SFSJ I* was filed nearly three years ago:

- 21
- 22 • Respondents delayed preparing and certifying the record in the *SFSJ I*
 - 23 • After they finally certified the *SFSJ I* record, Respondents filed a motion
 - 24 • After that motion was denied and a trial date (including briefing
 - 25 dates be vacated, and the case stayed, until Respondents took action on

26 _____
27 ³ There is of course no basis for Respondents' overreach to now have 60 (rather than 30)
28 days on their opposition, except as an obvious way to try to stretch the hearing out into
November.

1 the State Controller's Order (that required the Diridon Property to be
2 returned to the Successor Agency).

- 3 • After the Diridon Property was returned to the Successor Agency—but
4 subject to the invalid Option Agreement—Respondents argued the case
5 should remain stayed until the Oversight Board adopted a Long Range
6 Property Management Plan (“LRPMP”) that addressed how the Diridon
7 Property would be disposed.
- 8 • When the Oversight Board finally adopted the LRPMP, Respondents
9 contended the action should remain stayed until the Department of
10 Finance approved or rejected the LRPMP.

11 It is a long list. Respondents now seek to postpone trial of the consolidated
12 cases until November 7, 2014, at the earliest. If that date sounds familiar, it should: the
13 Option Agreement, the validity of which Petitioners are challenging, will expire by its
14 terms if not exercised by November 7, 2014.⁴ Apparently, Respondents' strategy
15 would seem to be to delay trial so long that they might argue the case has become moot
16 if the AIG has not exercised the Option Agreement by November 7, 2014, and prevent
17 any review of the merits of Petitioners' claims that challenge the validity of the Option
18 Agreement.⁵ But we submit Petitioners' should have their case heard on the merits,
19 including their CEQA claims which, by statute, must be “quickly heard and
20 determined.” Cal. Pub. Res. Code § 21167.1.

21 ⁴ The City Attorney made this very point at the last case management conference, when the
22 Court set the August 8, 2014 trial date:

23 MR. JOHNSON: That brings up another point, Your Honor, which you may or may
24 not recall. This option expires in November.

25 *See* Declaration of Marne Sussman (“Sussman Decl.”), Ex. 1, at 9 [Transcript of Feb. 14,
26 2014 Case Management Conference, p. 9.].

27 ⁵ Notably, the City is pursuing the opposite litigation strategy in its antitrust lawsuit against
28 Major League Baseball. The City filed the *San Jose v. MLB* lawsuit in federal court on
June 16, 2013, alleging that MLB is violating antitrust laws by preventing the A's from
moving to San Jose. On January 3, 2014, the district court dismissed the City's antitrust
case, and the City appealed to the Ninth Circuit. There, the City filed a motion to
expedite the appeal based on a two-fold proposition: (1) that San Jose has standing
because of its interest in the Option Agreement, and (2) San Jose's claims may be mooted
when the Option Agreement expires in November 2014. *See* Sussman Decl., Ex. 2, at 4-5
[MLB's Reply in Support of Motion to Take Judicial Notice]. The Ninth Circuit granted
the City's motion to expedite their appeal; the appeal is now fully briefed, and is
scheduled to be heard on the next available Ninth Circuit calendar. *Id.*, Ex. 3 [Order
Expediting Appeal].

1 III. THE OVERSIGHT BOARD HAS FAILED TO MAKE, AND CANNOT
2 MAKE, AN AFFIRMATIVE SHOWING OF GOOD CAUSE FOR TRIAL
3 CONTINUANCE.

4 Rule 3.1332 of the California Rules of Court addresses continuances. Under the
5 rule, the court may grant a continuance “only on an affirmative showing of good cause
6 requiring the continuance.” Rule 3.1332(c). Furthermore, “[t]he party must make the
7 motion or application as soon as reasonably practical once the necessity for the
8 continuance is discovered.” Rule 3.1332(b). In addition, the request for continuance
9 must be based on “supporting declarations.” *Id.* In ruling on a motion for continuance,
10 the court must consider, among other things, “Whether there was any previous
11 continuance, extension of time, or delay of trial due to any party,”⁶ and whether “the
12 case is entitled to a preferential trial setting.”⁷ Rule 3.1332(d).

13 A. The Oversight Board Has Made No Showing For Continuance.

14 As a threshold matter, the Oversight Board has failed to make its own request
15 for continuance, and failed to support the request with competent declarations. This
16 should be the beginning and end of the matter. The motion, such as it is, has been
17 brought by the City of San Jose, City Council for the City of San Jose, Successor
18 Agency to the Redevelopment Agency of the City of San Jose and Diridon
19 Development Authority (“City Respondents”)—not the Oversight Board itself.
20 Furthermore, there is no supporting declaration from the Oversight Board, but merely a
21 conclusory hearsay declaration⁸ from the deputy city attorney who represents the City
22 Respondents. On this basis alone, the Oversight Board has failed to make a sufficient
23 showing for continuance.

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25 ⁶ Thus, Respondents’ prior delay actions, as discussed above, are therefore probative.

26 ⁷ See previous discussion of preferential trial setting for CEQA cases. Cal. Pub. Res. Code
§ 21167.1.

27 ⁸ The declaration consists of five short paragraphs, the concluding paragraph of which is
28 based on information and belief.

1 B. City Respondents Have Not Shown, And The Oversight Board Could
2 Not Show, Good Cause For Continuance.

3 To show good cause for continuance, the moving party must make its motion
4 “as soon as reasonably practical” once the necessity for the continuance is discovered.

5 In their motion, City Respondents claim:

- 6 • The Oversight Board made an “expeditious decision” to retain new
7 independent counsel (Motion, 3);
- 8 • The Oversight Board voted “unexpectedly” on May 2 to seek new
9 independent counsel (*id.*); and
- 10 • On February 14, 2014, when the Court set the August 8, 2014 trial date,
11 “lead counsel for Defendants had no reason to believe . . . that the City
12 Attorney’s Office would not serve as lead counsel for the Oversight Board.”
13 (*Id.*)

14 None of these assertions is correct and none provides the showing needed to continue
15 trial.

16 First, the Oversight Board’s decision to retain new independent counsel to
17 represent it was anything but “expeditious.” From June 2013 through January 2014,
18 Petitioners wrote a series of letters to the Oversight Board demanding it comply with
19 Health & Safety Code §§ 34161 *et seq.* (the “Redevelopment Dissolution Law”) with
20 respect to the Diridon Property—specifically, that the Oversight Board must recognize
21 and rule that the Option Agreement was not “an enforceable obligation,” and direct the
22 sale of the Diridon Property to the highest bidder. When Petitioners filed the *SFSJ II*
23 petition in July 2013, they named the Oversight Board as a defendant-respondent, and
24 served the summons and petition on the Oversight Board. Here is the pertinent
25 chronology:

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27
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- 1 • June 26, 2013: Petitioners send letter to OB, demanding that OB reject the Successor
- 2 Agency's determination that the Diridon Property be accepted "subject
- 3 to" the Option Agreement.⁹
- 4 • July 31, 2013: Petitioners file *SFSJ II* petition, naming OB as a respondent.
- 5 • Aug. 1, 2013: Petitioners serve *SFSJ II* petition and summons on OB.
- 6 • Aug. 12, 2013: Petitioners' letter to OB demanding that it declare the option
- 7 unenforceable.¹⁰
- 8 • Aug. 20, 2013: Petitioners serve *SFSJ II* first amended petition and summons on OB.
- 9 • Sept. 25, 2013: Petitioners' letter to OB re: unenforceability of Option Agreement.¹¹
- 10 • Oct. 9, 2013: Petitioners' letter to OB re: unenforceability of Option Agreement.¹²
- 11 • Jan. 8, 2014: Petitioners' letter to OB re: unenforceability of Option Agreement.¹³
- 12 • Jan. 29, 2014: Petitioners' letter to OB re: unenforceability of Option Agreement.¹⁴
- 13 • Feb. 14, 2014: Court sets *SFSJ* cases for trial on August 8, 2014.
- 14 • Mar. 6, 2014: All parties, including OB, stipulate to briefing schedule.
- 15 • Mar. 11, 2014: Petitioners serve *SFSJ II* second amended petition and summons on OB.
- 16 • Mar. 11, 2014: Court enters order based on parties' stipulated briefing schedule.

17 Throughout these nine months, the Oversight Board was well aware of the *SFSJ II* litigation,
 18 and the fact that the Oversight Board itself was a named defendant-respondent. The Oversight
 19 Board had ample time and opportunity to retain independent counsel and/or to object to the trial
 20 date or briefing schedule. By waiting until May 2 to decide it needed independent counsel (and
 21 until May 14 for Respondents to file a motion), the Oversight Board and Respondents failed to act
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 24 ⁹ Sussman Decl., Ex. 4 [6/26/13 letter].

25 ¹⁰ Sussman Decl., Ex. 5 [8/12/13 letter].

26 ¹¹ Sussman Decl., Ex. 6 [9/25/13 letter].

27 ¹² Sussman Decl., Ex. 7 [10/9/13 letter].

28 ¹³ Sussman Decl., Ex. 8 [1/8/14 letter].

¹⁴ Sussman Decl., Ex. 9 [1/29/14 letter].

1 “as soon as reasonably practical” as required for a trial continuance under Rule 3.1332(b) of the
2 California Rules of Court.

3 Second, the vote of the Oversight Board on May 2 to seek new independent
4 counsel cannot have been “unexpected” to Respondents. The transcript of the January
5 30, 2014 meeting of the Oversight Board—at which the City Attorney was present—
6 reveals that the City Attorney and Oversight Board discussed the possible need for
7 independent counsel.¹⁵ This discussion occurred before the trial date was set, before all
8 parties agreed to the briefing scheduled, and long before (almost 4 months) this belated
9 motion for continuance.

10 Third, contrary to Respondents’ unsupported¹⁶ assertion in their Motion (at 3),
11 on February 14, 2014, when the Court set the August 8, 2014 trial date, the City
12 Attorney’s Office *did* have reason to believe it might not serve as lead counsel for the
13 Oversight Board. Just two weeks earlier, the City Attorney had discussed with the
14 Oversight Board the possible need for independent counsel, and the need for a “closed
15 session” to discuss the matter.¹⁷ And, on February 13, 2013, the day before the
16 February 14 case management conference, the Oversight Board held a meeting—
17 attended by the City Attorney—wherein the possible need for conflicts counsel in the
18 *SFSJ II* case was discussed in closed session.¹⁸ At the case management conference the
19 next day, the City Attorney reported on the Oversight Board meeting, but did not
20 mention any possible need for separate counsel for the Oversight Board, nor object to
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24 ¹⁵ Sussman Decl., Ex. 10 at 30-31 [Transcript of 1/30 OB meeting, Guthrie-Doyle
exchange].

25 ¹⁶ The assertion appears in the Motion without citation to any evidence, and is not contained
in the Declaration of Ardell Johnson.

26 ¹⁷ Sussman Decl., Ex. 10 at 30-31 [Transcript of 1/30 OB meeting, Guthrie-Doyle
exchange].

27 ¹⁸ Sussman Decl., Ex. 11 [Agenda for 2/13/14 meeting—Conference with Conflicts
28 Counsel – Existing Litigation Pursuant to Gov. Code Section 54956.9(d)(1)].

1 the trial setting on that basis.¹⁹ See Declaration of Marne Sussman (“Sussman Decl.”),
2 Ex. 1, at 9 [Transcript of Feb. 14, 2014 Case Management Conference, p. 9.]. Surely,
3 these events speak for themselves, show a lack of candor with the Court, and
4 undermine the request for a continuance.

5 IV. CONCLUSION.

6 We submit the Court should limit the continuance to delay of the Opening Brief until
7 May 30, 2014, to account for the interference and delay associated with this motion,
8 and then maintain the existing intervals for opposition and reply briefs, subject to a
9 hearing date as soon after filing of the reply brief as the Court might set.²⁰

10 Dated: May 16, 2014.

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18 By 
19 _____
20 Blaine I. Green
21 Attorneys for Petitioners

22 _____
23 ¹⁹ Sussman Decl., Ex. 1 at 3 [Transcript of Feb. 14, 2014 Case Management Conference, p.
24 3.].

25 ²⁰ With no citation to evidence or authority, City Respondents assert the Oversight Board
26 must put a request for proposal of legal services out to bid, and that the process would
27 take several months. Motion at 3. Moreover, the Oversight Board and Respondents have
28 already had 9 months since the *SFSJ II* case was filed and served to retain such counsel,
and at least 3 months since the conflict issue and possible desire for separate counsel was
discussed by the Oversight Board and City Attorney. We submit it is up to the Board to
retain counsel quickly, if it feels it needs to do so, but subject to this Courts’ scheduling
orders and not at leisure under an RFP process.

1 Case No. 111-CV-214196; related to and consolidated with Case No. 113-CV-250372

2 PROOF OF SERVICE BY HAND DELIVERY

3 I, Douglas Wright, and Anthony Trujillo, the undersigned, hereby declare as follows:

4 1. We are over the age of 18 years and are not a party to the within cause. We
5 are employed by Nationwide Legal LLC in the City of San Francisco, California.

6 2. Our business address is 859 Harrison Street, Suite A, San Francisco, CA 94107.

7 3. On May 16, 2014, we served a true copy of the attached document titled exactly
8 PETITIONER'S OPPOSITION TO MOTION TO CONTINUE TRIAL DATE by placing it in
9 an addressed sealed envelope clearly labeled to identify the attorney being served at the
10 address shown below and delivering it to the attorney, or to the office of the attorney and
11 leaving it with a receptionist or other person having charge thereof, or (if there was no such
12 person at the office) by leaving it between 9 A.M. and 5 P.M. in a conspicuous place in the
13 office. Such service was effected on the following attorneys:

14 Richard Doyle, Esq.
15 Nora Frimann, Esq.
16 Ardell Johnson, Esq.
17 Assistant City Attorney
18 City of San Jose
19 200 East Santa Clara Street, 16th Floor
20 San Jose, CA 95113
(served by Douglas Wright)

Geoff L. Robinson, Esq.
Perkins Coie LLP
Four Embarcadero Center, Suite 2400
San Francisco, CA 94111
(served by Anthony Trujillo)

19 We declare under penalty of perjury that the foregoing is true and correct. Executed
20 this 16th day of May, 2014, at San Francisco, California.

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22

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