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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYLVIA DARENSBURG, VIRGINIA MARTINEZ, and VIVIAN HAIN; individuals on behalf of themselves and all others similarly situated; AMALGAMATED TRANSIT UNION 192; COMMUNITIES FOR A BETTER ENVIRONMENT,

Plaintiffs,

v.

METROPOLITAN TRANSPORTATION COMMISSION,

Defendant.

No. C 05 01597 EDL

DEFENDANT METROPOLITAN TRANSPORTATION COMMISSION'S AMENDED NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; AMENDED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: Tuesday, December 13, 2005
Time: 2:00 p.m.
Crtrm: E, 15th Floor
Before: Magistrate Judge Elizabeth D. LaPorte

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NOTICE OF MOTION AND MOTION

TO PLAINTIFFS DARENSBURG, MARTINEZ, HAIN, AMALGAMATED TRANSIT UNION 192 and COMMUNITIES FOR A BETTER ENVIRONMENT, and their attorneys of record:

PLEASE TAKE NOTICE THAT on Tuesday, December 13, 2005, at 2:00 p.m. or as soon thereafter as this matter may be heard, Defendant METROPOLITAN TRANSPORTATION COMMISSION, ("MTC") will and hereby does bring this amended motion seeking an order by this Court dismissing the Complaint for Injunctive and Declaratory Relief of Plaintiffs DARENSBURG, MARTINEZ, HAIN, AMALGAMATED TRANSIT UNION 192 ("ATU") and COMMUNITIES FOR A BETTER ENVIRONMENT ("CBE") on the ground that the Complaint fails to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure Rule 12(b)(6).

Plaintiffs cannot demonstrate that MTC in any way caused their alleged injuries, nor can they show that any relief granted by this Court likely will redress their alleged injuries. Plaintiffs' handful of specific allegations are inaccurate when evaluated in light of the documents upon which they rely in the Amended Complaint. These documents, subject to judicial notice as official acts of government entity MTC and because of their inclusion in the Amended Complaint, undermine completely Plaintiffs' factual allegations. Moreover, the remaining allegations are so unclear and conclusory as to not allow MTC to evaluate whether the challenged conduct occurred within the relevant two-year limitations period and fail to state a claim.

This amended motion is based on the following Memorandum of Points and Authorities, the Amended and initial Complaint on file in this action, all documents in the Court's file on this matter, MTC's Request for Judicial Notice filed October 28, 2005, and the Declaration of Alix Bockelman in support thereof filed October 28, 2005 (with its exhibits), and any other evidence or materials that the Court may allow before or at the time the matter is set to be heard.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs have filed a First Amended Complaint ("FAC") that fails to rectify the deficiencies noted in this Court's September 19, 2005 Order ("Order") dismissing their original.

Plaintiffs fail to demonstrate they have standing to bring this action, because they cannot show that MTC has in any way caused their alleged injuries. Nor can they show that any order of this Court likely will provide redress where, as here, the truly responsible party (AC Transit) is not before the Court.

Plaintiffs do make a handful of new and specific factual allegations. These new allegations, however, are troubling as Plaintiffs misstate the content of the documents on which their FAC relies. This Court can and must take judicial notice of those documents to which Plaintiffs refer so that the Court is not misled. Plaintiffs cannot avoid dismissal by presenting misleading accounts of public documents, which are judicially noticeable and easily verifiable.

For example, Plaintiffs allude to a letter from 39 Ministers requesting funding for a specific Richmond bus project to show causation. In fact, that letter requests increased funding for *all AC Transit routes including Transbay service*. AC Transit never requested funding for that Richmond project, and MTC already has funded that project through a different operator, WestCAT. Similarly, Plaintiffs allege that MTC adopted a policy to prevent AC Transit from using preventive maintenance (capital) funds for operations. This is patently untrue. MTC's policies, embodied in Commission's resolutions, generally apply to all operators in MTC's jurisdiction. Where that is not the case, MTC has allowed AC Transit along with two other operators special status *to allow the continued use* of preventive maintenance funds. As a result, MTC has provided AC Transit with these funds every year since FY 1999-2000. MTC has ensured continued access to these funds, which AC Transit again has requested for the next fiscal year. Finally, MTC's and AC Transit's enabling legislation dispel any suggestion that in the past MTC should or could have dictated fares, routes, and schedules to AC Transit.

As to redressability, Plaintiffs make unsupported allegations with regard to the content and status of funding for projects on the horizon for AC Transit. AC Transit's strategic vision documents demonstrate commitments to *expand* services across all of that transit agency's service area, not just in Plaintiffs' desired areas. This occurs even as AC Transit acknowledges service cuts in some of its service areas. Moreover, it is also very evident that AC Transit seeks funding for these future initiatives from any number of sources, not just MTC, and that MTC already is programming funding for much of AC Transit's strategic vision.

Plaintiffs make other new allegations to be sure. They are of a most conclusory nature with no factual underpinning. The FAC fails to provide MTC with sufficient detail to enable it to digest and evaluate the new allegations, or to even determine, for example, whether these claims even arose within the relevant two-year limitations period.

Plaintiffs have not demonstrated that this Court has subject matter jurisdiction here. This Court now has allowed Plaintiffs two opportunities to demonstrate their standing, but they have failed. The Court should dismiss this matter without leave to amend.

II. FACTUAL BACKGROUND

The FAC makes just a handful of specific allegations concerning MTC's discriminatory conduct. Even a cursory look at the documents on which Plaintiffs rely, however, demonstrates that, at best, Plaintiffs misunderstand the state of MTC's actions and policies.

A. The Truth About the Metropolitan Transportation Commission

Plaintiffs misstate MTC's role and statutory mandate. Since its creation in 1970 by the California Legislature, MTC has been the Bay Area's local area transportation planning agency, providing comprehensive transportation planning for the City and County of San Francisco, Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano, and Sonoma Counties. Cal. Gov. Code §§ 66500 *et. seq*. The region's transportation system also includes 101 cities with three major airports, five public ports, eight toll bridges, dozens of highways, hundreds of miles of bicycle and pedestrian routes, thousands of buses, cable cars, rail cars, and ferries, thousands of miles of local streets and roads, and over two dozen independently governed transit operators.

1. MTC's Mandate and Planning Activities

Plaintiffs refer throughout their FAC to MTC's Regional Transportation Plan ("RTP"), which is mandated by California law to help achieve a coordinated and balanced regional transportation system, including, mass transportation, highway, railroad, maritime, bicycle, pedestrian, goods movement and aviation facilities and services. Cal. Gov. Code §§ 65080, 66513, 29532. The RTP also is the region's long-range transportation plan, a prerequisite for federal funds. *See* 23 U.S.C. § 34(g). The current RTP, which was published in 2005, is entitled

Transportation 2030 ("2005 RTP").[1]

Plaintiffs also refer at great length to MTC's 2001 Regional Transit Plan ("2001 RTP") but misstate its contents, especially with respect to the Lifeline Transportation Network ("LTN").[2] The purpose of the LTN analysis, which was completed as part of the 2001 RTP, was to assess the current ability of the fixed route transit system to serve low-income communities. The analysis considered the proximity, timing, and availability of fixed routes to low-income communities. It revealed that few spatial gaps existed in the LTN. About half (43%) of the region's existing transit routes met the criteria for lifeline service. (LTN at p. 4, 21.) Most of the gaps were temporal in nature, meaning that the transit system was not available during the service hour objectives established for the analysis. Assuming a fixed route solution, an additional 1.55 million service hours would be needed, or an increase of 13% in total fixed route service that operated in the Bay Area in 2001. (*Id.* at p. 26.) The LTN Report recognized that many transportation gaps experienced by low-income residents of the Bay Area are not necessarily best met by providing additional fixed route service. (*Id.*) Contrary to Plaintiffs' assertions of a $1 billion shortfall, MTC did not provide any dollar estimate for providing this level of service. Rather, MTC will consider a variety of solutions, such as the provision of shuttles, guaranteed ride home programs, etc.

During Phase I of the 2005 RTP, the Commission agreed to dedicate $216 million in new funds to supplement already existing lifeline services and programs, which represents 43% of the region's transit services, are funded primarily by public subsidy. (2005 RTP at pp. 52-55.) MTC anticipates that it may obtain funds from State Proposition 42 State Transit Assistance ("STA") funds, and from Federal Job Access and Reverse Commute (JARC) funds. (*Id.* at p. 55.)

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[1] The 2005 RTP or "*Transportation 2030*" is available on MTC's website. (http://www.mtc.ca.gov/planning/2030_plan/index.htm)

[2] The 2001 RTP is also available on MTC's website. The Lifeline Transportation Network analysis was completed as part of the RTP and can be found at: http://www.mtc.ca.gov/library/2001_rtp/lifeline.htm.

2. MTC's Annual Funding Activities

a. Funding Sources and Uses

As set forth in its initial Motion to Dismiss, MTC has general statutory authority to program transportation funds, and depending on the funding source, specific statutory authority to allocate transportation funds. There are different rules governing each funding source; these are not MTC's rules but come from federal, state, or local law. There are two broad categories of funds: *Operating funds* and *Capital funds*. There are two major sources: *Non-Federal* and *Federal*. In almost all cases, funds available for operations are from non-federal sources. The great bulk of capital funds come from federal sources. Except for situations where operational maintenance expenses can be capitalized (*Capitalized or Preventive Maintenance*), transit operators cannot utilize capital funds for operational expenses, except under strict limitations.

MTC provided the specifics of transportation funding sources in its Memorandum of Points and Authorities in support of its first motion to dismiss. In summary, approximately 60% of AC Transit's *operating* budget comes from funds outside of MTC's programming or allocations jurisdiction. Of the remaining 40% that are subject to review by MTC, AC Transit receives more than its "fair share" under MTC's policy direction. In fact, MTC's allocations to AC Transit have outstripped inflation by 60% over the last 20 years.

On the capital side, MTC adopts policies for specific funding programs, such as the FTA's Urbanized Area/ Fixed Guideway Rail Modernization programs, and Federal Aid Highway's Surface Transportation Program ("STP"), and Congestion Mitigation and Air Quality Improvement Programs ("CMAQ"). In addition, because FTA's funding is by project, the funding flow to any single transit operator is irregular, reflecting the cyclical nature of capital replacement. STP and CMAQ funds are flexible highway funding categories first authorized under ISTEA and retained under TEA-21. *See* 23 U.S.C. §§ 133, 149. MTC, in partnership with the region's congestion management agencies, transit operators, and the California Department of Transportation ("Caltrans"), developed project selection and ranking criteria for these funds, which can be spent on highways, local roads, bike and pedestrian facilities as well as transit. STP is limited to capital expenses. CMAQ is generally limited to capital expenses, but may also be used to help fund operating costs for the first three years of new operations.

As part of MTC Resolution No. 3695, MTC made available $106.9 million in STP and CMAQ funds to regional projects. (Declaration of Alix Bockelman ("Bockelman Decl.") in support of Request for Judicial Notice at ¶6, Exh. C-001.)[3] This funding became available as a result of unanticipated federal funding, due mostly to the region's successful use of federal dollars in advance of state and federal deadlines. These dollars were directed to several categories of projects; one of which was strategic expansion as Plaintiffs note. (*Id.* at C-003-04, 010-11.) What Plaintiffs fail to mention is that the strategic expansion funding was directed solely to ready-to-go projects already programmed in the State Transportation Improvement Program (STIP) that had been stalled as a result of the recent state budget shortfalls. (*Id.* at C-010-11.) Because AC Transit did not have any strategic expansion projects in the STIP, there were no AC Transit (or any other transit project for that matter) projects under consideration for this funding category. (*Id.* at C-016.)

As to preventive maintenance funds, it was Congress that phased out completely federal transit operating assistance for large urban areas in Fiscal Year ("FY") 1998-99. Title 23 U.S.C. §§ 133, 149. Since that time, MTC has creatively enabled Bay Area operators, including AC Transit, to continue to capitalize maintenance expenses, which are normally operating expenses, with FTA § 5307 capital funds. (*See generally, id.* at ¶8, Exhs. D, E, F.) Starting in 1999, AC Transit requested preventive maintenance funds from MTC for operating expenses until passage of a local tax measure, Measure B. MTC approved this request. (Exh. E-017-20.)

MTC's efforts on AC Transit's behalf continued in 2001. AC Transit requested that MTC exchange funds programmed to several bus projects for preventive maintenance. This, in turn, would free up operating dollars from AC Transit's budget that could be used to buy busses that did not meet federal "Buy America" requirements. MTC approved this request. (*Id.*, E-005, 013, 017-20, 026 (Tip Amendment #01-19 (embodied in MTC Revised Resolution. No. 3300).) In 2002, MTC adopted Resolution No. 3515 for FY 2003-04, which directed FTA §5307 funds, usually reserved for capital expenditures, for preventive maintenance due to severe budget

[3] All subsequent references to exhibits are to exhibits attached to the Bockelman Declaration.

conditions for transit operators in MTC's jurisdiction. (Exh. F-001-015.) AC Transit requested and received preventive maintenance funds under this policy. (Exh. E-190.)

In 2003, MTC adopted Resolution 3580 for FY 2004-05 that allowed the use of §5307 capital funds for preventive maintenance if an operator could show that a budget shortfall exists and that the shortfall would result in significant service reductions. (Exh. D-041.) AC Transit, along with Golden Gate Transit and Santa Clara VTA requested preventive maintenance funds in light of the continuing economic hardships they faced; MTC programmed preventive maintenance funds to AC Transit in that fiscal year through MTC Resolution No. 3616. (*Id.*; *see also,* Exh. E-202-05.) In 2004, the following year, MTC again programmed preventive maintenance funds to AC Transit. (*Id.* at E-208.)

In 2005, MTC instituted a new policy regarding the use of §5307 Funds through Resolution No. 3688 ("2005 Policy") (Exh. D-001-02) for FYs 2005-06 through 2007-08. The new 2005 Policy does apply not only to AC Transit, but to all operators within MTC's jurisdiction. (*Id.*) Under the 2005 Policy, AC Transit has requested preventive maintenance funds for FY 2005-06, and MTC has programmed these funds for FY 2005-06 through MTC Resolution No. 3714. (*Id.*; *see also* Exh. E-212-15.)

Prior to its action to institute a preventive maintenance policy in 2005, MTC scored preventive maintenance as a lower scoring project when considering all requests for FTA funds. Because of the many requests for higher scoring projects – such as vehicle replacement and track rehabilitation – preventive maintenance was rarely funded. However, as noted above, MTC made exceptions to its scoring policy starting in 2001 to meet AC Transit's needs. As noted at the outset, the 2005 Policy establishes a more permanent process whereby operators experiencing financial hardship are able to access preventive maintenance. (Exh. D-001-02, 008, 011, 016, 020, 025-27.)

b. Richmond Bus Project and Free Bus Passes

Plaintiffs refer to a letter sent to MTC by 39 Ministers ("Ministers' Letter") demanding that MTC fund a specific Richmond bus program in 2001. The Ministers made no such request and the Richmond bus program does not appear in the Ministers' letter. Rather, they requested that MTC give AC Transit more money for *all of its East Bay and TransBay operations*. (Exh. G-001.) Moreover, contrary to Plaintiffs' suggestions, AC Transit never requested funding for that program. (*See* Exh. A-108-116, Exh. B.)[4] Instead, another operator, WestCAT, *requested and received* funding for the Richmond bus program. (Exh. H-002-013, 16-21; Exh. I-004-06, 021, 038, 041 and 048.) WestCat's project is referenced as the "WestCat 30Z" program in the "Blueprint Project Notebook to the RTP" referenced in the FAC. (Exh. L-012-13.) This project is listed as the "Intra West Contra Costa Rapid Bus" and is ranked as the most cost-effective project in the RTP Blueprint. (*Id.* at L-009.)

Plaintiffs' reference to MTC's denial of a free bus pass program for AC Transit is also confusing as MTC funding that program. (Exh. M-001-04.)

B. The Truth About AC Transit Belies Plaintiffs' Allegations

Plaintiffs' quarrel should be with AC Transit over that agency's priorities. Plaintiffs, however, have chosen to paint AC Transit as a helpless pawn without power to determine its own transportation policies, routes, fares, and schedules. The Court must not let Plaintiffs escape dismissal of this matter by allowing reliance upon patently untrue allegations that are contradicted by AC Transit's enabling legislation and transportation planning documents.

1. AC Transit's Enabling Legislation

In enacting California Public Utilities Code § 24501, *et seq*., the California Legislature authorized the creation the Alameda-Contra Costa Transit District ("AC Transit"). Cal. Pub. Util. Code § 24561. A Board of Directors runs AC Transit; each Director is elected from the District's five wards with two at-large members. *Id.* §§ 24646 *et seq*., §§ 24823 *et seq*., and §§ 24830 *et seq*. "The Board is the legislative body of the district and determines all questions of policy." *Id.* § 24883. "All matters and things necessary for the proper administration of the affairs of the district which are not provided for in this part shall be provided by the Board." *Id.* § 24884.

[4] Exhibit A is comprised of several documents that make up the Regional Transit Expansion Plan. Resolution 3357 is the Regional Transit Expansion Policy and Criteria, which is incorporated as Appendix A, (Exh. A-043-60), in the Regional Transit Expansion Policy: Initial Assessment, (*id.* at A-025-120). Resolution 3434, (*id.* at A-001-16) adopted Resolution 3357 and the Regional Transportation Expansion Program of Projects. Attachment A to Resolution 3434 lists the projects funded. (*Id.* at A-007). Appendix B to the Regional Expansion Transit Policy: Initial Assessment is the list of projects proposed to be included in the RTEP. (*Id.* at A-061-120.)

Finally,

> The Board shall supervise and regulate every transit facility owned and operated by the district, including the fixing of rates, rentals, charges, and classifications, and the making and enforcement of rules, regulations, contracts, practices, and schedules, for or in connection with any transit facility owned or controlled by the district.

Id. § 24885. "Transit facilities" are defined as all real and personal property, equipment, rights, or interests owned or to be acquired by the district for transit service. *Id.* § 24506.

2. AC Transit's Strategic Vision and Short-Range Transit Plan

AC Transit's Strategic Vision, cited by Plaintiffs, is contained at Chapter 5 of its Short Range Transit Plan (FY2001-FY2010). (Exh. J.) It describes a tiered approach to "accomplish the goal of increasing ridership to about 85 million by 2005-06, then rising to 100 million by 2010." (*Id.* at J-005.) The first tier is known as the Financially Constrained Operating Plan ("FCOP"), "which is based on anticipated revenue from existing sources." In their 2001 "Strategic Vision," AC Transit planned to maintain service levels reinstated in 1999 and even add a small amount of service, based on anticipated funding through Alameda County Measure B. (Id. at p. J-012). However, even though the maintained and increased services were funded by Measure B, according to AC Transit, AC Transit has cut service levels by approximately 14% since 2003 because the revenues "have not been as robust as planned" in their 2001 Strategic Vision (*Id.* at J-012). The Strategic Vision notes that ridership on AC Transit has "decreased significantly--primarily due to the poor economy and unemployment." (*Id.* at J-005). AC Transit now considers the return of service to levels and the improvements envisioned in 2001 as the second tier of the Strategic Vision. (*See id.* at J-006). Tier 1 (the FCOP) is already funded.

The third tier, the Optimal Service Plan ("OSP"), is broken into Phases I and II. (*Id.* at J-033.) The OSP is a wish list of service enhancements AC Transit could implement. Phase I is the Rapid Bus Program. Phase I envisions "[c]apital and operating improvements...in the top ten corridors, [i]mproving midday and owl service," and "flexible service concepts in areas of low density." (*Id.* at J-017) Of Phase I, AC Transit's Strategic Vision recites:

> The Metropolitan Transportation Commission realized the

> importance of these Enhanced Bus corridors, and has included them into the final Regional Transportation Plan (RTP) and Regional Transit Expansion Program or Projects (RTEP). The Telegraph/International/E. 14th Street Corridor has been included under Track One of the RTP, while Hesparian, Foothill and MacArthur Boulevard Corridors have been included in the RTEP.

(*Id.*)

Phase II, known as Bus Rapid Transit (BRT) "envisions further improvements on several of the highest ridership corridors," (*id.* at J-006) including "minor service increases and major capital investment on the top four corridors—only for the most heavily used corridors in the East Bay." (*Id.* at J-015) In addition to these tiers, AC Transit mentions that it "is also exploring opportunities to manage ferry services." (*Id.* at J-024.)

Finally, in terms of financing the projects of the Strategic Vision, AC Transit notes that it has "not identified all revenue streams to implement them. However, Local, Regional and Federal partners can assist [AC Transit] in prioritizing those elements of the Strategic Vision that can either be funded or identified for advocacy." (*Id.* at J-025.) And, "[f]ull implementation of AC Transit's Vision requires a partnership with the communities we serve." (*Id.* at J-036.) AC Transit deems external factors essential to full implementation of Vision including:

> Local Cities and other jurisdictions served by AC Transit must adopt "transit first" policies on [AC Transit's] trunk lines...Caltrans and other regional agencies must recognize the special value of a highly functional Transbay bus system...[and] Public/private partnership opportunities should be explored whenever possible to help AC Transit meet the needs of expanding and emerging markets.

(*Id.*) AC Transit does not assume that MTC is its sole funding source.

III. PROCEDURAL BACKGROUND

Plaintiffs initially filed a complaint on April 19, 2005 alleging that MTC violated: (1) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; (2) the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; and, (3) California Government Code § 11135 by engaging in discriminatory funding practices against the riders of AC Transit.

After the August 18, 2005 hearing on MTC's motion to dismiss, this Court issued its September 19, 2005 Order granting MTC's motion with leave to amend. On October 11, 2005, Plaintiffs filed their First Amended Complaint.

IV. MOTION TO DISMISS

A. Legal Standard.

A complaint "should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Van Buskirk v. Cable News Network, Inc.,* 284 F.3d 977, 980 (9th Cir. 2002). "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 2137, 119 L.Ed.2d 351 (1992). The court "need not accept inferences drawn by the plaintiffs if such inferences are unsupported by the facts set out in the complaint." *Kowal v. MCI Communications Corp.,* 16 F.3d 1271 (D.C. Cir. 1994).

A complaint upon which relief may be granted must at the very least outline a recognized legal or equitable claim that sufficiently pinpoints the time, place and circumstances of the alleged occurrences and which, if later proven to the required legal degree, will justify some form of relief, in order to withstand a motion to dismiss. *Dorothy K. Winston & Co. v. Town Heights Development, Inc.,* 376 F.Supp. 1214 (D. D.C. 1974).

On a Rule 12(b)(6) motion, the Court may look at extrinsic evidence in two ways without converting it into a motion for summary judgment. First, the Court may consider "material which is properly submitted as part of the complaint" on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment. *Lee v. City of Los Angeles,* 250 F.3d 668, 688 (9th Cir. 2001). If the documents are not physically attached to the complaint, they may be considered if the documents' "authenticity ... is not contested" and "the plaintiff's complaint necessarily relies" on them. *Id.* At least one court used the following reasoning to explain this rule:

> A plaintiff who pleads misrepresentations in a particular document ought not be permitted to defeat a motion to dismiss through the artifice of not attaching the critical document to the complaint. In these circumstances the rationale for converting a motion to dismiss into one for summary judgment--that plaintiff must have sufficient notice--"is largely dissipated"

> because the plaintiff had ample notice of a critical document on which the complaint is based.

I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co., Inc., 936 F.2d 759 (2d Cir.1991); *accord Haskell v. Time, Inc.,* 857 F.Supp. 1392, 1397 (E.D. Cal. 1994). Such documents are considered incorporated by reference in the complaint under Fed. R. Civ. Proc. 10(c). Allegations in the complaint may be disregarded if contradicted by facts established by exhibits attached to the complaint. *Del Puerto Water Dist. v. U.S. Bureau of Reclamation,* 271 F.Supp.2d 1224, 1231 (E.D. Cal. 2003).

Second, under Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record." *Mack v. South Bay Beer Distrib.,* 798 F.2d 1279, 1282 (9th Cir. 1986). The court need not accept as true allegations that contradict facts that may be judicially noticed. *Westlands Water Dist. v. U.S. Dept. of Interior, Bureau of Reclamation,* 850 F.Supp. 1388, 1399 (E.D. Cal. 1994).

B. Plaintiffs Have Failed to Allege Standing Sufficient to Maintain this Action In Federal Court.

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan,* 504 U.S. at 560, which itself "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

Plaintiffs have the burden to allege facts demonstrating that they are proper parties to invoke judicial resolution of this dispute and the exercise of this Court's remedial powers. *See Warth v. Seldin*, 422 U.S. 490, 518, 95 S. Ct. 2197, 2215, 45 L.Ed.2d 343 (1975). A party seeking to invoke a federal court's jurisdiction must demonstrate three things: (1) "injury in fact"; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *See id.*

As the Court acknowledged in its Order, while Plaintiffs met their burden to show injury in fact, they did not meet the elements of causation and redressability. For the reasons discussed below, Plaintiffs' FAC remains deficient. Accordingly, after two bites at the apple, the Court should dismiss this case with prejudice.

1. Plaintiffs Have Not and Cannot Demonstrate That MTC's Alleged Actions Have Caused Their Alleged Injuries.

The causation element of standing requires that Plaintiffs show that MTC's funding decisions were "fairly traceable to the challenged action of the defendant." *Lujan,* 504 U.S. at 560. Even with the Court's Order guiding them as to what to allege to cure the deficiencies in the Complaint to meet this element, Plaintiffs' amended allegations still fail.

When a plaintiffs asserted injury arises from the government's regulation of a third party that is not before the court, it becomes "substantially more difficult" to establish standing. *Id.* at 562 (citations and internal quotation marks omitted). Moreover, as the Court noted in its Order, MTC's actions must at a minimum be a "substantial motivating factor" in AC Transit's decisions to show causation exists. (Order at 8.) To establish this prong, Plaintiffs must show that MTC's actions have a determinative effect on AC Transit's funding decisions to Plaintiffs' disadvantage. *Bennett v. Spear,* 520 U.S. 154 (1997).

The Court found that Plaintiffs' allegations "approached" this showing with its general allegations in the Complaint, noting the allegations that MTC's funding practices deny equal opportunities and benefits to Plaintiffs, which result in Plaintiffs receiving an inferior quality and quantity of service. (Order at 8.) These allegations, however, were insufficient. The Court then provided a detailed road map directing Plaintiffs as to how to cure their defective allegations. It did so by pointing out the only two specific examples of MTC's actions that potentially caused Plaintiffs' harm - allegations regarding (1) preventive maintenance funds; and (2) the funding of the Richmond project - that were not adequately tied to AC Transit's acts to establish causation.

Although Plaintiffs attempted to cure the defects that the Court identified, the allegations are still lacking. To be sure, a review of extrinsic evidence which the Court can and should consider in reviewing this motion contradicts the claims made regarding these specific projects. The Court need not accept these allegations as true, and should disregard them. Nor have the Plaintiffs added any new allegations to the FAC that would support a finding of causation. Indeed, the new allegations are nothing more than generalized statements that merely highlight the fatal flaws attending Plaintiffs' lawsuit. As demonstrated below, the vagaries and random complaints about MTC's conduct are not sufficiently tied to a decline in AC Transit's service to demonstrate causation.

a. Preventive Maintenance.

The first example that the Court identified in its Order involved the use of preventive maintenance funds. The Court stated that although Plaintiffs alleged that "MTC curtailed AC Transit's ability to make flexible use of preventive maintenance funds," the Complaint did not allege, "for example, that MTC's revocation of the flexible use of preventive maintenance funds is a substantial factor in inferior AC Transit services." (Order at 9:2-6.)

In response, Plaintiffs amended their complaint to state that MTC decided to "curtail AC Transit's ability to make use of federal 'formula' funds to cover preventive maintenance costs." (FAC ¶43, 13:13-16.) And that despite MTC's knowledge of the importance of having these funds available, "MTC has recently adopted a policy which restricts the availability of such funding to two years out of the next twelve." *Id.* at 13:16-19. According to Plaintiffs, this decision "has the effect of injuring plaintiffs by forcing AC Transit to divert scarce operating funds to use for preventive maintenance, thereby necessarily reducing the amount of operating funds available for AC Transit to provide service for Plaintiffs." *Id.* at 13:19-23.

These misleading allegations, however, are contradicted by judicially noticeable facts. If anything, a review of the policy and history to which Plaintiffs refer demonstrates that no such revocation of funds has occurred or is subject to occur. To the contrary, MTC has bent over backwards to accommodate and allow AC Transit and other operators to make use of preventive maintenance funds for operations during recessionary times so that AC Transit would not have to completely shut down operations. (*See* Exhs. D, E and F.) Rather than "curtailing that practice," after two years of allowing the transit operators to get these funds as an exception to their general policy, as explained above, MTC institutionalized the exception to ensure that transit operators had the opportunity to apply for such funds should the need to address an operating shortfall be required in the future. AC Transit, which received preventive maintenance monies under this exception in FYs 2000-01 to FY 2005-06, has also applied for these funds for FY 2006-07. In addition, AC Transit will likely receive funding for preventive maintenance pending confirmation from AC Transit that economic hardship persists.

Accordingly, the Court should disregard these allegations that are contradicted by judicially noticeable facts. *Westlands Water Dist.,* 850 F.Supp. at 1399.

b. Richmond Bus Project.

The second way the Court stated that Plaintiffs could show that MTC has a coercive or determinative effect on AC Transit's inferior service was if they could allege that "AC Transit did not carry out" a "highly cost-effective Richmond bus project…due substantially to MTC's funding decisions." (Order at 9:3-8.) In the FAC, Plaintiffs make this conclusory assertion:

> [I]n 2001 a group of 39 African American ministers wrote to Defendant MTC seeking equity in the per passenger funding between AC Transit and local rail services. The ministers pointed out that Defendant MTC ranked a bus project that could be provided by AC Transit in the Richmond area…with a population that is 69% minority, as the most cost-effective project considered in [] MTC's Regional Transportation Plan.

(FAC ¶48.) Plaintiffs proceed to allege, in line with the Court's Order, that because "MTC rejected the proposal for the AC Transit Richmond bus project, AC Transit was unable to obtain the funding that it needed in order to provide this service, thus depriving Plaintiffs of…the benefits of greater mobility that the project would have afforded them." (FAC ¶48, 16:6-9.)

Yet, a review of the Ministers' Letter and AC Transit's requests for funding that same year, contradicts these statements. The Court can consider this extrinsic evidence under the doctrine that the Complaint necessarily relies on the letter and the Regional Transit Expansion Program of Projects, the document in which all AC Transit requests for funding for expansion projects in 2001, were included. Moreover, the RTEP is a public record subject to judicial notice. Because these allegations are contradicted by facts established by materials central to the complaint whose authenticity is not in question, and are documents subject to judicial notice, the Court should disregard them. *See Del Puerto Water Dist.*, 271 F.Supp.2d at 1231; *Westlands Water Dist.,* 850 F.Supp. at 1399.

The Ministers' Letter does not request funding for any particular service. All it states is that the ministers seek "equity" in funding AC Transit service because their "members who ride the bus system *in the East Bay and to San Francisco* depend on those buses for basic transportation." (*See* Exh. G (emphasis added).) In addition, according to AC Transit's own requests for funds, there is no mention of the Richmond bus project extension. Rather, AC Transit sought funds to expand its service primarily in the cities of Oakland and Berkeley, with some service extending into the cities of Emeryville and San Leandro. (*See* Exhs. A-108-116, B.) Instead, another operator, WestCAT, *requested and received* funding for the Richmond bus program alluded to in the Amended Complaint. (Exh. H-002-13, 016-21; Exh. I-004-06, 021, 038, 041 and 048.)

Accordingly, because neither the Ministers' Letter, nor AC Transit's funding requests even mention a Richmond bus project, it simply cannot be said that MTC had a "determinative" effect on AC Transit's ability to carry out the bus project. *Bennett,* 520 U.S. at 160.

c. Lobbying Efforts.

Plaintiffs also provide new allegations that MTC's lobbying efforts somehow are the cause of AC Transit's inferior service. Like the unpersuasive examples regarding preventive maintenance monies and the Richmond bus project, these allegations do not bring Plaintiffs any closer to meeting their burden to establish causation.

Plaintiffs acknowledge that state and federal legislation earmarks funds with conditions and uses that are completely outside MTC's control. (FAC ¶44.) Nevertheless, Plaintiffs believe that MTC has the power to secure changes in state and federal legislation to the benefit of certain transit operators over others. (FAC ¶¶39, 44.) For example, Plaintiffs allege that MTC "successfully advocated a change in the law that would provide for allocating funds in the...JARC funding program on formula basis" despite an awareness that this would reduce funding available to AC Transit. (FAC ¶39.) With all due respect, while MTC is flattered by Plaintiffs' belief that MTC has such power over Congress, even taking Plaintiffs' allegations as true, it simply cannot be cognizable to charge that MTC was a "substantial factor" in determining complex state and federal transit legislation. That duty is in the province of the legislators who make the laws, not a local planning body. These allegations are even more attenuated than those claiming that MTC has control of AC Transit, and do not establish causation.

d. Expansion Projects.

Additionally, Plaintiffs allege that MTC has failed to fund expansion projects that serve minorities. For example, MTC has committed to funding "mostly rail" projects in the 2001 RTP, but has failed to meet the minimum in the "Lifeline Transportation Program" intended to work in tandem with the RTEP. "Its 2005 RTP seeks only $216 million in new revenues over 25 years…a shortfall of well over a billion dollars." (FAC ¶45.) A review of that 2005 RTP shows no such shortfall, but rather that MTC already has committed $216 million to the LTN Program, (2005 RTP at p. 55.). MTC's funding efforts are in the initial stages. Moreover, there is not even an attenuated causal connection alleged between Plaintiffs here and any specific initiative in the LTN. Finally, insofar as there was no commitment on behalf of MTC to provide the funds, any potential complaint about lack of funding is unripe.

The verifiable facts also show that MTC has acknowledged and embraced many of AC Transit's expansion projects. As noted above, in its RTEP MTC has programmed AC Transit's proposed expansion projects. (Exh. A-002, 007, 014, 021-022, 034, 038, 057-59, 108-118; Exh. B-001-021.) AC Transit itself acknowledges that MTC has been instrumental in directing funds to its efforts to expand service in any number of its service corridors. (Exh. J-017.)

Plaintiffs also allege that MTC "did not distribute its full allocation of federal funds" under two programs, CMAQ and STP." And, that in adopting TIP in 2004, MTC did not allocate any of the $105 million in these funds to AC Transit despite the fact that AC Transit has projects that could have been funded under the "strategic expansion" category. (FAC ¶48, 16:12-19.)

As part of MTC Resolution No. 3695, which is subject to judicial notice, MTC made available $106.9 million in STP and CMAQ funds to regional projects when those funds became available. (Exh. C-003-04.) This federal funding was unanticipated and available due mostly to the region's compliance with state and federal deadlines. Funds were directed to several categories of projects; one of which was strategic expansion as Plaintiffs note. What Plaintiffs fail to mention is that the strategic expansion funding was directed solely to ready-to-go projects already programmed in the STIP. (*See Id.* C-010-11.) Because AC Transit did not have eligible projects in the STIP, it did receive this additional funding.

Accordingly, the judicially noticeable MTC resolutions demonstrate that Plaintiffs' allegations regarding funding are completely off base. The Court should not accept them.

e. Service Cuts

AC Transit's Strategic Vision, cited by Plaintiffs, belies their contention regarding causation. In their 2001 "Strategic Vision," AC Transit planned to maintain service levels reinstated in 1999 and even add a small amount of service, based on anticipated funding through Alameda County Measure B. (*Id.* at J-012). However, even though the maintained and increased services were funded by Measure B, according to AC Transit, AC Transit has cut service levels by approximately 14% since 2003 because the revenues "have not been as robust as [they had] planned" in their 2001 Strategic Vision (*Id.*) The Strategic Vision notes that ridership on AC Transit has "decreased significantly--primarily due to the poor economy and unemployment." (*Id.* at J-005). But the shortfall is "short-term setback[] associated with the economic downturn." (*Id.* at J-004.) AC Transit now considers the return of service and the improvements envisioned in 2001 as Tier 2 of the Strategic Vision.

Thus, the realization of AC Transit's Strategic Vision depends on the revenues generated from Alameda's half-cent sales tax (Measure B), unemployment factors, and the general economy, factors over which MTC obviously has no control. Plaintiffs' contention that success or failure of the Strategic Vision is solely dependant on funding from MTC is incomplete and thus misleading, and therefore fails to establish causation.

f. The Allegations Are Too Conclusory and Generalized For This Court to Accept to Establish Causation.

Finally, the balance of Plaintiffs' allegations, which are general and conclusory, do not help Plaintiffs meet their burden on standing.

For example, Plaintiffs allege generally that "through the power of the purse strings" MTC decides which transit needs will be met and if so the quantity of quality of service. Conversely it decides which transit opportunities will be denied." But Plaintiffs have not shown any such denials for AC Transit. In addition, Plaintiffs allege that MTC "exercises direct control" over at least 40% of AC Transit's budget, and that MTC "monitors the budgets of the transit operators within its jurisdiction, evaluating their service and overall performance," (FAC ¶43, 23:13-4:14), but fail to say how. These allegations, which have no factual support, should not be accepted. It is AC Transit that determines its fares, its policies, its schedules, and its priorities under its enabling legislation. Cal. Pub. Util. Code §§ 24501 *et seq*., 24885.

Plaintiffs also claim that MTC "attaches conditions to the allocation and/or release of essential funds, conditions that dictate the transit opportunities AC Transit may provide" by requiring AC Transit to "match" funds. (FAC ¶42, 12:23-28.) However, the claim that MTC mandates a matching requirement is overly simplifying the complexities of the funding process. For example, it is the federal government's requirement that transit operators "match" capital funding allocations that it makes. *See* 49 U.S.C. § 5307(e) ("a grant of the Government for a capital project (including associated capital maintenance items) under this section is for 80 percent of the net project cost of the project. A recipient may provide additional local matching amounts....") Accordingly, by law MTC cannot appropriate these funds without a matching contribution by local transit operators. *Id.*

Moreover, Plaintiffs allege in conclusory fashion that "AC Transit has reduced the quality and quantity of service that had been previously available to Plaintiffs...because of MTC's funding decisions, including decisions to deprive AC Transit of operating funds and/or flexibility." (FAC ¶43.) Conversely, Plaintiffs claim that "the amount of service that AC Transit provides to Plaintiffs...would grow if []MTC provided Plaintiffs with additional operating funds and flexibility." (*Id.*) But, as explained above, the "flexibility" that Plaintiffs claim MTC provides in preventive maintenance has not been denied AC Transit, but extended. In addition, there are no factual allegations that MTC denies operating funds to AC Transit over which it has any modicum of control. Accordingly, the Court should disregard these conclusory and generalized allegations, which add nothing to the causation inquiry.

Finally, Plaintiffs allege that MTC plays a "determinative" role in the amount of subsidy per passenger trip received by the riders of each of the region's transit operators. And they allege that the subsidy has a "determinative effect" on the quantity and quality of service available to the riders of that operator. (FAC ¶¶46-47.) Plaintiffs' allegation that MTC plays a "determinative" role in the subsidy each transit operator receives, however, is just too conclusory to accept. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). MTC does not control the "subsidy per passenger trip" determination, as this ratio is comprised of elements, mandated by state and federal law, over which MTC has no control. As the FAC alleges, "this figure is calculated from data contained in the National Transit Database, which is maintained by the Federal Transit Administration." (FAC at ¶40.) Thus, saying that MTC controls the ratio is overly simplistic and nonsensical.

Moreover, even if this Court takes Plaintiffs' description of the subsidy per passenger trip as correct, Plaintiffs' argument fails because MTC has no control over the amount of the fare charged. According to Plaintiffs, the ratio is a product of the fare minus the government subsidy. Absolute subsidy amounts or percentage subsidy amounts are not meaningful statistics. Assuming MTC had control over all the subsidies that are allocated, which it does not, MTC has no control over how transit operators determine fares or on what services they use funds they receive. Because AC Transit, BART and Caltrain have the power to determine what fares they charge, MTC does not and cannot have any meaningful control over "subsidy per passenger trip." Finally, during oral argument on MTC's first motion to dismiss, the Court already recognized that the subsidy per trip computations were meaningless.

In sum, Plaintiffs' amendment to the Complaint does not sufficiently allege standing. The specific examples they provide are belied by the facts in documents referenced in the complaint and those subject to judicial notice. Moreover, the remainder of the allegations are too conclusory to accept. Accordingly, Plaintiffs have again failed to meet their burden.

2. Plaintiffs Still Cannot Demonstrate That The Relief They Seek From MTC Will Redress Their Alleged Injuries

Plaintiffs also failed to cure the deficiencies in the FAC with respect to redressability because they have not and cannot demonstrate that the relief they request will remedy their injury. *Simon,* 426 U.S. at 41-46. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 107, 118 S.Ct. 1003, 1019, 140 L.Ed.2d

210 (1998). Plaintiffs have no standing where it is purely speculative that a requested change in government policy will alter the behavior of regulated third parties that are the actual cause of a plaintiff's injuries. *National Wrestling Coaches Ass'n v. Dept. of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004).

In its Order, the Court found that Plaintiffs failed to meet this element in their Complaint because it is "insufficiently clear whether a court order aimed at MTC would have remedied Plaintiffs' quality of life injury because there are insufficient allegations that MTC determines in significant part the extent to which AC Transit funds the services that Plaintiffs seek…." (Order at 10.) The Court noted that Plaintiffs alleged that "[i]f MTC refrained from its discriminatory funding practices, it could fund transit…The complaint does not allege that MTC would likely do so." *Id.*

Plaintiffs' attempted cure is to state generally that "[i]f MTC ceased its discriminatory funding…the result would be greater funding for AC Transit, much or all of which AC Transit would use to provide improved transportation opportunities for Plaintiffs and members of the Plaintiff Class." (FAC ¶50, 17:15-18.) In addition, Plaintiffs conclusorily assert: "If MTC did not engage in its discriminatory funding…it *would* provide AC Transit with greater funding, and AC Transit *would* improve and mitigate these inferior conditions." (FAC ¶67, 23:12-18.) (emphasis added).

Plaintiffs' suggestions that MTC somehow can control or should have controlled AC Transit's fares, routes, or schedules, however, is incorrect. AC Transit is an independent public entity, not an operating subsidiary of MTC. Its Board is its "legislative body of the district and determines all questions of policy." Cal. Pub. Util. Code § 24883. AC Transit's Board controls "[a]ll matters and things necessary for the proper administration of the affairs of the district," and "supervise[s] and regulate[s]" all property, facilities, and equipment, including "the fixing of rates, rentals, charges, and classifications, and the making and enforcement of rules, regulations, contracts, practices, and schedules." *Id.* §§ 24885, 24506. In addition, MTC's role and powers are limited to that which is provided in its enabling legislation. *See* Cal. Gov. Code § 66500 *et. seq.* Yet, even in the face of AC Transit's and MTC's enabling legislation, Plaintiffs allege that

MTC should dictate district policy to AC Transit by conditioning the provision of operating funds to AC Transit.[5]

This is not so. AC Transit's and MTC's powers are enumerated and limited by statute. *See Hayward Area Planning Ass'n., Inc. v. Alameda Cty. Trans. Auth.*, 72 Cal.App.4th 95, 104-108, 84 Cal.Rptr.2d 744, 749-751 (1999); *City of Ceres v. City of Modesto*, 274 Cal.App.2d 545, 550, 79 Cal.Rptr. 168, 170 (1969); *Scott v. Common Council of City of San Bernardino*, 44 Cal.App.4th 684, 697-698, 52 Cal.Rptr.2d 161, 170 (1996); *Hubbard v. City of San Diego,* 55 Cal.App.3d 380, 127 Cal.Rptr. 587 (1976), *G.L. Mezzetta v. City of American Canyon,* 78 Cal.App.4th 1087, 1092, 93 Cal.Rptr.2d 292, 295-296 (2000); *Midway Orchards v. County of Butte*, 220 Cal.App.3d 765, 783, 269 Cal.Rptr. 796, 807 (1990). MTC's and AC Transit's respective roles are clear. If the Legislature intended MTC to have substantial control over AC Transit's routes, schedules, and fares, it would have repealed or modified AC Transit's powers.

In addition to being improper and possibly illegal for MTC to force AC Transit to use funds in a certain way, or for a Court order to supersede AC Transit's enabling legislation, Plaintiffs' redressability allegations also fail with respect to its references to AC Transit's "Strategic Vision Plan." (FAC ¶50, 17:18-19.) Plaintiffs allege that the "Strategic Vision policy clearly states that AC Transit will implement its plan to the extent it receives the additional funds through MTC that are needed to implement and operate the plan...Conversely, to the extent it does not receive additional funds through MTC...AC Transit will be unable to do so..." (FAC ¶53, 27:18-4:19.) Plaintiffs go on to suggest that, without additional funds from MTC, AC Transit's provision of services to Plaintiffs is likely to decline. (*Id.* at 19:5-7.)

This is an incomplete if not misleading reading of AC Transit's Strategic Vision. Notably absent from the FAC is the progress that AC Transit already has made in achieving the goals in the plan. This is a critical omission in terms of redressability because, as AC Transit itself acknowledges, the "implementation of the [strategic] vision is already underway." (Exh. J-036.) Also absent is acknowledgment of the assistance, by AC Transit's own account, that MTC

[5] As noted above, MTC does not and cannot control how earmarked monies are used. Where federal, state or local law earmarks funds for specific purposes, MTC cannot override those legal dictates.

already provides to AC Transit in achieving its strategic vision, and that AC Transit does not rely solely on MTC to achieve it. (*Id.* at J-017, J-036.)

First, it is clearly noted in the Introduction to the Strategic Vision that implementation of Tier 1 was made possible through Measure B, a voter initiative--not an MTC funding decision. (*See* e.g. J-004.) In terms of redressability, Plaintiffs' claim that the "Strategic Vision policy clearly states that AC Transit will implement its plan to the extent that it receives the additional funds through the MTC" (FAC at ¶53 at 18:27-28) is unfounded. Nowhere does the Strategic Vision rely on funds solely received through MTC. In fact, realization of the vision, according to AC Transit's, relies on, for example, "local cities," "Caltrans," and unspecified "Public/private partnerships." (J-036) Moreover, AC Transit, itself, has not identified all funding sources to achieve their vision. (J-025).

Second, Plaintiffs erroneously imply that improvements ("on the 10 busiest East Bay Corridors") set forth in the Strategic Vision are not being realized. For example, as to Tier 3, Phase I, AC Transit announces that MTC "realized the importance of these Enhanced Bus corridors, and have included them into the final" RTP and RTEP. The Telegraph/International/E. 14th Street Corridor has been included under Track One of the RTP, while Hesparian, Foothill and MacArthur Boulevard Corridors have been included in the RTEP." (Exh. J-017.) The FAC alleges these routes "serve Oakland," where Plaintiffs Darrensberg and Hain live. Thus, these project routes are already programmed for funding. (*See id.*) There is nothing for the Court to redress.

It is disingenuous to use this plan as an example to show the Court how it could redress Plaintiffs' injuries where the AC Transit's plan already is in the process of being implemented and, more importantly, it is clear that AC Transit's Strategic Vision is dependent on factors other than those within MTC's purview. While more money from any one source could translate into more and/or better service to Plaintiffs, the Strategic Vision makes clear that MTC is but one factor in the realization of AC Transit's Vision. Thus, Plaintiffs' speculating as to what a party not before this Court 'would' do as opposed to 'could' is semantics. AC Transit's Strategic Vision does not provide Plaintiffs the factual basis lacking in the original complaint.

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B. The Applicable Statute of Limitations Limits the Bases for Plaintiffs' FAC

In order to form the bases of their FAC, the alleged discrimination of which Plaintiffs complain under the Equal Protection Clause and Title VI must have occurred in the prescribed time period. *Taylor v. The Regents of the Univ. of California,* 993 F.2d 710, 712 (upholding the dismissal of plaintiffs' §§1981, 1983, 1985 and 2000d [Title VI] claims as barred by the state statute of limitations for personal injury actions). In California, that time period is two years. Cal. Code of Civ. Proc. § 335.1. That two-year statute of limitations applies to Plaintiffs' injunctive claims. *Cholla Ready Mix, Inc. v. Civish,* 382 F.3d 969 (9th Cir. 2004). Here, the only allegations occurring within the limitations period are those that are contradicted by judicially noticeable facts. For their other conclusory allegations, Plaintiffs either fail to provide a date, or provide a date before April 2003, over two years before this action was filed.

Plaintiffs generally allege MTC has "historically engaged," (FAC at ¶1) and "over many years" (*Id.* at ¶3) has channeled funds to BART and Caltrans at the supposed expense of AC Transit. Plaintiffs' paragraphs 11, 12 and 13 lack any temporal scope whatsoever and in paragraphs 15-16 Plaintiffs provide dates of 1989 and 2001. Plaintiffs' paragraph 36 provides no time frames for MTC's alleged "actions or omissions." Likewise, in paragraphs 40-41, Plaintiffs, without providing a time period, allege that: MTC "has in the past decided to deny or delay AC Transit funding"; "take steps within [MTC's] power to provide AC Transit with additional funds;" MTC "has in the past decided to deny or delay AC Transit funding"; and "has failed to take steps within its power to provide AC Transit with additional funds, including operating funds."

Similarly, paragraph 42 alleges that "MTC reduces the overall size of AC Transit's budget by, *inter alia*, choosing not to allocate to AC Transit funds within MTC's control and choosing to lobby for funding for projects that benefit riders of Caltrain or BART, to the exclusion of AC Transit riders." In paragraph 43, Plaintiffs allege that "AC Transit has reduced the quality and quantity of service that had previously been available to Plaintiffs and/or implemented fare increases that injured Plaintiffs because of MTC's funding decisions." Paragraph 44 states that

Plaintiffs make generalized allegations without dates or specific legislation. Aside from being unintelligible, there are no time limits alleged in these paragraphs.

Finally, in paragraphs 49-69, Plaintiffs provide no information that any of the alleged conduct by MTC occurred within the two-year limitations period.

Other than those allegations that are simply shown to be false through judicially noticeable materials or documents central to the complaint whose authenticity is not in dispute, the FAC contains allegations wholly lacking in temporal frame or alleges discrimination occurring outside of the statute of limitations. Accordingly, the FAC should be dismissed on this basis.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Amended Complaint must be dismissed without leave to amend.

DATED: November 1, 2005

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