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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

SAN DIEGO TRANSPORTATION ASSOCIATION, a California corporation; JOE CIPRIAN, an individual; JANAN INSURANCE AND FINANCIAL SERVICES, INC., a California corporation d/b/a JADEN EXPRESS; CURTIS BECKER, an individual d/b/a CURTIS CAB; RONALD HAWKINS, an individual d/b/a ANDY'S CAB; SAVATAR SAHOU, an individual; USA CAB, LTD., a California corporation

Petitioners,

CASE No. 37-2015-00008725-CU-TT-CTL

OPPOSITION TO MOTION TO INTERVENE

Date: April 28, 2015
Time: 9:00
Dept: C-71
Judge: Ronald S. Prager
TRIAL DATE: None Set

vs.

SAN DIEGO METROPOLITAN TRANSIT SYSTEM f/k/a SAN DIEGO METROPOLITAN TRANSIT DEVELOPMENT BOARD, a California public agency; and DOES 1-100 inclusive,

Respondents.

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INTRODUCTION

The instant motion is a transparent attempt to divert the court's attention from the issues presented by the petition herein and to transform this case into something it was never intended to be but in which counsel for the intervenors specialize: legal circuses. The motion is supported by the most disingenuous memorandum of points and authorities the undersigned has ever had the misfortune of reviewing in a career spanning more than three decades. This is, perhaps, understandable inasmuch as it is submitted by ideologues more interested in political advocacy than in advancing the law. The Institute for Justice ("Institute") is a decidedly unserious, self-described political advocacy organization masquerading as a law firm and it is operated to advance a political agenda. Its cases are political cases brought to make political points described in overheated, self-dramatize rhetoric on its website (www.ij.org) referring to its lawyers as its "merry band of litigators".

All of this is amply illustrated by the means through which their representation began. The Institute for Justice handed out flyers to one and all, trolling for clients like cheap ambulance chasers lurking by a hospital. (Declaration of Howard, Exhibit "1") It used to be referred to as "barratry" and in a more civilized age was beneath the dignity of reputable lawyers, was considered unethical and exposed its practitioners to disbarment.

Its lead lawyer herein, Mr. Hottot, has, for his part, submitted his declaration to this court that is materially false in several respects, hardly an auspicious beginning for a lawyer who seeks to practice before this court as a guest and certainly beneath the ethical standards that generally adhere in San Diego.

The motion is riddled with false representations, overheated rhetoric and maudlin descriptions of aspirations for upward mobility.

This is, perhaps understandable because that is all they have. It is not good law and it is not good practice. We will, over the course of this opposition, disclose to the court the

unprecedented extent of the false representations counsel for the intervenors have made herein. It is conduct that should not be rewarded by this Court.

Why is this important? Because it illustrates, as nothing else could, why the motion should be denied. Intervention is not available to those who want to enlarge the issues presented by the complaint or to transform legitimate legal cases into political circuses. It is available only to those who have "direct and immediate interests" in the outcome. These proposed intervenors do not and the nature of their legal representatives illustrates as much.

Applications to intervene are straightforward affairs. To prevail, applicants must demonstrate either that they are subject to compulsory joinder – something even the Institute has not had the temerity to suggest herein – or that they have a "direct and immediate" interest in the outcome and their presence will not disrupt the proceedings by expanding the issues presented by the petition. The intervenors have demonstrated none of these things.

We must begin by indicating to the court what this case is not. Intervenors' overheated rhetoric aside, it is not about the "political process" (*Moving Papers*, page 3, line 5; Intervenors proposed complaint, ¶ 11-12)) . It is not about "monopolies" (*Proposed Intervenors Complaint*, ¶ 10). It is not about "cartels" . It is not about "BIG TAXI". (*Declaration of Howard*, Ex. "1") It is not even about whether or not the proposed intervenor will obtain taxi permits. It is about the circumstances under which government may do so. The petition is not an attempt by petitioners to "prevent Prospective Intervenors from acquiring permits of their own" (*Moving Papers*, page 1, lines 19-20). Nothing in the allegations contained in the actual complaint herein even remotely bears on those issues. This court will search the petition herein in vain for any mention of anything having anything to do with any of those issues. More specifically, the Court will find no reference to or request that it "prevent [the intervenors] from obtaining permits".

But that is the problem with ideologues. They seldom understand where their ideology ends and the law begins.

What this case is about is environmental protection. It is about California' carefully constructed and comprehensive environmental protection scheme. It is about environmental analysis processes clearly and firmly established under the California Environmental Quality Act ("CEQA") and the legion of cases that interpret government's clear duties under it. There is no lack of irony in the government's current resistance to complying with the provisions of that act when it takes such pains to ensure that those in private industry do so. The case is also about MTS' willful refusal to comply with the provisions of that act despite the warnings of members of its own board.

The case is also about MTS' willful refusal to comply with the provisions of the California Administrative Procedures Act ("CAPA"), *Government Code* 11370 et seq., that require that public agencies support regulation by adequate evidence, studies and findings of need and its concomitant prohibitions against arbitrary and capricious action. The case is also about MTS' jumping the gun in the face of an unsettled regional transportation plan – to which it will be subject and to which it must conform – that the Fourth District Court of Appeal has ruled void as unsupported by an adequate environmental impact report ("EIR"). Until the San Diego Association of Governments ("SANDAG") can develop an acceptable EIR, the regional transportation plan is in limbo and there is no evidentiary or environmental support for changes to taxi permitting policy like that adopted by MTS.

It is on these bases that the petitioners have requested provisional relief prohibiting MTS from proceeding in the face of its multiple and egregious violations of CEQA and CAPA.

Finally, the case is about petitioners' property interest in the permits MTS has already issued; the market for which MTS created and has actively encouraged for over two decades. On that claim, however, the petitioners do not seek an injunction prohibiting the issuance of permits. On that claim, the petitioners seek only damages. So, it has no impact on the proposed intervenors whatsoever. Sustaining that cause of action will not result in the denial of any taxi permit to any person.

All of this is to say that the proposed intervenors have no legitimate interest in this case, nor could they. If the petitioners prevail, this court will issue an injunction requiring MTS to do what it should have done in the first place: (1) conduct the environmental studies required by CEQA; (2) conduct whatever fact finding is necessary to support changes in policy, in accordance with *Govt Code* 11370 et seq.; (3) wait until SANDAG completes its regional transportation plan to ensure that MTS' policies conform to the requirements of same, and (4) pay damages if MTS' actions improperly impair property interests belonging to current permit holders.

Not one of these outcomes has any direct impact whatsoever on the proposed intervenors. Petitioners cannot have any legitimate interest in preventing MTS from conducting environmental studies and fact finding to supports its proposed changes. No one could have a legitimate interest in supporting MTS' willful multiple violations of law. Once MTS carries out its duties under the *Public Resources* and *Government Codes*, it might well decide that it has the power and justification to do exactly what it has already done and lift the current cap on taxicab permits. If it does, the proposed intervenors will get the permits they seek.

THE PROPOSED INTERVENORS CANNOT INTERVENE AS A MATTER OF RIGHT

The proposed intervenors have oddly suggested that they are entitled to intervene as a matter of "right", misrepresenting current law and failing to provide this Court with controlling precedent.

To intervene as a matter of right, a proposed intervention must either be authorized by statute (The Rutter Guide, Civil Procedure Before Trial, § 2:401) or the proposed intervenor must be in the position of being a compulsory party to the action. *Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 556. The *Hodge* court observed that "The description of an indispensable party under the compulsory joinder statute is virtually identical to the description of a party who may intervene as of right", juxtaposing the standard necessary to

show intervention as of right under CCP § 387(b) to the provisions of CCP § 389(a), which describes the standard for compulsory joinder. The court found that the standards are identical, so to prevail on a motion to intervene as of right, a party must show that he is a compulsory party to the action and entitled to compulsory joinder. (See, also, The Rutter Guide, *California Civil Procedure Before Trial*, Section 2:407.)

The intervenors did not furnish this court with this inconvenient authority, and even they did not have the temerity to argue that they are compulsory parties to the instant action. They also cited this Court to no statute that provides for them the right to intervene in this action as a matter of right. It is their burden to do so and they have failed. The motion must be denied on this basis.

PROPOSED INTERVENORS HAVE NOT CARRIED THEIR BURDEN OF DEMONSTRATING A RIGHT TO PERMISSIVE INTERVENTION.

While the intervention statute CCP 387 is to be "liberally construed" in favor of intervention *Simpson Redwood Co. v. State of California* (1987) 196 Cal.App.3d 1192, 1202, it is not unlimited. A party seeking intervention is *required* to show:

1. That the party has a *direct and immediate interest* in the litigation; *and*

2. That the intervention *will not enlarge the issues* in the case; *and*

3. The reasons for intervention outweigh any opposition by existing parties.

Truck Ins. Exchange v. Superior Court (Transco Syndicate #1) (1997) 60 Cal.App.4th 342, 346.

> "If proper procedures are followed [citation], the court has *discretion* to permit a nonparty to intervene in litigation pending between others, provided: [P] The nonparty has a *direct and immediate interest* in the litigation; and [P] The intervention will *not enlarge* the issues in the case; and [P] The reasons for intervention outweigh any opposition by the existing parties. [Citations.]" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 1997) P 2:414, p. 2-55 rev. # 1, 1996, original italics.)"

See, also, *Fireman's Fund Ins. Co. v. Gerlack* (1976) 56 Cal.App.3d 299, 303:

"Several principles should govern the exercise of that discretion. The proposed intervener's "'interest in the matter in litigation . . . must be of such a direct and immediate character that [he] will either gain or lose by the direct legal operation and effect of the judgment.'" (*Jersey Maid Milk Products Co.* v. *Brock*, 13 Cal.2d 661, 663 [91 P.2d 599]; and see *People* ex rel. *Public Util. Com.* v. *Ryerson*, 241 Cal.App.2d 115, 119 [50 Cal.Rptr. 246];*In re Mercantile Guaranty Co.*, 238 Cal.App.2d 426, 434 [48 Cal.Rptr. 589, 19 A.L.R.3d 1267].) The issues of the action may not be enlarged by the proposed intervention. (*Muller* v.*Robinson*, 174 Cal.App.2d 511, 515 [345 P.2d 25]; *LePleux (Py)* v. *Applegate*, 164 Cal.App.2d 9, 11 [330 P.2d 65].) And, all important, the intervention must be denied if the reasons therefor "are outweighed by the rights of the original parties to conduct their lawsuit on their own terms."

Proposed intervenors fail on all three.

1. **The Proposed Intervenors Do Not Have A Direct and Immediate Interest**.

"Direct and immediate interest" is a term of art in intervenor jurisprudence. "To support permissive intervention, it is well settled that the proposed intervener's interest in the litigation must be direct rather than consequential, and it must be an interest that is capable of determination in the action." *City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1037. The court goes on to explain that:

"The requirement of a direct and immediate interest means that the interest must be of such a direct and immediate nature that the moving party " 'will either gain or lose by the direct legal operation and effect of the judgment.' [Citation.]" (*Jersey Maid Milk Products Co. v. Brock* (1939) 13 Cal.2d 661, 663 [91 P.2d 599] (*Jersey Maid*); *Fireman's Fund Ins. Co. v. Gerlach, supra,* 56 Cal. App. 3d at p. 303; *Socialist Workers Etc. Committee v. Brown*(1975) 53 Cal. App. 3d 879, 891 [125 Cal. Rptr. 915] (*Socialist Workers*).) "A person has a direct interest justifying intervention in litigation where the judgment in the action *of itself* adds to or detracts from his legal rights without reference to rights and duties not involved in the litigation. [Citation.]" (*Continental Vinyl Products Corp. v. Mead Corp.* (1972) 27 Cal. App. 3d 543, 549 [103 Cal. Rptr. 806], italics added (*Continental Vinyl*).) Conversely, "An interest is consequential and thus insufficient for Intervention when the action in which intervention is sought does not directly affect it although the results of the action may indirectly benefit or harm its owner."

See, also *US Ecology, Inc. v. State of California* (2001 – 4th DCA) 92 Cal.App.4th 113, 140 (which the intervenors misrepresented in their moving papers). In that case our court of appeal *vacated* the trial court's grant of intervention and returned the case to that court to

determine whether the proposed intervenor had an interest that was sufficiently "direct or immediate" as to justify intervention.

An indirect interest is not sufficient. For example, shareholders cannot intervene in actions against a corporation because while a judgment against the corporation may indirectly result in the shareholder's loss of money, the harm suffered by the shareholder would be "indirect" or "consequential" and not "direct" *Continental Vinyl Products Corp. v. Mead Corp.* (1972) 27 Cal.App.3d 543, 553.

These intervenors have no such interest. A decision in this case will not directly impact the intervenors' ability to obtain taxi permits. A decision in this case will only and solely decide (1) whether MTS is under a duty to comply with CEQA; (2) whether MTS violated CAPA by failing to support its action with adequate evidence and findings, acting acted arbitrarily and capriciously in failing to do so, and (3) whether MTS' actions causes cognizable damage to the petitioners. If an injunction issues as a result of MTS' serial violations of CEQA and CAPA, the result will simply be to force MTS to comply with its statutory obligations before issuing more taxi permits, nothing more. Any harm suffered by the intervenors would be completely indirect and consequential. An injunction requiring MTS to comply with the law does not directly prohibit the issuance of permits to the intervenors and, in fact, will not have any impact on the intervenors once MTS has carried out its statutory obligations.

The intervenors admit as much, of course. They do not claim a direct harm. In their words, "That is all Abdi and Abdullah want to ensure in this case: The demise of Petioner's lawsuit." But this lawsuit is not about them. It is about environmental protection and the obligation of government to comply with its duties under the Administrative Procedures Act.

Moreover, the intervenors cannot have a direct and immediate interest in preventing MTS from complying with CEQA and CAPA. In fact, no one can have a legitimate interest in saving government from having to comply with its obligations under the law.

The question before this Court is whether MTS has a duty to comply with CEQA and CAPA. The intervenors do not even have standing with respect to the CEQA claims under *Public Resources Code* § 21177 or even under CAPA which is purely a statutory scheme designed to compel *government* to comply with certain procedures in enacting regulations. An interest in relieving government of its obligation to obey the law is not a *direct and immediate* interest belonging to the intervenors.

If after MTS complies with its obligations under the codes it finds that the studies suggest that lifting the cap is not environmentally sound it may, on that basis, decide not to issue further permits. But that is not an attack on the intervenors. It would be compelled by law and it is not something the intervenors are entitled to attack in this proceeding since it has not yet occurred.

2. **The Proposed Intervenors Seek To Change the Entire Nature of the Case**.

To demonstrate a colorable entitlement to permissive intervenor, a proposed intervenor must show that his intervention will not change or enlarge the issues in the case. *Fireman's Fund Ins. Co. v. Gerlack* (1976) 56 Cal.App.3d 299, 303; *Muller* v.*Robinson*, 174 Cal.App.2d 511, 515; *LePleux (Py)* v. *Applegate*, 164 Cal.App.2d 9, 11.

Nothing could more clearly illustrate the intervenor's intention to change the nature of this action and convert it to a political case than their assertion that because a political process transpired this court should not upset the governmental action that followed. (*Moving Papers*, page 4) Intervenors make this assertion as if a "political process" is all that is required to confer legitimacy for governmental action. It isn't. Governmental action taken after the political process must be done in compliance with law. That is why California adopted its Administrative Procedures Act, *Government Code* 11370 et seq.. Statutory law requires that governmental agencies follow certain procedures and support any proposed action with evidence and that they not act "arbitrarily and capriciously".

It is why a massive volume of Supreme Court cases upset governmental action that does not comply with government's obligations under the law. It is the opposite argument that the

intervenors' ideologue attorneys asserted in their losing argument in *Kelo v. City of New London* (2005)545 US 469 in which counsel for the proposed intervenors herein vigorously (and unsuccessfully) argued that the political process in which the City of New London engaged should be overturned because it was constitutionally infirm.

The instant motion is riddled with intense and inflammatory political rhetoric. Intervenors spend paragraphs talking about the "political process" (*Moving Papers*, page 3, line 5; Intervenors proposed complaint, ¶ 11-12)) . They suggest this case is about "monopolies" (*Proposed Intervenors Complaint*, ¶ 10) and "cartels" . They suggest their clients are victims of "BIG TAXI" (*Declaration of Howard*, Ex. "1") and that this case should be defended on that ground.

It need not be repeated but must be underscored that this case is and always has been about the requirement that government comply with the same obligations under CEQA that it demands of everyone else. It has always been about government's obligations to act deliberately and to refrain from arbitrary and capricious conduct under CEQA. This case is about whether doubling or tripling the number of taxicabs on the road will have an environmental impact. (It is beyond debate that automobiles have emissions and that if one auto emits, two emit twice as much. There will be an environmental impact. The only question is now much and that is why MTS is required to comply with CEQA – to find out how much before irremediably increasing toxins in the air – by conducting a study and a report.)

In their moving papers, (Page 1) the intervenors argue their Milwaukee case is the duplicate of this one. It is not. It did not involve environmental review or the misapplication of administrative procedures. They argue that "the hopes of the intervenors will be dashed", as if the intervenors have the right to permits irrespective of whether or not they have an adverse environmental impact and MTS no duty to comply with CEQA. The statement is, of course, false, as well. They assert that Petitioners are "seeking to prevent the intervenors from obtaining permits" when the Petition is devoid of any such request. (*Moving Papers*, p. 2)

Intervenors' rendition of the facts is a maudlin contemplation of the challenges immigrants suffer and a heart-tugging description of the lives they lead as they seek the American dream. But that has nothing to do with whether or not MTS has an obligation to comply with CEQA and CAPA. (*Id.*)

Intervenors' attorney, Mr. Hottot, testified in the declaration supporting his application for admission to this court *pro hac vice* that the instant case is "substantially similar" to a "case in Minneapolis, Minnesota, in which the U.S. Court of Appeals for the Eighth Circuit held that taxicab permit holders do not have a constitutional right to prevent new competition in the city's transportation market". Putting aside the fact that it is materially false, that case is not only not "substantially similar" to the instant case, it has no relationship to it at all, either by issues or applicable law. Attached to the Declaration of John W. Howard is a copy of the decision in that case. This Court can readily see that Mr. Hottot's representation was materially false. The Minneapolis case was not about environmental protection. It was not about government's failure to comply with the administrative procedures act. It was not about CEQA. It has no relationship to the instant case in any way.

All of this demonstrates that the proposed intervenors clearly intend to geometrically enlarge the issues in this case and convert it from the straightforward government accountability case it is to a political argument over "free markets" and immigrant aspirations.

Intervenors clearly fail to demonstrate that they will not enlarge the issues. For that reason the intervenors application for intervention should be denied.

THE PETITIONERS ARE ENTITLED TO TRY THE CASE THEY HAVE FILED.

Respondent's desire to transform a straightforward government accountability case into something it is not and should not be collides with Petitioners' right to try the case they have filed. This is a case of the obligations of government, not the rights of people seeking discretionary permits. Petitioners have filed a case on very narrow issues and intervenors want to expand the case to address issues not presented by the Petition. As between those interests,

the interest of a party filing a lawsuit must prevail over those seeking to intervene. *Truck Ins. Exchange v. Superior Court (Transco Syndicate #1)* (1997) 60 Cal.App.4th 342, 346. It is not even a close question, in this instance.

Intervenors point out that MTS does not oppose their intervention. Of course it doesn't. The last thing MTS wants is for this case to be tried on the merits of the claim. The last thing MTS wants is for this Court to address MTS' serial violations of the Public Resources and Government Codes. The last thing MTS wants is for this Court to focus on what MTS has failed to do.

But that is what this Court will do unless diverted from its path by the emotional appeals and political rhetoric in which counsel for the intervenors specialize.

CONCLUSION

The standard for intervention is liberal but not limitless. These proposed intervenors are clearly not entitled to intervene of right and have utterly failed to carry their burden of showing an entitlement to permissive intervention. They seek to expand the issues in the case. They have no immediate interest in the issues presented by the case. And, as between the interests of the intervenors and those of the Petitioners, the Petitioners are clear entitled to try the case on the issues on which they have filed and not those the intervenors seek to interject. . Inasmuch as the standard of review in such instances is abuse of discretion, City and County of San Francisco v. State of California (2005) 128 Cal.App.4th 1030, 1036, this Court should exercise its discretion to deny the motion.

Dated: April 23, 2015

John W. Howard
Attorney for Petitioners.

PROOF OF SERVICE

I, the undersigned, do declare that I am employed in the county aforesaid, that I am over the age of [18] years and not a party to the within entitled action; and that I am executing this proof at the direction of the member of the bar of the above entitled Court. The business address is:

JW Howard Attorneys LTD
The NBC Tower, 225 Broadway, Suite 2220
San Diego, California 92101

■ MAIL. I am readily familiar with the business' practice for collection and processing of correspondence for mailing via the United States Postal Service and that the correspondence would be deposited with the United States Postal Service for collections that same day.

□ FACSIMILE. I am readily familiar with the business' practice for collection and processing of correspondence for electronic transmission and that the correspondence was successfully transmitted by facsimile that same day in the ordinary course of business.

□ OVERNIGHT. I am readily familiar with the business' practice for collection and processing of correspondence for overnight delivery/receipt next day via a major carrier such as UPS, FedEx, DHL or similar carrier, and same were deposited that same day.

■ ELECTRONIC. I am readily familiar with the business' practice for collection and processing of documents via electronic (e-mail) system and said documents were successfully transmitted via e-mail that same day.

□ PERSONAL. The below described documents were personally served that day.

On the date indicated below, I served the within:

1. **OPPOSITION TO MOTION TO INTERVENE**
2. **DECLARATION OF JOHN W. HOWARD IN OPPOSITION TO MOTION TO INTERVENE**

in said action by placing a true copy thereof closed in a sealed envelope, addressed as follows and placing same in the U.S. mail, postage prepaid, as well as emailed to:

Wesley Hottot, Esq.
INSTITUE FOR JUSTICE
10500 N.E. 8th Street, Suite 1760
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Meghan A. Wharton
Chief Deputy City Attorney
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San Diego, California 92101

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was ***EXECUTED*** on April 23, 2015 at San Diego, CA.

Clara Castañeda