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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 SHARKS SPORTS & ENTERTAINMENT)
12 LLC,)

13 Plaintiff,)

14 vs.)

15 FEDERAL TRANSIT ADMINISTRATION;)
16 K. JANE WILLIAMS, in her official capacity)
as the Acting Administrator of the Federal)
17 Transit Administration; EDWARD)
18 CARRANZA JR., in his official capacity as)
Acting Regional Administrator of the Federal)
19 Transit Administration Region IX Office; and)
20 ELAINE L. CHAO, in her official capacity as)
Secretary, United States Department of)
21 Transportation,)

22 Defendants.)
23

Case No.:

) **COMPLAINT FOR DECLARATORY**
) **AND INJUNCTIVE RELIEF FOR**
) **VIOLATIONS OF THE NATIONAL**
) **ENVIRONMENTAL POLICY ACT AND**
) **THE ADMINISTRATIVE PROCEDURE**
) **ACT**

24 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

25 Plaintiff Sharks Sports & Entertainment LLC (“SSE” or “Plaintiff”) alleges the
26 following against Defendants Federal Transit Administration (“FTA”); K. Jane Williams, in her
27 official capacity as Acting Administrator of the FTA; Edward Carranza Jr., in his official
28 capacity as Acting Regional Administrator of FTA Region IX; and Elaine L. Chao, in her

1 official capacity as Secretary of the United States Department of Transportation (collectively,
2 “Defendants”):

3 **INTRODUCTION**

4 1. In a Record of Decision dated June 4, 2018 (“ROD”), the FTA announced its
5 decision that the environmental requirements had been satisfied for the BART Silicon Valley
6 Phase II Extension Project, which is part of the BART Silicon Valley Program. That Program
7 consists of the extension of the BART system from Fremont into Santa Clara County through
8 Milpitas, San Jose, and Santa Clara. The BART Silicon Valley Program is being implemented
9 in two phases: The Phase I Berryessa Extension Project and the Phase II Extension Project. The
10 Phase I Project to Berryessa is not yet completed and is now tentatively rescheduled to become
11 operational in 2018.

12 2. The remaining 6 miles of the BART Silicon Valley Program is called the Santa
13 Clara Valley Transportation Authority’s (“VTA”) BART Silicon Valley Phase II Extension
14 Project (“Phase II Project” or “Project”). The Phase II Project includes the extension of the
15 BART system from the Berryessa/North San Jose Station through downtown San Jose in an
16 approximately 5-mile-long tunnel, mostly under Santa Clara Street, terminating near the Santa
17 Clara Caltrain Station.

18 3. The most important planned station on the Phase II Project route is the BART
19 Diridon Station, which will interconnect several transit modes, including: BART, Caltrain, light
20 rail, the bus system, private vehicles, the Altamont Express, Amtrak (Capitol Corridor and
21 Coast Starlight), and the planned High Speed Rail (“HSR”). Diridon Station is projected to be
22 the biggest intermodal station in the West.

23 4. The SAP Center (“Arena”) is an 18,000-seat regional multipurpose event center
24 located adjacent to the planned BART Diridon Station. With over 170 events per year, the
25 Arena is one of San Jose’s most consistent and impactful economic catalysts and a critical asset
26 to the City’s economic success. The Arena’s operations support over 5,000 full time equivalent
27 jobs, generate more than \$250 million in annual economic impact, and provide millions of
28 dollars in revenue for San Jose.

1 5. As a regional event center, the Arena attracts more than 1.5 million people to San
2 Jose’s downtown area every year, drawing a diverse crowd from throughout Santa Clara, San
3 Mateo, Santa Cruz, and Alameda counties, and beyond. The region from which the Arena
4 draws is primarily suburban, and mass transit is not a viable option for the majority of the
5 Arena’s patrons. Accordingly, the Arena is reliant on a large supply of convenient parking
6 nearby, as well as highly functional and efficient ingress and egress from all modes of
7 transportation. One of the reasons the Arena was built in its present location is because of its
8 excellent access to major highways and large surface streets.

9 6. Automobiles are the primary means of transportation in the South Bay, which
10 includes the counties of Santa Clara, San Mateo, Santa Cruz, and Alameda. In fact, the 2040
11 San Jose General Plan predicts that more than 20 years from now, 60% of all trips will still be
12 by automobile. After approximately 20 years of light rail operation, the use of light rail to
13 attend Arena events remains trivial. Surveys report that travel by Caltrain for Arena events is
14 similarly insignificant. Experience shows that past predictions of mass transit use for Arena
15 events have been grossly overestimated.

16 7. The Final Supplemental Environmental Impact Statement/Subsequent
17 Environmental Impact Report and Draft Section 4(f) Evaluation, dated February 2018 (“Final
18 SEIS/SEIR”) for the Phase II Project is a joint environmental document that attempts
19 compliance with both the federal National Environmental Protection Act (“NEPA”) by virtue of
20 the Supplemental Environmental Impact Statement (“SEIS”) sections of the document, and the
21 California Environmental Quality Act (“CEQA”), by virtue of the Subsequent Environmental
22 Impact Report (“SEIR”) sections of the document.

23 8. NEPA requires federal agencies undertaking any major federal action to review
24 the environmental impacts of the proposed action and to “study, develop, and describe
25 appropriate alternatives to recommended courses of action.” 42 U.S.C. §4332(2)(C)(E).
26 NEPA’s purpose is two-fold: first, to ensure that federal agencies undertaking a major federal
27 action will take a hard look at the proposed project’s environmental impacts before deciding
28 how to proceed, and, second, to ensure that relevant information about the impacts of a

1 proposed project and its alternatives will be made available to members of the public, to provide
2 a meaningful opportunity for public comment and participation in the federal decision-making
3 process.

4 9. FTA is using this Final SEIS/SEIR to renege on prior commitments to mitigate
5 parking that have been part of the Phase II Project going back to, at least, the 2004 Draft
6 EIS/EIR for the 16-mile project, the 2009 Draft EIS, and the 2010 Final EIS. All of these
7 previous environmental documents have relied upon actual, competent studies demonstrating
8 that the BART Diridon Station was going to be a huge parking draw and that it would, absent
9 mitigation, cause significant direct and indirect adverse environmental impacts throughout the
10 downtown and Diridon areas. Not only were huge spillover parking problems anticipated, but
11 also significant safety, access, and pollution issues that would negatively impact pedestrians,
12 drivers, bicyclists, and businesses were also predicted. These prior environmental documents
13 culminated in the proposal to construct an 8-story, 1,300 space parking garage at BART Diridon
14 Station, in order to provide critical (albeit only partial) mitigation of adverse impacts caused by
15 the BART Project.

16 10. In 2016, FTA released a Draft Supplemental Environmental Impact
17 Statement/Subsequent Environmental Impact Report (“Draft SEIS/SEIR”) that, without the
18 benefit of any parking studies, eliminated all long-term parking mitigation, including the
19 promised 8-story garage, which based upon the previous parking studies was a required part of
20 the Project. After the close of the public comment period on the Draft SEIS/SEIR, FTA
21 concluded that it lacked sufficient information about the parking situation (presumably since it
22 had conducted no studies that would support its new position), and undertook a parking
23 inventory that merely counted parking spaces throughout the downtown and Diridon Station
24 areas. This minimal inventory work did not meet any traffic/parking engineering standard for
25 studying problems the Project was anticipated to cause related to parking demand, parking-
26 related traffic, safety, and pollution. Nor did the inventory provide FTA any information related
27 to the environmental impact of removing the parking garage from the Project. It also did not
28 account for multiple factors that would substantially reduce the number of parking spaces

1 actually available for public use, including: spaces that are reserved for particular users, spaces
2 that are occupied by other users, and spaces in facilities that are not available for general public
3 parking. Many of the on-street spaces cited in the survey are in permit-only residential parking
4 areas, where the general public cannot park. In short, the parking inventory undertaken is not a
5 scientific parking study and does not meet the standard for adequacy under NEPA.

6 11. In addition to its failure to account for or mitigate the long-term parking impacts
7 caused by the Phase II Project, the Project also will permanently eliminate 715 existing parking
8 spaces in the Diridon Station area, which spaces are already required and fully utilized by
9 Caltrain passengers, together with patrons and employees of the Arena, and other Diridon
10 Station area businesses. The Final SEIS/SEIR does not provide for any replacement of those
11 spaces.

12 12. The unmitigated interim adverse impacts that will arise during construction of
13 the Phase II Project are enormously significant. The agencies estimate that the construction of
14 the Phase II Project will take 8 years; however, the agencies' performance on the Phase I
15 portion of the project has been plagued by substantial delays, indicating that the Phase II Project
16 will also take much longer than estimated. Accordingly, the downtown and Diridon Station
17 areas will likely be impacted for at least a decade. Unmitigated interim/construction impacts
18 will have serious effects on downtown businesses, including the Arena.

19 13. Construction of the Phase II Project will interfere with access to the Diridon
20 Station area, including access into the Arena itself. For example, if trucks are marshaled on
21 Autumn Street, a logical location, the Arena would be blocked on two sides and its main
22 entrance blocked entirely, a fact not disclosed in the Final SEIS/SEIR. For other large FTA
23 infrastructure projects in California, such as the Los Angeles County Metropolitan
24 Transportation Authority ("Metro") light rail projects, the environmental planning documents
25 have included well-documented and enforceable mitigation plans. However, for the Phase II
26 Project, the Final SEIS/SEIR provides only inadequate, vague promises of future disclosure and
27 future planning for mitigation.

1 14. The FTA’s Final SEIS/SEIR ignores the significant data generated by Plaintiff,
2 including the parking analysis and customer travel information related to the Arena’s
3 operations. It also ignores the emphatic comments submitted by Plaintiff and the City of San
4 Jose explaining that parking at Diridon Station has not been adequately studied or mitigated.
5 Indeed, FTA has held a consistent bias against studying or mitigating both the short and long-
6 term parking impacts. Unaccountably, FTA has been unwilling to examine, disclose, or
7 mitigate the Phase II Project construction impacts with the diligence required by federal law, as
8 it has done on similar projects in Southern California.

9 15. Defendants must be prohibited from continuing the Phase II Project until the
10 environmental impacts are studied, disclosed and mitigated in a scientifically valid and neutral
11 way.

JURISDICTION AND VENUE

12
13 16. This Court has subject matter jurisdiction under 28 U.S.C. §1331 (federal
14 question), 28 U.S.C. §1361 (action to compel an officer of the United States to perform his
15 duty), and 28 U.S.C. §§2201-2202 (“creation of remedy” and “further relief” provisions
16 establishing power to issue declaratory judgments in case of actual controversy). Plaintiff has a
17 right to bring this action pursuant to, *inter alia*, the Administrative Procedure Act (“APA”), 5
18 U.S.C. §§701-706 and 23 U.S.C. §139(k)-(l). FTA’s issuance of the Record of Decision on
19 June 4, 2018 approving the FEIS constitutes final agency action.

20 17. Venue is proper in the Northern District of California under 28 U.S.C. §1391
21 because the Plaintiff’s headquarters are located in the District, officers of the Plaintiff live in the
22 District, land affected by the action is located in the District, and a substantial part of the acts or
23 omissions giving rise to this Complaint occurred in the District.

24 18. Venue is proper in the San Jose Division of the Northern District of California
25 because the land that is the subject of this action is located in Santa Clara County and because a
26 substantial part of the acts or omissions giving rise to this Complaint occurred in Santa Clara
27 County.

THE PARTIES

1
2 19. Plaintiff SSE is a Delaware limited liability company. Through its subsidiary
3 San Jose Sharks, LLC, SSE owns and operates the San Jose Sharks professional ice hockey
4 team, a member of the National Hockey League. SSE is also the parent company of San Jose
5 Arena Management, LLC, the manager of the Arena, which is located in downtown San Jose
6 adjacent to BART's planned Diridon Station under Santa Clara Street. The Project directly
7 impacts SSE, the Arena, and all of its businesses and operations. Plaintiff has standing to sue as
8 it is adversely affected and aggrieved by Defendants' unlawful approval of the Project.

9 20. Defendant FTA is the federal agency charged with approving projects for
10 funding under the New Starts Program, which is the primary federal funding mechanism for
11 locally planned, implemented, and operated transit projects, including the Phase II Project.
12 FTA is responsible for complying with NEPA in connection with any decisions involving major
13 federal actions. Together with the VTA, who prepared the EIS on which the FTA relies (*see*,
14 *e.g.*, 23 C.F.R. §771.109(c)), FTA issued the Draft SEIS/SEIR and the Final SEIS/SEIR for the
15 Project in December 2016 and February 2018, respectively. FTA independently issued the
16 ROD on June 4, 2018.

17 21. Defendant FTA is a federal government agency within the U.S. Department of
18 Transportation and is authorized to plan and implement new transit infrastructure or
19 improvements to existing infrastructure. Regional FTA Offices prepare and participate in
20 environmental impact assessments of federally funded projects and have review authority for
21 the final action decision. FTA is the lead agency for the Project with regard to NEPA and is
22 charged with the duty of ensuring compliance with NEPA, Sections 4(f) and 106, and other
23 applicable federal laws.

24 22. Defendant K. Jane Williams is sued in her official capacity as the Acting
25 Administrator of FTA, responsible for all FTA activities.

26 23. Defendant Edward Carranza Jr. is sued in his official capacity as the Acting
27 Regional Administrator of FTA's Region IX Office, the FTA official responsible for issuance of
28 the ROD.

1 24. The United States Department of Transportation is the parent department of the
2 FTA and maintains overall responsibility for compliance with NEPA.

3 25. Defendant Elaine L. Chao is sued in her official capacity as the Secretary of the
4 U.S. Department of Transportation, responsible for all Department of Transportation activities.

5 **STATUTORY AND REGULATORY BACKGROUND**

6 **National Environmental Policy Act (“NEPA”)**

7 26. NEPA requires a federal agency to prepare an EIS for any “major Federal action
8 [] significantly affecting the quality of the human environment.” 42 U.S.C. §4332(2)(C).
9 NEPA applies to state transportation projects with significant federal funding. *Rattlesnake Coal*.
10 *v. EPA*, 509 F.3d 1095, 1101 (9th Cir. 2007). The EIS must include a detailed statement
11 regarding among other things: (i) “the environmental impact of the proposed action,” (ii) “any
12 adverse environmental effects which cannot be avoided should the proposal be implemented,”
13 and (iii) “alternatives to the proposed action.” 42 U.S.C. §4332(2)(C). NEPA’s purpose is two-
14 fold: first, to ensure that federal agencies undertaking a major federal action take a “hard look”
15 at a proposed project’s environmental impacts before deciding how to proceed, and, second, to
16 ensure that relevant information about the impacts of a proposed project and its alternatives is
17 made available to members of the public, in order to provide a meaningful opportunity for their
18 comment and participation in the federal decision-making process.

19 27. The Council on Environmental Quality (“CEQ”) has promulgated regulations
20 applicable to all federal agencies undertaking a NEPA review. 40 C.F.R. Part 1500. Individual
21 agencies supplement the CEQ regulations with agency-specific regulations. NEPA regulations
22 applicable to FTA and Federal Highway Administration (“FHWA”) actions are set forth at 23
23 C.F.R. Part 771.

24 28. The CEQ regulations direct federal agencies to “[u]se the NEPA process to
25 identify and assess the reasonable alternatives to proposed actions that will avoid or minimize
26 adverse impacts of these options upon the quality of the human environment.” 40 C.F.R.
27 §1500.2(e). The regulations stress that the alternatives analysis of an EIS “is the heart of the
28

1 environmental impact statement” and therefore requires agencies to “[r]igorously explore and
2 objectively evaluate all reasonable alternatives.” 40 C.F.R. §1502.14.

3 29. Essential to an agency’s obligations under NEPA is the duty to ensure that “high
4 quality” environmental information is available to the public before decisions are made and
5 before actions are taken. 40 C.F.R. at §1500.1(b). Agencies are to “[m]ake diligent efforts to
6 involve the public in preparing and implementing their NEPA procedures.” *Id.* at §1506.6(a).
7 Further, agencies are to hold or sponsor public hearings or meetings whenever appropriate,
8 including when there is “[s]ubstantial environmental controversy concerning the proposed
9 action or substantial interest in holding the hearing.” *Id.* at §1506.6(c)(i).

10 30. The CEQ NEPA regulations provide for coordination between federal agencies
11 subject to NEPA and state and local agencies “to reduce duplication between NEPA and State
12 and local requirements.” 40 C.F.R. at §1506.2(a). In concert with at least one federal agency,
13 state and local agencies like VTA may act as joint lead agencies to prepare an EIS. *Id.* at
14 §1501.5(a)(b). However, both the CEQ and FHWA-FTA regulations require federal agencies to
15 independently evaluate and take responsibility for information considered in the environmental
16 review. *Id.* at §1506.5; 23 C.F.R. §771.109(c)(2) (state or local government entities that serve
17 as joint lead agencies with FTA “may prepare environmental review documents” if FTA
18 “furnishes guidance and independently evaluates the documents”) and (c)(5) (“A public agency
19 that has state-wide jurisdiction (for example a State highway agency or a State department of
20 transportation) or a local unit of government acting through a statewide agency . . . may prepare
21 the EIS and other environmental review documents with [FTA] furnishing guidance,
22 participating in the preparation, and independently evaluating the document.”).

23 31. The CEQ NEPA regulations emphasize that “[a]ccurate scientific analysis . . .
24 and public scrutiny are essential to implementing NEPA.” *Id.* at §1506.5. NEPA directs
25 agencies to “[e]ncourage and facilitate public involvement in decision which affect the quality
26 of the human environment.” *Id.* at §1500.2(d).

27 32. An agency preparing an environmental impact statement (“EIS”) must discuss in
28 detail the environmental impacts of the proposed action and its alternatives, including issues

1 related to “urban quality, historic and cultural resources, and the design of the built
2 environment.” *Id.* at §1502.16(g).

3 33. An EIS must identify and provide a full and fair discussion of all significant
4 environmental impacts caused by the proposed action/project. 42 U.S.C.A §4332; 40 CFR
5 §1502.1. EISs shall not serve as a means of justifying decisions already made. 40 CFR
6 §1502.2(g). The EIS shall describe the environment of the area. 40 CFR §1502.15. The EIS
7 shall also describe all direct and indirect effects and their significance. 40 CFR §1502.16. Such
8 analysis must include the urban environment. 40 CFR §1502.16(g).

9 34. An EIS shall identify the means to mitigate adverse environmental impacts. 40
10 CFR §1502.16(h). Agencies must insure professional and scientific integrity in the discussions
11 and analysis in an EIS. They shall identify any methodologies used and make explicit reference
12 by footnote to the scientific and other sources relied upon for conclusions in the statement. 40
13 CFR §1502.24.

14 35. The agency must take a “hard look” at identifying and evaluating potential
15 adverse environmental impacts. *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d
16 1372, 1376 (9th Cir. 1998). An action will be set aside as arbitrary or capricious if the agency
17 can identify no “rational connection between the facts found and the choice made;” that is, if the
18 “explanation for its decision [ran] counter to the evidence before the agency or is so implausible
19 that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor*
20 *Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

21 36. NEPA requires that an EIS study and discuss environmental impacts, including
22 specifically the impact of traffic and parking. NEPA covers the human environment, including
23 quality of urban life. 40 CFR §1502.16(g). “[O]mission of a reasonably complete discussion of
24 possible mitigation measures would undermine the ‘action forcing’ function of NEPA. Without
25 such a discussion, neither the agency nor other interested groups and individuals can properly
26 evaluate the severity of the adverse effects.” *Robertson v. Methow Valley Citizens Council*, 490
27
28

1 U.S. 332, 352, 371 (1989). Under FTA guidance, adequate parking is an environmental impact
2 and can be a mitigation measure.¹

3 37. An EIS is inadequate if it does not adequately discuss the mitigation measures it
4 cites or fails to include mitigation measures that should have been discussed. Mitigation
5 measures must meet the NEPA scientific integrity standard of 40 CFR §1502.24 and be
6 presented in sufficient detail to ensure that environmental consequences have been fairly
7 evaluated. *See S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 588
8 F.3d 718, 727 (9th Cir. 2009). A perfunctory description of mitigating measures is inconsistent
9 with the “hard look” that NEPA requires of an EIS. “Mitigation must ‘be discussed in sufficient
10 detail to ensure that environmental consequences have been fairly evaluated.’” *Carmel-By-the-*
11 *Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir.1997). There should be an estimate
12 of how effective the mitigation measures would be if adopted, or a reasoned explanation as to
13 why such an estimate is not possible. Mitigation cannot be so general that it would be
14 impossible to determine where, how, and when they would be used and how effective they
15 would be. *Neighbors of Cuddy Mountain*, 137 F.3d at 1381. There need to be clear
16 commitments and measurable performance expectations. CEQ Memo dated January 4, 2011,
17 “*Appropriate Use of Mitigation Monitoring and Clarifying the Appropriate use of Mitigated*
18 *Findings of No Significant Impact*,” p.8.

19 38. The FTA-FHWA joint regulations supplementing the CEQ regulations provide
20 that the agencies should evaluate alternatives and make decisions “in the best overall public
21 interest based upon a balanced consideration of the need for safe and efficient transportation; of
22 the social, economic, and environmental impacts of the proposed transportation improvement;
23 and of national, state, and local environmental protection goals.” 23 C.F.R. §771.105(b).

24 39. The CEQ regulations require that agencies “make every effort to disclose and
25 discuss at appropriate points in the draft environmental impact statement all major points of
26 view on the environmental impacts of the alternatives including the proposed action.” 40
27 C.F.R. §1502.9(a). Agencies are required to discuss at appropriate points in the final

28 _____
¹ <https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/transportation-impacts-0>.

1 environmental impact statement any responsible opposing view not adequately discussed in the
2 draft statement and indicate the agency's response to the issues raised. *Id.* at §1502.9(b).

3 40. Under the CEQ NEPA regulations, “[w]hen an agency is evaluating reasonably
4 foreseeable significant adverse effects on the human environment in an environmental impact
5 statement and there is incomplete or unavailable information, the agency shall always make
6 clear that such information is lacking.” 40 C.F.R. §1502.22. Further, if the incomplete
7 information “is essential to a reasoned choice among alternatives” and the costs to obtain
8 complete information are “not exorbitant,” the agency *must* include complete information in the
9 EIS. *Id.* at §1502.22(a).

10 **Transportation Infrastructure Finance and Innovation Act (“TIFIA”)**

11 41. The Transportation Infrastructure Finance and Innovation Act (“TIFIA”), Pub. L.
12 105-178, 112 Stat. 107, 241 (1998), codified at 23 U.S.C. §§601-609, provides a mechanism for
13 federal funding of nationally or regionally significant surface transportation projects such as the
14 Phase II Project. TIFIA requires that, in determining eligibility of applicant projects, DOT
15 consider “[t]he extent to which the project helps maintain or protect the environment.” 23
16 U.S.C. §602(b)(vii), 49 C.F.R. §80.15(a)(7) (as one of eight relevant criteria, environmental
17 impacts are to be weighed as one-eighth of the evaluation and selection process). Funds granted
18 under the TIFIA program must comply with NEPA. 23 U.S.C. §602(c); 49 C.F.R. §80.9(c).
19 DOT is prohibited from obligating funds for a project that has not received an environmental
20 Categorical Exclusion, a Finding of No Significant Impact, or a Record of Decision as a result
21 of the NEPA process. 49 C.F.R. §80.9(f). Plaintiff asks this Court to provide the relief
22 requested herein to ensure that DOT does not rely on the incomplete Phase II Final SEIS/SEIR
23 to extend TIFIA funds to this project.

24 **Administrative Procedure Act (“APA”)**

25 42. The Administrative Procedure Act, 5 U.S.C §§701-706, provides for judicial
26 review of federal agency determinations such as those at issue here. The APA requires a
27 reviewing court to hold unlawful and set aside any agency action found to be arbitrary
28

1 capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C
2 §760(2)(A).

3 **Declaratory Judgment Act**

4 43. The Declaratory Judgment Act, 28 U.S.C. §§2201-02, authorizes “any court of
5 the United States” to “declare the rights and other legal relations of any interested party seeking
6 such declaration.”

7 **HISTORY OF THE PUBLIC PROCESS**

8 44. On January 30, 2015, VTA issued a Notice of Preparation (“NOP”) to initiate
9 preparation of a Subsequent EIR for the Phase II Project. Plaintiff is informed and believes and,
10 on that basis, alleges that the NEPA Supplemental Environmental Impact Statement preparation
11 process also began at that time. The NOP diverged from prior environmental planning
12 documents dating back to at least 2004, by eliminating the BART Diridon Station 8-story
13 parking garage mitigation in its project description. No justification for the elimination of the
14 mitigation was disclosed in the NOP, and no study, official change in policy, or change in the
15 physical conditions of the property had occurred between 2011 and 2015 to justify its
16 elimination.

17 45. In December 2016, FTA released the Draft SEIS/SEIR. A formal public
18 comment period followed, during which Plaintiff submitted a comment letter raising concerns
19 about numerous issues and impacts, including the lack of any study justifying the elimination of
20 long-term parking mitigation, the inadequate interim parking disclosure and mitigation, the lack
21 of adequate disclosure and mitigation for construction impacts, and the failure to include a
22 legally sufficient Mitigation Monitoring and Reporting Program (“MMRP”).

23 46. Similarly, the City of San Jose submitted a letter during the comment period that
24 raised concerns about numerous issues and impacts, including the elimination of long-term
25 parking mitigation, the inadequate interim parking mitigation, the lack of study of indirect
26 impacts caused by the failure to provide adequate interim and long-term parking, the lack of
27 adequate mitigation for construction impacts, and the failure to include a legally
28 sufficient MMRP.

1 47. In February 2018, FTA released the Final SEIS/SEIR, which did not contain a
2 legally sufficient MMRP. On April 2, 2018, SSE submitted a second comment letter, which
3 attached samples of legally sufficient MMRPs prepared for FTA rail extension subway projects
4 located in Los Angeles. Those legally sufficient MMRPs, which were included as part of the
5 final environmental review documents for those projects, demonstrate that FTA can and should
6 have prepared effective, enforceable, and measurable mitigation plans along with the Final
7 SEIS/SEIR, so that decision-makers and the public could have evaluated them meaningfully.
8 By contrast, FTA is violating standard practice by proposing only vague, unenforceable
9 mitigation measures for the Phase II Project and deferring disclosure of such proposed measures
10 until the time for meaningful review by the public and the courts has expired.

11 48. The Phase II project has been beset by long-running disputes that prevented the
12 drafting of a NEPA-compliant document. The most prominent deferred decision was on
13 whether to open up the length of Santa Clara Street for a massive cut-and-cover, so that two
14 separate tubes could be emplaced for BART trains, or to use tunneling techniques. Between the
15 Draft and Final SEIS/SEIRs, studies were undertaken to try and resolve this dispute. During
16 that time, several VTA Board members were sent to Barcelona, Spain to observe its subway
17 system. The failure to resolve these disputes prior to completion of the final SEIS/SEIR and in
18 a timely fashion meant that no one knew what the Project entailed during the environmental
19 review process.

20 49. The difference in construction impacts between cut-and-cover and tunneling is
21 enormous. At the time of the drafting of the Final SEIS/SEIR, some station locations and
22 alignments remained undecided, including the BART Diridon Station. In addition, none of the
23 ventilation structure locations had been determined. Thus, the adequacy of proposed mitigation
24 required under NEPA could not be evaluated because the impacts to be mitigated were
25 unknown. In fact, the decision to tunnel was not taken until after BART's General Manager
26 issued a letter on March 28, 2018 supporting the tunneling option—long after the Final
27 SEIS/SEIR had been finalized and published.
28

1 accommodate BART park-and-ride demand with 1,200 parking spaces. Areas for automobiles,
2 shuttles, and buses to drop off passengers would be provided on North 28th Street and/or within
3 the station campus.

4 54. A TOJD would be located within the Alum Rock Station campus and consist of a
5 maximum of 500,000 square feet of office space with approximately 1,650 parking spaces,
6 20,000 square feet of retail with 100 parking spaces, and up to 275 dwelling units with
7 approximately 400 parking spaces. The TOJD would range from 4 to 9 stories within the
8 station area. Design of the TOJD is supposed to be coordinated with shared parking with
9 BART in that area.

10 55. From Alum Rock/28th Street Station, the Phase II Project tunnel curves under
11 North 28th Street before aligning under Santa Clara Street. A TOJD is proposed at an
12 undisclosed ventilation structure location at the northwest corner of Santa Clara and 13th Streets
13 and would consist of 13,000 square feet of retail.

14 56. The Downtown San Jose Station would be located beneath Santa Clara Street
15 between Market and 3rd Streets. No parking would be provided at the Downtown Station. A
16 TOJD is proposed at this station. The line remains beneath Santa Clara Street and continues
17 west 45 feet below the riverbed of the Guadalupe River and 40 feet below the creek bed of Los
18 Gatos Creek.

19 57. Diridon Station would be located between Autumn Street to the east, White
20 Street to the west, Santa Clara Street to the north, and West San Fernando Street to the south.
21 The underground station platforms would be located directly under Santa Clara Street and
22 adjacent to the Arena. *No BART parking would be provided at Diridon Station. In addition,*
23 *715 existing and fully utilized spaces would be permanently eliminated.* The existing VTA bus
24 transit center would be reconfigured to accommodate projected bus and shuttle transfers to and
25 from the BART station.

26 58. Another TOJD would be located adjacent to Diridon Station and would consist
27 of a maximum of 640,000 square feet of office space and 72,000 square feet of retail. The
28 TOJD would be approximately eight levels high and have only three levels of underground

1 parking, with approximately 400 parking spaces to service the TOJD. The planned 400 parking
2 spaces are only 25% of the total 1,600 spaces required by City Code for a development of this
3 size.

4 59. The line continues west from Diridon Station under Santa Clara Street/The
5 Alameda and turns north under Cleaves Avenue to West Julian Street before aligning under
6 Stockton Avenue. The line continues north under the Caltrain tracks and Hedding Street. It
7 continues on the east side of the Caltrain tracks and crosses under Interstate 880 before exiting
8 at the West Tunnel Portal near Newhall Street.

9 60. A TOJD would be located on the east side of Stockton Avenue, south of Taylor
10 Street, at another ventilation structure. The development would consist of a maximum of
11 15,000 square feet of ground level retail along the street frontage facing Stockton Avenue.

12 61. The BART Extension in Santa Clara includes the Newhall Maintenance Facility,
13 which is approximately 40 acres. A parking structure of up to five levels would be located
14 north of Brokaw Road and east of the Caltrain tracks to serve the Santa Clara Station within the
15 approximately 10-acre station campus area. The structure would accommodate 500 BART
16 park-and-ride parking spaces in addition to public facilities on the site.

17 62. Systems facilities throughout the route would be located above- and underground
18 and include Traction Power Substations and Sectionalizing Stations, auxiliary power
19 substations, ventilation facilities, and Train Control and Communication Equipment. The
20 stations and line would also include emergency exhaust ventilation facilities with ventilation
21 shafts and fresh air intake/exhaust hatches. Large new High-Voltage Substations and Switching
22 Stations will be required.

23 **Failure to Present a Neutral and Unbiased Environmental Document That Complies with**
24 **the NEPA Scientific Integrity Standard**

25 63. NEPA requires that an EIS provide a reasonable good-faith disclosure of
26 environmental impacts. Information should be presented allowing decision-makers and the
27 public to understand the environmental consequences of the project. Courts addressing agency
28 bias and predetermination must inquire whether the agency engaged in its NEPA analysis with

1 good-faith objectivity. Additionally, federal courts may look outside the environmental analysis
2 prepared by the agency to detect predetermination. *See, e.g., Nat'l Audubon Soc'y v. Dept. of*
3 *Navy*, 422 F.3d 174, 198-200 (4th Cir. 2005). Here, the FTA chose the result it desired and
4 removed the Diridon Station's long-term parking mitigation from the Phase II Project without
5 any study or evidence supporting that decision. FTA then refused to undertake any studies to
6 fairly evaluate the consequences of this decision.

7 64. The previous environmental reports prepared for the project did not shy away
8 from looking at the parking issue in a neutral and scientifically valid manner. The 2004 Final
9 EIR, which was certified by the VTA Board in December 2004, projected that the BART
10 parking demand in 2025 at the Diridon Station would be 2,262 vehicles. This Final EIR further
11 stated that all these spaces would need to be provided in structured parking.

12 65. The Draft SEIR published in January 2007 projected that 40% of the BART
13 riders at the Diridon Station would be park-and-ride. This document further stated that 1,313
14 parking spaces would be required at the Diridon Station in 2030 to accommodate this park-and-
15 ride demand. Despite this parking demand and need for 1,313 spaces, VTA staff recommended
16 in the 2007 Final SEIR that no parking should be provided at the Diridon Station. The Policy
17 Advisory Board ("PAB") overrode VTA staff, who at the time recommended eliminating
18 parking, despite the evidence of a significant parking impact that required mitigation. The
19 PAB, which is made up of two Board Members and other elected officials from jurisdictions
20 within a particular corridor, is meant to ensure that the local jurisdictions most affected by
21 major transportation improvement projects are involved in guiding the planning, design, and
22 construction of these projects. Thus, in 2007, the existence of properly studied and disclosed
23 parking impacts allowed the environmental document to serve its purpose and the
24 decisionmakers to do their jobs.

25 66. The 2010 Final EIS also studied the parking issues and recommended a parking
26 garage of 1,300 spaces to partially mitigate the disclosed parking spillover impact caused by the
27 BART Diridon Station. (Final 2010 EIS 3-31) However, VTA conceded in the 2010 Final EIS
28 that even that structure would not fully mitigate the parking demand caused by the BART

1 Diridon station and therefore recommended a large financial contribution, leasing parking,
2 monitoring the parking mitigation, developing a parking plan and providing parking on nearby
3 VTA property. (Final EIS Mitigation Measure TR-1 p ES-15)

4 67. The scientifically defensible study used in the 2010 Final EIS found that 44% of
5 users of the BART Diridon Station would be Park and Ride Users, and that parking demand
6 would be 1,610 spaces on the opening day of the BART Diridon Station. The worst-case
7 analysis was a need for 2,585 spaces in 2030, and the best-case analysis was that 1,300 spaces
8 would be necessary in 2030. The 2010 Final EIS further included a parking inventory and
9 occupancy survey of nine publicly owned parking facilities within ½ mile walking distance of
10 the Diridon Station that found a total of 3,258 spaces, of which only 687 spaces were vacant
11 (and thus potentially available for BART users).

12 68. By contrast, the 2018 Final SEIS/SEIR included a misleading and inaccurate
13 parking survey that failed to account for occupancy of spaces and restrictions on general public
14 parking. The VTA's recommendation in the Final SEIS/SEIR to not provide any parking at the
15 Diridon Station is thus based on an incomplete parking survey that did not reveal the actual
16 number of parking spaces available.

17 69. The 2007 and 2010 environmental documents did their jobs as disclosure
18 documents—they gave decisionmakers and the public the information needed to understand the
19 environmental consequences of the Project. The VTA staff were only able to eliminate parking
20 in the current project by choosing not to study or disclose the parking and environmental impact
21 issues at all in the Final SEIS/SEIR.

22 70. The Final SEIS/SEIR further lacks scientific integrity under NEPA because FTA
23 improperly manipulated the travel demand model by treating the Diridon Station as an urban
24 station in complete disregard of its actual physical location and setting. The manipulated travel
25 demand model was used to argue the incredible assertion that no one would drive to Diridon
26 Station to try and ride BART. The Diridon Station is surrounded by parking lots and has an
27 over 80-year history as an origination station for commuters going north and east by commuter
28 trains, Caltrain, and Amtrak. Comparing the results of no-BART parking at the Diridon Station

1 to results presented in the 2010 BART Final EIS confirms the misuse of the travel demand
2 model. Table 3-23 in that document states that BART parking demand at the Diridon Station
3 will be 1,610 vehicles in the opening year and 2,585 vehicles in 2030. This manipulation of the
4 model, by specifically inputting “no parking” at the Diridon Station as an input parameter,
5 prevented the true parking demand from being disclosed and analyzed.

6 71. The Final SEIS/SEIR states, without any evidentiary support, that the BART
7 Diridon Station is projected to be, not an origin station but a destination station in the a.m.
8 commute direction, as patrons travel to nearby “activity centers.” The argument that Diridon
9 Station is a destination station is used to bolster the conclusion that no one will drive to Diridon
10 Station to use BART. According to the Final SEIS/SEIR, the parking demand at this station
11 will be less than at stations that primarily function as origins in the a.m. commute direction.
12 (Response to SSE Comment P84-18 of the Final SEIS/EIR.) Since the preparation of the 2005
13 Downtown Strategy and FEIR, the City of San Jose has prepared two EIR addendums revising
14 the phasing of downtown development, to account for the fact that the demand for residential
15 development has outpaced demand for office space (jobs). As a result, downtown San Jose is,
16 like the rest of the City, jobs poor. This is why the Envision San Jose 2040 General Plan
17 emphasizes correcting the City’s jobs-to-housing imbalance, including in the Downtown
18 Growth Area. Being jobs poor means that the BART Diridon Station will be an originator, not
19 a destination station. The Final SEIS/EIR not only has no evidence for the assertion that the
20 BART Diridon Station will be a destination, the evidence is entirely to the contrary. The Final
21 SEIS/SEIR’s reversal of such well-known commuter flow information is evidence of
22 manipulation intended to achieve a preordained result.

23 72. The City of San Jose is a city of a million residents, the largest in the San
24 Francisco Bay Area. Diridon Station is located in its downtown and will one day be the largest
25 intermodal transit station in the western United States, with automobiles, light rail, bus transit,
26 the Caltrain commuter line, passenger rail service (Capitol Corridor, ACE), Amtrak Coast
27 Starlight, California High Speed Rail, and BART all converging at the same location. These
28 facts all encourage the provision of parking, not discourage it, particularly since private

1 automobiles are the largest single transit mode using the station. Caltrain supplies parking at
2 Diridon Station, but it is often full. Further, Caltrain determined that parking at Diridon Station
3 was necessary, even though Santa Clara, which is “one stop away” has parking. The objective
4 evidence based on the Caltrain data is that BART Diridon Station is an originator and the
5 functional equivalent of an end-of-the-line station. Absent agency staff’s desire to reach a
6 predestined result, there is no explanation for how any competent disclosure document could
7 draw the opposite conclusion.

8 73. Traffic volume data collected by the California Department of Transportation
9 (Caltrans) shows that the total traffic volume along I-680 and I-880 north of San Jose during the
10 a.m. and p.m. peak periods is practically the same in the northbound and southbound directions.
11 Thus, contrary to unsupported assertions presented in the Final SEIS/SEIR, current traffic
12 volumes on I-680 and I-880 north of San Jose confirm that the Diridon Station will serve as an
13 origin for persons traveling *to* the north, as well as a destination for trips *from* the north. Not
14 applying available reliable information, such as Caltrans data, and instead making selective
15 assumptions regarding the BART Diridon Station’s function, lacks scientific integrity and is
16 evidence of agency bias.

17 74. The FTA’s conclusion that the Diridon Station will function as a destination
18 station is not supported by the information presented in Table 3-18 of the Final SEIS/SEIR.
19 This is the only data the Final SEIS/SEIR presents in the record to support its assertion.
20 However, the table simply presents comparative travel times for selected origin-destination
21 pairs. Though several pairs represent trips to downtown San Jose, the table does not present any
22 pairs with downtown San Jose as the origin and a destination of Milpitas, Union City, Fremont,
23 Pleasanton, etc. This cherry-picking of data does not present an accurate picture of the function
24 of the BART Diridon Station and indicates a determined attempt by FTA, in the Final
25 SEIS/SEIR, to put its thumb on the scale of the analysis.

26 75. Contrary to the statement in the Final SEIS/SEIR that driving to Diridon Station
27 is not convenient, the locations of the on- and off-ramps to all major highways near Diridon
28 Station demonstrate that such access *is* convenient and that the station will serve as an

1 origination station for riders west and south of downtown San Jose. The decision to locate the
2 Arena in that location, and its continued success there, are predicated on this convenient
3 automobile access.

4 76. The Diridon Station Area Plan (“DSAP”) Final EIR² includes a discussion of
5 parking and traffic associated with the BART and HSR projects in the Cumulative Conditions
6 section. The DSAP EIR relied on the trips generated and parking spaces included in the BART
7 project and on the traffic study completed for the BART FEIS (2010). This information was
8 vital to the determination of cumulative impacts in the DSAP EIR. Indeed, the DSAP project is
9 an extremely important project to the City of San Jose, as major developers are purchasing
10 properties and beginning the entitlement process that would allow millions of square feet of
11 development. The approved DSAP included in its impacts analysis the previously promised
12 parking for the BART project, and the DSAP EIR concluded that parking would be required at
13 the Diridon Station to accommodate BART users. To not include the previously promised and
14 relied upon parking puts the DSAP projects in jeopardy. The claim that the decision not to
15 provide any park-and-ride parking is consistent with other land use plans affecting the Diridon
16 Station area, such as the DSAP, is simply untrue, lacks any support in the record, and is
17 calculated to lead to a particular (and wrong) conclusion.

18 77. At 3-79, the Final SEIS/SEIR concedes that “if” BART riders access the BART
19 Diridon Station for park-and-ride, they could also use “several downtown parking garages.”
20 However, there is no parking study demonstrating that any of these spaces are “excess.”
21 Certainly, on evenings and weekends those spaces are often filled by Arena patrons. During the
22 day, meanwhile, these garages are filled close to capacity, leaving few spaces that are actually
23 available for BART customers. The extent to which early morning BART commuters take
24 parking currently used by downtown businesses and residents is exactly the impact the FTA
25 requires VTA to analyze and mitigate.³ This parking-pressure scenario, which is completely
26 unevaluated and unmitigated in the Final SEIS/SEIR, could result in the downtown parking

27 _____
28 ² <https://www.sanjoseca.gov/DocumentCenter/View/34120>, p.155.

³ <https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/transportation-impacts-0>.

1 facilities being overrun with BART parkers. The failure to study or disclose this impact is
2 consistent with other existing BART stations being woefully under-parked, and this pattern of
3 not addressing the well-known problem of inadequate parking at BART stations is another line
4 of evidence demonstrating agency bias.

5 78. Another example of agency analysis ignoring obvious facts is that VTA and
6 BART have determined that the Alum Rock/28th Street Station warrants the construction of
7 1,200 parking spaces. Yet, this station does not meet the criteria of an end-of-the-line station to
8 the extent that Diridon Station does. As any resident of the South Bay knows, the Alum Rock
9 Station will be far less convenient than Diridon Station, which is located in a more central
10 location near downtown. Even the underlying information buried in the Final SEIS/SEIR is
11 consistent with that self-evident fact. Yet the conclusion is to the contrary in the Final
12 SEIS/SEIR.

13 79. Providing parking at the BART Santa Clara Station will not alleviate the parking
14 pressure caused by the BART Diridon Station, contrary to VTA's argument (without supporting
15 evidence) in the Final SEIS/SEIR. The only direction to travel on BART from Diridon will be
16 to the north, either to an area of the City of Santa Clara without housing or jobs or to the East
17 Bay. Driving from San Jose to take BART in Santa Clara, where a 500-space parking lot is
18 proposed (and opposed by Apple, which leases a building that will be removed to construct the
19 Santa Clara Station parking structure), makes no sense since vehicular and transit options in that
20 area are disconnected. The proposed Santa Clara Station and parking lot area is inaccessible on
21 two sides (airport to the east and major rail line to the west). To assume that Arena patrons in
22 San Jose and southern Santa Clara County will drive to Santa Clara to take BART to Diridon to
23 attend an event is nonsensical.

24 80. The obviously inaccurate statements in the Final SEIS/SEIR regarding
25 information well known to any resident of the South Bay is beyond mere error. These
26 inaccuracies are asserted without any evidence in the record or are based on cherry-picked data.
27 This is not good faith, it is not scientific integrity, and it does not provide decision makers and
28 the public the neutral disclosure document to which they are entitled by law.

1 **Refusal to Analyze Removal of Existing Parking under NEPA**

2 81. The BART Diridon Station is permanently removing existing parking (715
3 spaces) that is extensively used by Caltrain passengers, Arena patrons, and other existing
4 Diridon Station users. Under NEPA and FTA guidelines this impact should be disclosed,
5 analyzed, and mitigated. “Environmental documentation for transit projects should identify
6 anticipated parking impacts and provide ways to avoid, minimize, and mitigate any adverse
7 effects on nearby residential or business communities.” FTA, Environmental Programs
8 Guidance.⁴

9 **Inconsistency with Land Use Plans**

10 82. NEPA requires federal agencies to discuss the effects of their actions on the
11 “quality of life for city residents,” and this requirement includes the effects of federal actions on
12 land use patterns and policies. Council on Environmental Quality regulations require federal
13 agencies to discuss in their impact statements possible conflicts between the proposed action
14 and the objectives of federal, regional, state, and local . . . land use plans, policies and controls
15 for the area concerned. 40 C.F.R. §1502.16(c)

16 83. The City and San Jose Arena Management, LLC, are parties to an Arena
17 Management Agreement (“AMA”), which includes a Transportation and Parking Management
18 Plan (“TPMP”) over 100 pages in length. The AMA requires the City to maintain certain levels
19 of available parking within close proximity to the Arena, and to manage traffic operations in
20 order to ensure convenient and efficient ingress and egress to and from the Arena.⁵ Typically,
21 environmental documents relating to projects in the vicinity of the Arena have considered these
22 obligations as part of their analyses. In other words, public agencies have treated the City’s
23 obligations under the AMA as tantamount to a land use plan and have considered whether the
24 projects in question would be consistent with that plan.

25 84. The City’s obligations related to parking and traffic are expressly incorporated
26 into the June 2014 final plan report for the Diridon Station Area Plan (“DSAP”). Other land use

27 ⁴ <https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/transportation-impacts-0>

28 ⁵ These obligations were clarified and reaffirmed under a Term Sheet effective May 19, 2015.

1 plans have requirements that the Final SEIS/SEIR also ignores, including: the 2004 Final EIR
2 for the San Jose Water Land Company Planned Development Rezoning, the 2005 Downtown
3 Strategy 2000 Final Program EIR, the 2011 Envision San Jose 2040 General Plan Final
4 Program EIR, the 2015 Envision San Jose 2040 General Plan Supplemental EIR, the 2014
5 Diridon Station Area Plan EIR, the 2015 Final EIR for Caltrain’s Peninsula Corridor
6 Electrification Project, and a host of others. The primary project objectives listed on pages 1-5
7 of the DSAP include “ensur[ing] the continued vitality of the San Jose Arena, recognizing that
8 the San Jose Arena is a major anchor for both Downtown San Jose and the Diridon Station area,
9 and that sufficient parking and efficient access for San Jose Arena Customers, consistent with
10 the provisions of the Arena Management Agreement, are critical for the San Jose Arena’s on-
11 going success.” The DSAP includes numerous provisions in support of this objective, including
12 the following:

13 Since its opening some two decades ago as the home of
14 the San Jose Sharks, the San Jose Arena has consistently
15 ranked among the 10 busiest indoor facilities for non-
16 sporting entertainment events. Preserving the
17 extraordinary success of Downtown’s ‘anchor tenant’
18 appears paramount and is reflected in the Land Use Plan.
19 Although densities will increase, and parking ratios will
20 drop over time, it is imperative that Diridon’s
21 development occurs in a coordinated fashion with its
22 transportation infrastructure to ensure adequate parking
23 supply for the San Jose Arena and avoid traffic problems
24 in each phase of development. (Page 2-3.)

25 The San Jose Arena Management Agreement commits the
26 City to pursue best efforts to achieve and maintain at least
27 6,350 parking spaces at Off-Site Parking Facilities
28 available for Arena patrons within one-half mile of the
 West Santa Clara Street entrance to the Arena, of which
 approximately half of such spaces will be within one-third
 mile of the West Santa Clara Street entrance. In addition,
 the City will manage and facilitate convenient vehicular
 access to and from parking facilities located in the Diridon
 Station area. Future TPMPs need to be in compliance
 with this agreement in order to meet the City’s obligations
 and ensure the continued success of the Arena as an
 anchor of the Diridon area and as a regional draw. (Page
 2-133.)

1 85. The City made a similar point in its March 6, 2017 Comment Letter at pages 6,
2 7, 10, and 11. The Final SEIS/SEIR for the Phase II Project completely ignores these important
3 land use plans. The AMA and DSAP are baseline conditions of the Diridon Station area that
4 were identified in the SSE February 27, 2015 Scoping Letter, yet the Final SEIS/SEIR fails to
5 identify or evaluate the adverse impacts the Phase II Project will have as a result of its
6 inconsistencies with the Land Use Plans in the Diridon Station area. Instead, the Final
7 SEIS/SEIR claims falsely that it is consistent with the Plans, despite being informed otherwise
8 by the City and SSE in their comment letters. (Final SEIS/SEIR Master Response 3.) In fact,
9 the Final SEIS/SEIR is not even consistent with previous EIRs and EISs prepared by FTA and
10 VTA for the extension of BART to San Jose.

11 86. A transportation and parking evaluation is something the City of San Jose would
12 require in the environmental study for any other large project in the Diridon Station area. The
13 City has on multiple occasions recognized the need to consider and mitigate adverse impacts on
14 the Arena caused by a major project in the Diridon Station area, particularly impacts related to
15 parking and transportation. This expressly includes transit projects. In a memo dated June 6,
16 2014, City staff recommended the following approach, which was accepted by the City Council
17 upon approval of the Diridon Station Area Plan:

18 For the BART and High Speed Rail transit projects, the
19 City will request that the lead agency conduct a project
20 parking analysis. The analysis should include a projection
21 of parking demand, demand management strategies,
22 recommended supply solutions, and potential impacts on
23 the existing parking supply within the Diridon area,
24 including suggested ways to mitigate the impact if it is
25 deemed significant. The results of any parking analysis
26 will be provided to Arena Management for review and
27 comment. The City will consider Arena Management's
28 timely feedback in formulating comments that the City
forwards to the lead agency as part of the project
development and approval process.

1 87. VTA's Master Response 3 includes the following inaccurate and misleading
2 statement: "Additionally, the decision to not provide park-and-ride facilities for the BART
3 Extension at Diridon Station is also consistent with the Envision San Jose 2040 General Plan,

1 Commercial Downtown Land Use Plan Policies, and Transportation Policies (adopted
2 November 2011).” The response goes on to list several City of San Jose land use policies, none
3 of which say that parking for BART should be excluded from the Diridon Station area.

4 88. In fact, parking for BART at the Diridon Station has been included in every
5 previous environmental and planning document prepared for its extension to San Jose. It was
6 also included in the DSAP FEIR prepared by the City of San Jose, which is consistent with the
7 City’s General Plan. To say that San Jose policies somehow encourage the decision to exclude
8 BART parking from the Diridon Station area is untrue, particularly in light of the fact that San
9 Jose has a contractual obligation to provide parking in the area, as the City pointed out in its
10 comment letter. The insistence on mischaracterizing the applicable land use plans evidences
11 improper agency bias and the intention to avoid an objective evaluation of this issue.

12 89. FTA has given only lip service to compliance with land use plans. The Final
13 SEIS/SEIR makes misleading assertions of compliance with selected phrases within carefully
14 chosen land use plans. Ignored is the fact that FTA is breaching its commitments made in
15 multiple certified environmental documents that others have rightfully relied upon. Also
16 ignored is the fact that it is others, particularly Plaintiff, who will bear the burden of this failure
17 to comply with the existing land use plans.

18 **Inadequate Analysis of Indirect Impacts From Lack of Parking**

19 90. NEPA requires an analysis of indirect impacts due to a lack of parking both
20 during construction and in the long-term. Air quality emissions are generated due to the
21 additional driving required to find parking, while other indirect impacts include those related to
22 pedestrian and bicycle safety.

23 91. The lack of adequate parking both during construction and in the long-term will
24 result in many situations where the safety of bicycle and pedestrian facilities will be
25 compromised. When parking is unavailable, the occurrence of predictable illegal on-street
26 parking, in loading zones and restricted parking areas or across driveways and sidewalks, will
27 affect the ability of pedestrians and bicyclists to have an adequate line of sight, and the quality
28 of pedestrian and bicycle paths of travel will necessarily be compromised and could result in

1 injury or death. This concern is especially acute for children and people using wheelchairs.
2 Safety is a standard issue to be evaluated under NEPA, yet it has not been evaluated.

3 **Refusal to Provide Effective, Measurable and Enforceable Construction Mitigation**

4 **Measures**

5 92. The Final SEIS/SEIR states that temporary traffic disruptions will be mitigated
6 by the development and implementation of a Construction Transportation Management Plan
7 (“CTMP”); however, the Final SEIS/SEIR does not identify any specific details about this
8 future CTMP, or even suggest metrics of its effectiveness. Given the long duration and heavy
9 amount of construction work along major arterials and adjacent to existing businesses and
10 residences in downtown San Jose, this is improper “deferred mitigation” under NEPA.

11 93. An example of the lack of disclosure is that it is not until Attachment B to the
12 ROD was published, long after the Final SEIS/SEIR, that it is disclosed in passing on page 7 in
13 the second full paragraph, that Santa Clara street will suffer from closures during construction.
14 This alarming information should have been fully disclosed in the Draft and Final SEIS/SEIRs
15 and effective, binding and measurable mitigation plans should have been provided.

16 94. NEPA requires that federal agencies take steps to ensure that mitigation
17 commitments are actually implemented. They should clearly identify commitments to
18 mitigation measures designed to achieve environmentally preferable outcomes in their decision
19 documents. They should specify mitigation commitments in terms of measurable performance
20 standards or clear results, thus establishing clear performance expectations. In addition,
21 agencies should establish a timeframe for the agency action and mitigation measures so that the
22 start date and duration of the mitigation commitment are clear.

23 95. Biased analysis is evident in the failure to adequately disclose and mitigate
24 construction impacts. VTA has a long history of failing to fully consider or disclose the
25 disruptive and damaging impacts of its construction projects on the San Jose community.
26 VTA’s failed to undertake an unbiased and good-faith analysis of foreseeable construction
27 impacts in accordance with NEPA on behalf of the FTA, and to provide adequate mitigation,
28 resulted in major economic damage to San Jose’s downtown businesses during the construction

1 of the downtown transit mall. Similarly, VTA failed during construction of its Bus Rapid
2 Transit (“BRT”) to conduct unbiased and good-faith analyses of the Project’s impacts, and the
3 businesses on Alum Rock Avenue suffered as a result. The FTA as the joint lead agency with
4 VTA has a duty to independently evaluate the construction impacts and take responsibility for
5 any biases in the Final SEIS/SEIR that diminish its effectiveness as a disclosure document
6 under NEPA.

7 96. Here, the construction impact mitigation measures lack specificity and fail to
8 commit FTA to a specific course of action that will reduce significant impacts. Without
9 adequate detail of the construction impacts, it is impossible to determine if the mitigation
10 measures are adequate. Without a description of the mitigation measures, in turn, it is
11 impossible to determine what other environmental impacts the mitigation measures
12 might trigger.

13 97. The Phase II Project will cause street, rail, and transit service closures and
14 necessitate the use of alternative transportation routes. Truck haul routes and marshalling areas
15 will be heavy disruptors of access in the downtown and Diridon Station area. The Final
16 SEIS/SEIR does not specify how this will be managed.

17 98. In the already heavily impacted Diridon Station area, additional impacts caused
18 by construction-worker parking have not been adequately disclosed, analyzed, or mitigated.
19 The Final SEIS/SEIR says only that construction worker parking will be accommodated in the
20 construction staging area or other designated locations. (MMRP TRA-CNST-B) This
21 perfunctory statement is far below standard for disclosure or mitigation of this type of impact.
22 No reference is made to the expected number of construction-worker vehicles that will be
23 parked in the Diridon area, the portion that will be parked in designated locations outside the
24 construction staging area, the locations of those designated areas, or negative impacts caused by
25 construction worker parking in those locations. No mitigation measures to avoid these
26 significant negative impacts are discussed. This construction impact should be fully analyzed,
27 disclosed, and mitigated.

28

1 99. The truck-haul routes depicted on Figure 5-12 of the Final SEIS show trucks
2 traveling in front of the Arena on Santa Clara Street. They are expected to access Santa Clara
3 Street from Autumn and Montgomery Streets as they apparently travel to and from Interstate
4 280 to the south. These trucks would be expected to affect traffic and roadway conditions in the
5 area, yet specific mitigation measures to be included in the individual Construction Traffic
6 Control Plans (“CTCP”) at this “major project element” location are not described (see pages 5-
7 84 of the Final SEIS/SEIR). The area across Santa Clara Street from the Arena is described as a
8 “Construction Staging Area” where materials will be stockpiled, yet no information is provided
9 about how construction equipment will access this staging area or how pedestrians will be
10 guided through the area during its active use.

11 100. The CTCPs are expected to include signage, notifications, maps, and schedules.
12 However, specific mitigation measures in accordance with standards promulgated by the Bay
13 Area Air Quality Management District (“BAAQMD”) and City of San Jose General Plan
14 policies MS-10.1 and 13.1—which are always expected to be included in proposed projects of
15 this type, even those of significantly lesser scale—are not included. Examples of these types of
16 mitigation measures include but are not limited to: (1) watering exposed surfaces (*e.g.*, parking
17 areas, staging areas, soil piles, graded areas, and unpaved access roads) twice per day; (2)
18 covering all haul trucks transporting soil, sand, or other loose materials; (3) removing all visible
19 mud or dirt tracked out of construction areas using wet power vacuum street sweepers at least
20 once per day; (4) limiting all vehicle speeds on paved and unpaved roads; (5) minimizing idling
21 times of construction equipment; (6) shielding sensitive uses from construction equipment with
22 the use of barriers, etc.; (7) maintaining and tuning all construction equipment, including haul
23 trucks, according to all manufacturer’s specifications; (8) limiting hours of construction; (9)
24 locating staging areas as far away as possible from adjacent land uses; and (10) employing flag
25 persons to control construction vehicle access and traffic and maintain pedestrian safety in the
26 project area. These types of specific, universally employed mitigation measures are not
27 included in either Chapter 6 or the CTCPs described in Chapter 5 of the Final SEIS/SEIR. The
28 hauling and storage of construction materials in front of the Arena would significantly affect

1 Arena operations, access, and patrons, as well as the residential areas within the Diridon Station
2 area.

3 101. There are no specifics or performance standards regarding the proposed CTMP
4 mitigation measure in the Draft SEIS/SEIR. To state that FTA will at some future date work
5 with the Cities of San Jose and Santa Clara to develop Master Cooperative Agreements that will
6 direct all coordination efforts between FTA and the cities prior to and during construction of the
7 BART Extension (pages 5-80 of the Final SEIS/SEIR) is too little, too late. There will be no
8 recourse for residents and businesses should specific measures fail to be implemented during
9 construction. In fact, the cities and the public at this point have no idea what measures would
10 actually be utilized or even any measures at all will ever be implemented.

11 102. The Final SEIS/SEIR acknowledges on page 6.2-6 that “construction activities
12 for the BART Extension Alternative may result in lane or road closures in the vicinity of SAP
13 Center and Avaya Stadium.” The Final SEIS/SEIR then states that “similar to other businesses
14 and property owners affected by construction, VTA will coordinate with the owners/operators
15 of these event centers to provide information regarding lane closures and detours and provide
16 wayfinding signs during construction.” However, coordination alone is not adequate mitigation.
17 A decade of lane closures, lost parking, and disruptive construction activity immediately
18 adjacent to residents and long-established businesses, including the Arena, would significantly
19 impact the viability of these businesses and physically divide an established community. This
20 impact is not identified, analyzed, or mitigated in the Final SEIS/SEIR.

21 103. The Final SEIS/SEIR is deficient because it is impossible to determine if the
22 sidewalk on the south (eastbound) side of Santa Clara Street between Stockton and Delmas
23 Avenues will remain fully available for pedestrians during construction. Pages 5-74 of the Final
24 SEIS/SEIR state that there will be lane closure (and, implicitly, sidewalk closures) on Santa
25 Clara Street. That is inconsistent with Figures 5-7/8, which indicate the construction staging
26 area will not intrude onto Santa Clara Street. This creates two problems: (1) The document
27 does not accurately identify the potential adverse impacts, and (2) the Arena will suffer
28 significant adverse impacts if any portion of the sidewalk is inaccessible to pedestrians, or if the

1 vehicular capacity of Santa Clara Street is diminished. Again, the lack of project definition for
2 a project-level EIS is apparent and means that this potential impact is not identified, analyzed,
3 or mitigated in the Final SEIS/SEIR.

4 **Inadequate Alternatives Analysis**

5 104. The Alternatives analysis is wholly inadequate. The Final SEIS/SEIR includes
6 only three alternatives (No Project, BART, and TOJD & BART), which do not constitute an
7 adequate “reasonable range” of alternatives.

8 105. The three alternatives included in the Final SEIS/SEIR do not address the
9 potential to reduce or avoid significant impacts of the Phase II Project. In fact, there are only
10 two real alternatives analyzed aside from the required No Project Alternative, and these are
11 essentially two variations of the proposed project. There is no real discussion of other potential
12 Alternatives that could reduce the significant impacts identified, particularly the transportation
13 disruption and noise impacts.

14 106. The two alternatives analyzed in the Final SEIS/SEIR are variations of the
15 proposed Phase II Project and do not appear to be created specifically to reduce potential
16 environmental impacts of the project. Although the Final SEIS/SEIR is a subsequent analysis
17 that tiers off prior environmental documents and incorporates those prior analyses by reference,
18 the prior environmental documents were of a program nature. There is no discussion of the
19 original selection process for this segment of the BART alignment and no evaluation of why it
20 was the selected.

21 **Arena Specific Impacts**

22 107. SSE was a major contributor to Measure B, which is providing funding for the
23 Phase II Project. SSE did so with the clear understanding, for more than a decade, that the
24 BART Diridon Station would include a parking garage and would not dramatically disrupt
25 traffic operations and pedestrian flow on Santa Clara Street. Nonetheless, as shown in the Final
26 SEIS/SEIR, there are no longer any plans to provide parking for the BART Diridon Station, and
27 it is obvious that Santa Clara Street in front of the Arena will be disrupted for years.
28

1 108. It is also obvious that the Arena, as well as nearby bars and restaurants (*e.g.*, San
2 Pedro Square) that depend on event center activities to support their own businesses will be
3 severely impacted by these unmitigated traffic disruptions. Unlike commuters, who when faced
4 with transportation challenges have no option but to continue on to reach their home or place of
5 employment, entertainment-goers have less need to tolerate poor access. The Final SEIS/SEIR
6 ignores the fact that unlike commuters, arena-goers have the option to take their entertainment
7 dollars elsewhere, including to other event centers in the San Francisco Bay Area.

8 **The Failure to Apply NEPA Analysis to the Transit-Oriented Joint Development**

9 109. The Draft SEIS/SEIR artificially limits its NEPA analysis to adverse impacts
10 caused by direct BART construction and operation and disclaims any responsibility for a NEPA
11 analysis of the Transit-Oriented Joint Development (“TOJD”). With this artificial constraint,
12 the Draft SEIS/SEIR only evaluates the TOJD under CEQA. Draft SEIS/SEIR 6.1-1, *et. seq.*
13 The VTA and FTA take too narrow a view of the scope of NEPA. NEPA is to be interpreted
14 broadly and used by federal agencies to the fullest extent possible. 40 CFR §1500.2. The
15 statutory requirement that an Environmental Impact Statement be prepared for all “major
16 Federal actions” must be interpreted with a view to the overall, cumulative impact of the action
17 proposed, related federal action and projects in the area, and further actions contemplated. 42
18 U.S.C.A. §4332.

19 110. The determination whether federal and non-federal projects are sufficiently
20 intertwined to constitute a federal action for NEPA purposes will generally require a careful
21 analysis of all facts and circumstances surrounding the relationship. 42 U.S.C.A. §4332(2)(C).
22 Here, as discussed above, the TOJD is tightly intertwined with the federal action and could not
23 take place but for the federal action and, therefore, the TOJD must be analyzed under NEPA.
24 Moreover, to survive a challenge to the legal sufficiency of the Draft SEIS/SEIR there must be a
25 careful analysis of all the facts and circumstances between the TOJD and the Phase II Project
26 justifying the conclusion that the TOJD is not a connected project requiring a NEPA analysis.
27 There is no such analysis in the Draft SEIS/SEIR.
28

1 111. The ROD at page 4 impliedly concedes that TOJD was required to be analyzed
2 under NEPA by arguing that the TOJD was analyzed under NEPA for its potential cumulative
3 impacts in Chapter 7. However, this highlights that there was no NEPA analysis in the rest of
4 the Final SEIS/SEIR. There is no explanation of the inconsistency between the statements at
5 Final SEIS/SEIR section 2.A.3 at page 2-130 that TOJD is not being analyzed under NEPA, and
6 the ROD stating that TOJD was partially evaluated under NEPA. A partial analysis of TOJD is
7 not NEPA compliance. The need to analyze TOJD under NEPA in the Cumulative Impacts
8 section demonstrates that TOJD is intertwined with the federal project and the failure to fully
9 analyze it under NEPA has resulted in a legally insufficient document.

10 112. At a hearing on April 5, 2018, the VTA Board approved the Transit-Oriented
11 Joint Development (“TOJD”) alternative. TOJD involves VTA working with private
12 developers to develop mixed-use developments consistent with California Public Utilities Code.
13 The Public Utilities Code defines TOJD as a commercial, residential, or mixed-use development
14 undertaken in connection with existing, planned, or proposed transit facilities and located 1/4
15 mile or less from the external boundaries of those facilities. There appear to be a total of six
16 TOJDs that are part of this Project. They have been added to virtually every location where
17 there is a significant BART facility. The TOJD was not evaluated under NEPA in the
18 Final SEIS/SEIR. FTA’s position was that since the TOJD projects were allegedly not
19 receiving federal funding, and originated with VTA, there was no requirement to evaluate the
20 TOJDs under NEPA. Yet, the Final SEIS/SEIR itself refutes the conclusion that the TOJD need
21 not be reviewed. Section 2.3.3.1 of the SEIS/SEIR states that “If the CEQA BART Extension
22 with TOJD Alternative is selected, the design of the 400 spaces of parking to accommodate
23 BART PNR demand around the station campus would be coordinated with the TOJD.” TOJD
24 includes shared parking as noted in the policies contained in the City of San Jose’s General
25 Plan. Also, additional work at the facilities will be required to facilitate TOJD. “This could
26 involve utility relocation and additional structural support to accommodate TOJD.”
27 (SEIS/SEIR, Page 6.1.1). TOJD is therefore intertwined with, at least, the parking and utilities
28 required for the NEPA project.

Additional Inadequate Analysis of the Impacts in the Final SEIS/SEIR

113. The Final SEIS/SEIR determined that construction of the Santa Clara Station with TOJD results in an impact at the intersection of Coleman Avenue and Brokaw Road (LOS F: PM peak hour) (page 3-97), under City of Santa Clara criteria. Page 3-98 of the Final SEIR/SEIR states that a mitigation measure for this intersection has been proposed and is presented in Impact BART Extension + TOJD TRA-1. The mitigation measure is actually TRA-A and includes improvements at the intersection (page 3-111) that the Final SEIS/SEIR states would reduce impacts to a less than significant level. However, page 2-17 (last paragraph) of the Final SEIS/SEIR states that, “Improvements to Brokaw Road and the intersection of Brokaw Road and Coleman Avenue near the Santa Clara Station are not part of the project.” If this is the case, the Project no longer includes mitigation for the Project-generated traffic impacts at the Coleman/Brokaw intersection, which is a violation of NEPA. In addition, the text of Chapter 3, where the impact is identified, has not been revised in the Final SEIS/SEIR. This confusion misleads the decisionmakers who must certify the environmental documents and approve the project. FTA did not address this issue in the response to SSE’s comments letter dated April 2, 2018 and submitted as a comment to the Draft SEIS/SEIR.

114. Additional facts and legal inadequacies in the Final SEIS/SEIR have been alleged in a parallel case to this lawsuit *Sharks Sports & Entertainment LLC v. Santa Clara Valley Transportation Authority, et al*, Case No. 18-CV-327687, filed in Santa Clara County Superior Court on May 3, 2018 under the California Environmental Quality Act (California Public Resources Code §21100, et seq.) (“CEQA lawsuit”).

CLAIMS FOR RELIEF**COUNT 1**

**VIOLATIONS OF NEPA AND ITS IMPLEMENTING REGULATIONS AND THE
 APA: FAILURE TO ADEQUATELY ASSESS AND DISCLOSE ENVIRONMENTAL
 IMPACTS OF THE PROJECT, MITIGATION, AND ALTERNATIVES**

115. Plaintiff hereby incorporates by reference and realleges each and every allegation above.

1 116. Defendants violated NEPA and its implementing regulations, 40 C.F.R. Part
2 1500 and 23 C.F.R. Part 771, and the APA because they:

3 a) Failed to take the requisite “hard look” at the environmental impacts of
4 the proposed Project and available alternatives, including significant parking information and
5 construction impact information directly on the environmental and safety impacts of the Project;

6 b) Did not study, disclose, or mitigate the elimination of currently existing
7 and fully utilized parking;

8 c) Did not study, disclose, or mitigate the parking impacts including spill-
9 over parking that will occur as a result to the BART Diridon station;

10 d) Predetermined to not include long-term parking mitigation for the BART
11 Diridon Station;

12 e) Included incomplete information regarding significant adverse impacts,
13 including those related to parking, traffic, construction, and TOJD, despite the fact that FTA
14 was well aware the studies were needed to complete that information and were not exorbitant
15 in cost;

16 f) Failed to adequately address the impact the project will have on the
17 Arena and Diridon Station area businesses;

18 g) Failed to include an environmental analysis of the TOJD projects, which
19 cannot be separated from the proposed Project, according to the requirements of NEPA;

20 h) Pre-judged the outcome of the environmental impact review, as
21 evidenced by FTA’s lack of independent evaluation of materials it accepted from VTA that
22 evidenced a clear bias against studying (1) long- and short-term parking impacts at the BART
23 Diridon Station, (2) TOJD, and (3) Construction Related Impacts;

24 i) Failed to prepare or commit to legally sufficient Mitigation Measures that
25 are adequate, measurable, and enforceable.

26 117. Defendants acted arbitrarily and capriciously in approving the Project based on a
27 factual record that contains both questionable data and gaping omissions.
28

1 118. Such actions were arbitrary, capricious, and an abuse of discretion in violation of
2 NEPA, its implementing regulations, and the APA.

3 **COUNT II**

4 **VIOLATIONS OF NEPA AND ITS IMPLEMENTING REGULATIONS AND THE**
5 **APA; FAILURE TO SUPPLEMENT THE DEIS AND FEIS**

6 119. Plaintiff hereby incorporates by reference and realleges each and every allegation
7 above.

8 120. Defendants violated NEPA and its implementing regulations, 40 C.F.R. Part
9 1500 and 23 C.F.R. Part 771, and the APA, by arbitrarily and capriciously refusing to
10 supplement the DEIS and FEIS for the Project despite substantial changes to the Project and in
11 light of significant new information; specifically, Defendants:

12 a) Failed to release for public review and comment, either through a
13 supplemental EIS or public hearings, additional significant new information, including deciding
14 to use tunneling methodology after the completion and closing of the public comment period on
15 the Final SEIS/SEIR; and

16 b) Failed to supplement the Final SEIS/SEIR despite the fact that the FEIS
17 contained incomplete information regarding foreseeable, significant adverse impacts of the
18 selected alternative, and even while FTA had knowledge that studies were needed to complete
19 this information.

20 121. Such actions were arbitrary, capricious, and an abuse of discretion in violation of
21 NEPA, its implementing regulations, and the APA.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

24 1. Declare that Defendants violated NEPA and the APA by issuing the ROD
25 approving the FEIS;

26 2. Issue an injunction requiring that Defendants fully comply with the provisions of
27 NEPA, including but not limited to preparation of an SEIS, and its implementing regulations as
28

1 described above and specifically to ensure that Defendants take no further actions toward
2 proceeding with the Phase II Project until they have fully complied with applicable law;

3 3. Issue an injunction prohibiting the FTA from obligating funds to the Project until
4 FTA has fully complied with the relevant provisions of NEPA;

5 4. Declare that the Final SEIS is invalid;

6 5. Order that the Record of Decision dated June 4, 2018 be vacated, set aside,
7 and/or rescinded;

8 6. Award Plaintiff the costs of this action, including its reasonable attorneys' fees;
9 and

10 7. Grant Plaintiff such further and additional relief as this Court deems just and
11 proper.

12
13 Dated: July 6, 2018

SILICON VALLEY LAW GROUP

14
15 By: /s/ Jeffrey S. Lawson
16 Jeffrey S. Lawson, Attorneys for
17 Sharks Sports & Entertainment LLC
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